

Do Statements Against Interests Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformulation

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INTRODUCTION

The general prohibition against hearsay¹ testimony serves as one of our legal system's most fundamental guarantees of truth.² The cardinal flaw of hearsay evidence lies in our inability to assess the testimonial capacities of the declarant.³ While traditional courtroom mechanisms, such as the oath, the jury's perception of witness demeanor, and cross-examination test the truth and accuracy of in-court statements, these safeguards are

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¹ Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

² See 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT THE COMMON LAW § 1364, at 28 (James H. Chadbourn ed., 1974) (praising the rule against hearsay as "the most characteristic rule of the Anglo-American law of evidence — a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's method of procedure"); see also *Donnelly v. United States*, 228 U.S. 243, 273 (1913) (noting that hearsay's exclusion rests in principles of common law).

³ This evidentiary concern explains why the definition of hearsay is limited to statements offered for "the truth of the matter asserted." FED. R. EVID. 801(c). If the probative value of the declaration is solely that it was made and the listener heard it, rather than its actual truth, the declaration falls beyond the scope of Rule 801's definition. See, e.g., *Howley v. Town of Stratford*, 217 F.3d 141, 155 (2d Cir. 2000) (holding declarant's statements not hearsay "since that testimony would be offered not to prove the truth of his statements but only to prove that he made them"); *United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir.) ("Statements offered as evidence of commands or threats or rules directed to the witness, rather than for the truth of the matter asserted therein, are not hearsay."), *cert. denied*, 528 U.S. 987 (1999).

lacking for out-of-court statements.⁴ Of course, the exclusion of hearsay testimony is far from absolute. The Federal Rules of Evidence and the state counterparts recognize several exceptions to the hearsay rule for circumstances where overriding policy justifications warrant admission of an out-of-court statement.⁵ In these enumerated instances, some enhanced reliability or special necessity outweighs the testimonial concerns inherent to out-of-court statements.

This Article explores one of these hearsay exceptions, namely Federal Rule of Evidence 804(b)(3)'s admission of statements against the declarant's interests, with a critical eye on the rule's underlying rationale. Simply put, Rule 804(b)(3) rests on a behavioral approach to law that mirrors rational actor theory.⁶ The Rule contemplates that if a reasonable person makes a statement against interests, the statement is unlikely to be a fabrication and thus retains substantial reliability.⁷ While at first blush this rationale may appear logical, if not intuitive,⁸ deeper reflection unearths serious psychological flaws. In particular, the literal rationale of the rule is unattainable. Under a rational actor paradigm, persons do not consciously act against their interests, but instead act to maximize their self-interest.⁹ A rational actor who truly perceived a declaration to be contrary to his interests would not have made the statement.

⁴ In *Williamson v. United States*, 512 U.S. 594, 598 (1994), the Supreme Court stated the following:

[T]he ways in which these dangers [of lying, misperception, faulty memory, and confusion] are minimized for in-court statements — the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine — are generally absent for things said out of court.

See also *Donnelly*, 228 U.S. at 273 (noting similar flaws in hearsay evidence).

⁵ The exceptions to the hearsay bar are articulated in Rule 803 and Rule 804. FED. R. EVID. 803 (enumerating twenty-three exceptions where the declarant's availability is immaterial); FED. R. EVID. 804(b) (listing five exceptions where the declarant is unavailable). In addition, Rule 801(d) identifies two types of out-of-court statements that do not qualify as hearsay. FED. R. EVID. 801(d) (listing prior statements by witnesses and admissions by party-opponents as not hearsay).

⁶ See, e.g., Edward L. Rubin, *Symposium: Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 22-34 (2001) (overviewing rational actor theory).

⁷ See *infra* PART I.B.

⁸ The Supreme Court characterized Rule 804(b)(3)'s underlying rationale as a "commonsense notion." *Williamson*, 512 U.S. at 599.

⁹ Rubin, *supra* note 6, at 23.

Rather, a rational actor makes a statement because, in his view, at the instant of declaration it was in his interests to make it. When a person acts otherwise, the rule's reliability is wanting because the individual fails to act reasonably.¹⁰ Furthermore, apart from this fundamental psychological flaw, enhanced deficiencies relate to statements pertaining to penal interests. Empirical research and common experience reveal myriad reasons why persons make untrue, self-incriminating statements.¹¹ Although these statements may be against the declarant's penal interests, they hardly are against the person's true personal interests. These deeper, personal interests are what motivate a person to lie.

Yet, the effects Congress envisioned by enacting 804(b)(3) are quite desirable. Through Rule 804(b)(3), Congress sought to identify statements that are most likely to be true. Notwithstanding the flaws in the current structure of the Rule, a modest reformulation can achieve the guarantees of trustworthiness that Congress envisioned, while remaining faithful to rational actor theory. This Article proposes a two-step reformulation. First, Congress must alter the Rule's inquiry away from whether the statement is against the declarant's interests, as such a creature simply does not exist. A more cogent query asks whether the statement, if untrue, would have been against the declarant's interests. Second, because of the dubious trustworthiness of statements against a declarant's penal interests, Rule 804(b)(3) should return to its common law roots and only admit statements relating to proprietary and pecuniary interests.

This Article proceeds in three parts. I begin in Part I with an overview of Rule 804(b)(3). I explain the history of the exception, the modern formulation, and the underlying reliability rationale that Congress used to justify a hearsay exception. In Part II, however, I demonstrate fatal errors in Congress's conclusion that statements admitted under the current structure of Rule 804(b)(3) carry greater indicia of reliability. Not only can the true rationale of the rule never be satisfied because reasonable persons do not consciously act

¹⁰ See *infra* PART II.A.

¹¹ See *infra* PART III.B. But see also *Williamson*, 512 U.S. at 599 (stating that "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true").

against their interests, but also a statement tending to subject a person to criminal liability is inherently suspect. Part III offers a solution. By reformulating Rule 804(b)(3) to address a more realistic conception of humans reasoning, many of the flaws discussed in Part II can be eradicated. As specified in Part III, this modification entails both restructuring the central inquiry of the rule and eradicating any exception for statements pertaining to the declarant's penal interests.

I. OVERVIEW OF RULE 804(b)(3)

A. *Historical Background of the Contemporary Standard*

Enacted by Congress in 1975,¹² Rule 804(b)(3) allows the admission of statements against interests made by unavailable nonparties.¹³ The threshold requirement of Rule 804(b)(3), as with all Rule 804 exceptions, is the declarant's unavailability.¹⁴ An exhaustive enumeration of the circumstances that qualify for unavailability is set forth in Rule 804(a).¹⁵ Once the declarant's

¹² Pub. L. No. 93-595, § 1, 88 Stat. 1942 (1975); see *Williamson*, 512 U.S. at 612 (Kennedy, J., concurring).

¹³ A statement made by a party, which is offered by an adverse party, is admissible under Rule 801(d)(2) as a statement by a party-opponent. FED. R. EVID. 801(d)(2). Rule 801(d)(2) presents a far more lenient standard for admissibility than Rule 804(b)(3). For an out-of-court statement by an adverse party to be admissible, Rule 801(d)(2) does not require the unavailability of the declarant, and the statement does not need to be against the declarant's interests at the instant of declaration. Statements by party opponents are excluded "on the theory that their admissibility in evidence is the result of the adversary system, rather than the satisfaction of the conditions of the hearsay rule." FED. R. EVID. 801 advisory committee's note (citing EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 265 (1962); John S. Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 564 (1937); 4 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1048 (James H. Chadbourn ed., 1972)).

¹⁴ See, e.g., Eileen A. Scallen, *Symposium: Analyzing "The Politics of [Evidence] Rulemaking"*, 53 HASTINGS L. J. 843, 884 n.82 (2002).

¹⁵ Unavailability includes situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a

unavailability is established, Rule 804(b)(3) admits statements that satisfy the following requirements:

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 the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing 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.¹⁶

In sum, the Rule admits statements contrary to a person's legal interests, provided they are of the sort that a reasonable person would not have made unless true.

The exception for statements against a declarant's interests has deep historical roots. Common law admitted statements against the declarant's pecuniary or proprietary interests but refused to extend the exception to statements against penal interests.¹⁷ The most famous articulation of the common law rule came in 1844 by the House of Lords in the seminal *Sussex Peerage Case*.¹⁸ The House of Lords limited the exception to statements against the declarant's proprietary or pecuniary interests by holding that the defendant could not offer supporting evidence that amounted to a criminal confession made by an individual unavailable to testify.¹⁹ For over 120

hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

FED. R. EVID. 804(a). In addition:

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Id.

¹⁶ FED. R. EVID. 804(b)(3).

¹⁷ FED. R. EVID. 804 advisory committee's note to Subdivision (b), Exception (3), 1972 Proposed Rules ("The common law required that the interest declared against be pecuniary or proprietary . . ."); Emily F. Duck, *The Williamson Standard for the Exception to the Rule Against Hearsay for Statements Against Penal Interest*, 85 J. CRIM. L. & CRIMINOLOGY 1084, 1085-86 (1995); Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 29-52 (1944).

¹⁸ *Sussex Peerage Case*, 8 Eng. Rep. 1034 (H.L. 1844); see 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 318, at 340 (4th ed. 1992) [hereinafter MCCORMICK].

¹⁹ *Sussex Peerage*, 8 Eng. Rep. at 1045; MCCORMICK, *supra* note 18, § 318, at 340. At issue was whether Augustus D'Este was the legitimate son of the Duke

years, until the enactment of Rule 804(b)(3), American courts followed the *Sussex Peerage* holding and refused to expand the exception to include statements against penal interests.²⁰

Rule 804(b)(3) remains faithful to the common law rule in certain respects. First, the Rule codifies common law by allowing the admission of statements against pecuniary or proprietary interests.²¹ In addition, the modern rule tracks common law by not admitting statements against social interests.²² The Supreme Court's proposed rule originally admitted statements that went against an individual's social interests, such as those that would make the declarant the "object of hatred, ridicule or disgrace."²³ Consistent with common law, Congress deleted this provision, citing reliability concerns.²⁴ Several scholars have criticized Congress's reasoning, arguing that social interests can provide just as strong incentives for truthfulness as proprietary or pecuniary interests.²⁵

of *Sussex*. D'Este attempted to prove his mother had been married to the Duke by offering evidence of statements made by a deceased clergyman who performed the marriage. The statement would have been against the deceased clergyman's criminal interests because he performed the marriage in violation of The Royal Marriage Act. *Sussex Peerage*, 8 Eng. Rep. at 1045.

²⁰ See *Sussex Peerage*, 8 Eng. Rep. at 1045; Peter W. Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851, 859 (1981) ("American courts heedlessly have followed the dictum in the *Sussex Peerage*."); see also *Donnelly v. United States*, 228 U.S. 243, 273 (1913) (relying in part on the *Sussex Peerage Case* to hold a statement inadmissible because it was against the declarant's penal interests only).

²¹ FED. R. EVID. 804(b)(3); see FED. R. EVID. 804 advisory committee's note to Subdivision (b), Exception (3), 1972 Proposed Rules (The common law required that the interest declared be pecuniary or proprietary"); Duck, *supra* note 17, at 1085-86; Jefferson, *supra* note 17, at 29-52; see also *Sussex Peerage*, 8 Eng. Rep. at 1045.

²² Glen Weissenberger, *Federal Rule of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1115 (1987).

²³ MCCORMICK, *supra* note 18, § 319, at 343; Tague, *supra* note 20, at 866 (citing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 378 (1969)). A handful of states have adopted provisions admitting statements against an individual's social interests. MCCORMICK, *supra* note 18, § 319, at 343 (citing cases in Oregon and Pennsylvania).

²⁴ FED. R. EVID. 804(b)(3) Note by Federal Judicial Center; Weissenberger, *supra* note 22, at 1115 n.160.

²⁵ See, e.g., MCCORMICK, *supra* note 18, § 318, at 340 ("Declarations against social interest, such as acknowledgements of facts which would subject the declarant to ridicule or disgrace, or facts calculated to arouse in the declarant a sense of shame or remorse, seem adequately buttressed in

Rule 804(b)(3), however, makes one significant departure from common law.²⁶ If a statement is of the sort that tends to subject a person to criminal liability at the time of its declaration, it may qualify as a hearsay exception.²⁷ In a criminal trial, a statement against penal interests may either inculcate or exculpate the defendant. If offered to exonerate the accused, the statement is admissible as long as sufficient indicia of reliability support its trustworthiness.²⁸ The admission of statements against penal interests had little support prior to the enactment of Rule 804(b)(3). As articulated in *Sussex Peerage*, common law refused to admit statements against penal interests.²⁹ In addition, prior to Congress's adoption of Rule 804(b)(3), the Supreme Court rejected the penal interests exception in *Donnelly v. United States*,³⁰ holding that these statements lack sufficient reliability to justify a hearsay

trustworthiness and should be received under the present principle.”); Edward J. Imwinkelried, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Declarations Against Social Interest: The (Still) Embarrassingly Neglected Hearsay Exception*, 69 S. CAL. L. REV. 1427, 1451-57 (1996) (arguing that courts should employ the declaration against social interests theory more often); Jefferson, *supra* note 17, at 39 (observing that a person is unlikely “to concede the existence of facts which would make him an object of social disapproval in the community unless the facts are true”).

²⁶ JON R. WALTZ, *THE NEW FEDERAL RULES OF EVIDENCE* 134 (1973); David Robinson, Jr., *From Fat Tony and Matty the Horse to the Sad Case of A.T.: Defensive and Offensive Use of Hearsay Evidence in Criminal Cases*, 32 HOUS. L. REV. 895, 920 n.179 (1995); Michael M. Martin, *The Supreme Court Rules on Statements Against Interest*, 11 TOURO L. REV. 179, 181 (1994); Weissenberger, *supra* note 22, at 1114.

Justice Oliver Wendell Holmes, dissenting in *Donnelly v. United States*, asserted the reliability of a criminal confession, stating “no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations . . .” 228 U.S. 243, 278 (1913) (Holmes, J., dissenting) (citing *Mattox v. United States*, 146 U.S. 140 (1892)).

Some states have rejected similar expansion of their versions of Rule 804(b)(3) to include statements tending to subject the declarant to criminal liability. *See, e.g.*, Charles W. Gamble, *Drafting, Adopting and Interpreting the New Alabama Rules of Evidence: A Reporter's Perspective*, 47 ALA. L. REV. 1, 24 n.139 (1995) (citing ALA. R. EVID. 804(b)(3); ALA. R. EVID. 804 advisory committee's note) (discussing Alabama's refusal to adopt such an expansion).

²⁷ FED. R. EVID. 804(b)(3).

²⁸ *Id.* (“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.”); *see, e.g.*, *Jennings v. Maynard*, 946 F.2d 1502, 1506 (10th Cir. 1991) (discussing indicia of reliability supporting the trustworthiness of a statement admitted under Rule 803(b)(3)).

²⁹ *Sussex Peerage Case*, 8 Eng. Rep. 1034, 1045 (H.L. 1844).

³⁰ 228 U.S. 243 (1913).

exception.³¹

Perhaps the greatest challenge in applying Rule 804(b)(3) is assessing whether a statement truly stands contrary to the declarant's interests. As the Advisory Committee Note to Rule 804(b)(3) instructs, this analysis "must be determined from the circumstances of each case."³² In addition, the text of the rule requires the judge to consider the mindset of a reasonable person in the declarant's position at the time the statement was made.³³ These requirements amount to an objective determination of whether a reasonable person, aware of the potential consequences of the statement, would have made the statement.³⁴

Further debate surrounds the ambiguous scope of Rule 804(b)(3). In particular, should a statement in its entirety be admitted, or should the statement be parsed so that only those parts contrary to the declarant's interests be admitted? The plain text of Rule 804(b)(3) provides little guidance here.³⁵ Wigmore noted a related challenge when the statement against interests refers to or incorporates the collateral statement.³⁶ The federal circuit courts of appeals split fairly evenly on the admissibility of such collateral, non-inculpatory statements.³⁷ In

³¹ *Id.*

³² FED. R. EVID. 804 advisory committee's note to Subdivision (b), Exception (3); see *United States v. Layton*, 855 F.2d 1388, 1405 (9th Cir. 1988) (holding that whether a hearsay statement bears sufficient indicia of reliability depends on the particular circumstances under which the statement was made), *cert. denied*, 489 U.S. 1046 (1989).

³³ FED. R. EVID. 804(b)(3) ("[A] reasonable person in the declarant's position would not have made the statement unless believing it to be true.").

³⁴ See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 299-300 (3d Cir. 1983) (holding testimony inadmissible under Rule 804(b)(3) because the plaintiffs failed to show that the declarants were "conscious" that the testimony was not in their best interests); see *Jennings*, 946 F.2d at 1506 (concluding that the declarant must have understood that his statement to an Oklahoma State Bureau of Investigation agent could subject him to criminal liability).

³⁵ See, e.g., *Williamson v. United States*, 512 U.S. 594, 612 (1994) (Kennedy, J., concurring) ("The text of the Rule does not tell us whether collateral statements are admissible . . ."); Michael D. Bergeisen, Note, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CAL. L. REV. 1189, 1202 (1978).

³⁶ WIGMORE, *supra* note 2, § 1456, at 341.

³⁷ For examples of decisions holding collateral, non-inculpatory remarks admissible under Rule 804(b)(3), see *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976); *United States v. Garris*, 616 F.2d 626 (2d Cir.), *cert. denied*, 447 U.S. 926 (1980); and *United States v. Casemento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990). For examples of decisions holding

1994, the Supreme Court resolved this circuit split in *Williamson v. United States*,³⁸ holding that the exception does not incorporate collateral remarks.³⁹ Writing for the majority, Justice O'Connor interpreted Rule 804(b)(3) as admitting "only those declarations or remarks within the confession that are individually self-inculpatory."⁴⁰ Therefore, Rule 804(b)(3) does not allow admission of "non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."⁴¹

B. Rationale Underlying Rule 804(b)(3)

Hearsay exceptions retain certain policy rationales that lie either in necessity or reliability, or both.⁴² For example, excited utterances are admissible⁴³ because statements are presumed to have enhanced reliability if the declarant lacks sufficient time to devise a fabrication.⁴⁴ A similar presumption of greater reliability underlies the exception for statements made for the

collateral, non-inculpatory remarks inadmissible under Rule 804(b)(3), see *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978), and *United States v. Porter*, 881 F.2d 878 (10th Cir.), *cert. denied*, 493 U.S. 944 (1989).

³⁸ 512 U.S. 594 (1994).

³⁹ *Id.* at 598-602.

⁴⁰ *Id.* at 599.

⁴¹ *Id.* at 600-01; see also *United States v. Price*, 134 F.3d 340, 347 (6th Cir.) (holding that "collateral statements, even ones neutral as to interests," are inadmissible despite their close proximity to the self-inculpatory statements), *cert. denied*, 525 U.S. 845 (1998).

⁴² Weissenberger, *supra* note 22, at 1117 ("Like the other hearsay exceptions contained in Rules 803 and 804, the exception for statement against interest is predicated upon the dual grounds of necessity and trustworthiness."); see also *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (citation omitted) (holding that a hearsay statement is admissible only if it bears adequate "indicia of reliability").

⁴³ FED. R. EVID. 803(2).

⁴⁴ *Idaho v. Wright*, 497 U.S. 805, 820 (1990) (noting that excited utterances are admissible because "such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation"); FED. R. EVID. 803 advisory committee's note ("The theory of [the excited utterance exception] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 435 (1928) ("[U]nder certain external circumstances of physical shock a state of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock.").

purpose of medical diagnosis⁴⁵ on the theory that an individual in need of medical care has strong motivations to be truthful because of the natural desire to receive proper and accurate medical treatment.⁴⁶ In enacting Rule 804(b)(3), Congress concluded that statements against interests possess compelling necessity and reliability justifications that warrant admission.⁴⁷

The necessity component rests in the unavailability prong of the Rule 804 exceptions, which requires a compelling justification for the declarant's inability to provide the testimony in court. Wigmore explained that the necessity principle "signifies the impossibility of obtaining other evidence from the same source"⁴⁸ In these cases where "the witness is practically unavailable, his statements should be received."⁴⁹ Of course, not all statements of unavailable declarants are admissible, so further indicia of reliability are needed.

The Advisory Committee explained that the reliability of declarations against interests arises from the presumption that "persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."⁵⁰ Because of this enhanced reliability, statements against interests are admitted under the theory that the traditional courtroom safeguards of a judicial oath and cross-examination are supplanted by the powerful human sanction of self-interests.⁵¹

The reliability rationale has remained paramount to

⁴⁵ FED. R. EVID. 803(4).

⁴⁶ FED. R. EVID. 803 advisory committee's note to paragraph (4).

⁴⁷ FED. R. EVID. 804 advisory committee's note to Subdivision (b), Exception (3) (discussing "[t]he circumstantial guaranty of reliability for declarations against interest"); Weissenberger, *supra* note 22, at 1117 ("[T]he exception for statement against interest is predicated upon the dual grounds of necessity and reliability.").

⁴⁸ WIGMORE, *supra* note 2, § 1456, at 326.

⁴⁹ *Id.*

⁵⁰ FED. R. EVID. 804 advisory committee's note to Subdivision (b), Exception (3) (citing *Hileman v. Northwest Eng'g Co.*, 346 F.2d 668 (6th Cir. 1965)); *accord* *United States v. Harty*, 930 F.2d 1257, 1264 (7th Cir.) ("[t]he circumstantial guarantee of reliability for declarations against interest is the assumption that people do not make statements which are damaging to themselves unless satisfied for good reason that they are true.") (quoting FED. R. EVID. 804 advisory committee's note), *cert. denied*, 502 U.S. 894 (1991); *Hileman v. Northwest Eng'g Co.*, 346 F.2d 668, 670 (6th Cir. 1965); MCCORMICK, *supra* note 18, § 317, at 335-36 (noting that the trustworthiness safeguard is established "[u]nder the theory that people generally do not lightly make statements that are damaging to their interests").

⁵¹ Weissenberger, *supra* note 22, at 1118.

judicial interpretations of Rule 804(b)(3). This preoccupation with reliability explains the Supreme Court's narrow construction of Rule 804(b)(3) in *Williamson* that safeguarded against the risk of declarants combining incriminating information and neutral or self-serving statements within the same statement.⁵² The Court reasoned, "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."⁵³ This reliability is unique to self-inculpatory statements because, as the Court explained in *Williamson*, "the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible."⁵⁴ Even if a defendant makes a generally self-inculpatory narrative, those parts of the narrative which are not self-inculpatory possess no added reliability.⁵⁵ These reliability concerns intensify if the declarant believes that a non-inculpatory remark would be admissible provided it was intertwined with an inculpatory statement.

Courts also emphasize reliability concerns when considering the admission of statements that are contrary to a person's legal interests in certain respects, but in furtherance of his interests in other respects. For example, courts are reluctant to admit statements against pecuniary interests if it is possible that the declarant foresaw that his statement could be used to his benefit in a subsequent litigation.⁵⁶ If a statement conceivably could go in both directions its reliability is severely undercut. The reliability rationale also underscored Congress's

⁵² Elissa J. Ferrante, Note, *The Statements Against Penal Interest Exception to the Hearsay Rule After Lilly v. Virginia*, 527 U.S. 116 (1999); *Making the Distinction Between Custodial and Non-Custodial Statements for Sixth Amendment Analysis*, 32 RUTGERS L.J. 519, 533 (2001) (noting that the Supreme Court in *Williamson* "required a higher level of reliability for [admission of] statements under Rule 804(b)(3)").

⁵³ *Williamson v. United States*, 512 U.S. 594, 599 (1994).

⁵⁴ *Id.* at 605.

⁵⁵ *Id.* The approach taken in *Williamson* mirrors that of the California Supreme Court in *People v. Leach*, 541 P.2d 296 (1975). In *Leach*, the court held that only the portions of a statement specifically against the declarant's interests are admissible. *Id.* at 311 (interpreting CAL. EVID. CODE § 1230 (West 1966)).

⁵⁶ See *Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 282-83 (5th Cir. 1991) (holding that the plaintiff-declarant most likely realized that his statements to an insurance adjuster would be used in forthcoming litigation, thereby creating a motive to fabricate).

refusal to extend the rule to statements against social interests. Despite the Supreme Court's inclusion of such statements in its proposed rule, the House Judiciary Committee deleted the provision reasoning that these statements "lack[] sufficient guarantees of reliability."⁵⁷ This diminished reliability stems from the concern that because of society's constantly changing moral norms, courts cannot objectively discern whether a particular declarant perceived the statement to be contrary to his interests.⁵⁸

II. DEFICIENCIES IN RULE 804(b)(3)'S RELIABILITY RATIONALE

Perhaps Rule 804(b)(3)'s seemingly intuitive premise has shielded it from the scrutiny it needs. In particular, two fatal flaws reside in the current text of Rule 804(b)(3). First, is it even possible for a reasonable person to make a statement against his interests? A person acting consciously and reasonably behaves in line with his interests, thereby defeating the reliability guarantee of the rule. Second, does the reliability guarantee carry any force with statements against penal interests? Although criminal punishments may appear more severe to an outside observer, a person's motivations for fabricating self-inculpatory statements are appreciably stronger and more common in the criminal context than in the civil context.

A. Reasonable Persons Do Not Act Consciously Against Their Interests

The basic theory for the reliability of statements against interests is relatively straightforward. A person is unlikely to make a statement against his own interests unless that statement is true.⁵⁹ At first blush, this intuition may appear commonsensical.⁶⁰ Further reflection, however, forces us to reconsider the Rule's wisdom, particularly in light of the Rule's consciousness and reasonableness requirements.

Rule 804(b)(3) imposes four requirements relevant to this

⁵⁷ HOUSE JUDICIARY COMMITTEE, FEDERAL RULES OF EVIDENCE, H.R. Rep. No. 93-650, at 16 (1973) (citing *United States v. Dovico*, 380 F.2d 325, 327 nn.2, 4 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967)).

⁵⁸ Weissenberger, *supra* note 22, at 1115 ("Where only 'social' interests are concerned, the requisite guarantees of trustworthiness are not thought sufficiently high to outweigh the danger that, in a world of rapidly changing moral attitudes, the statement may not have been against the declarant's interest as he or she perceived it.").

⁵⁹ See *supra* PART I.B.

⁶⁰ See *Williamson*, 512 U.S. at 599 (referring to Rule 804(b)(3)'s rationale as a "commonsense notion").

criticism. First is the Rule's objective reasonableness standard. The text of Rule 804(b)(3) leaves no doubt that the determination of whether a statement is against interests must be made objectively from the perspective of a rational actor. The Rule instructs that a statement is admissible if "a reasonable person in the declarant's position would not have made the statement unless believing it to be true."⁶¹ As the language compels, courts have interpreted this standard from the objective perspective of a reasonable person in the declarant's position, not necessarily the declarant himself.⁶²

Second, the declarant must have understood the statement to be against his interests. Without this consciousness prong, the declarant would lack adequate basis for making a reasonable determination, thus eradicating the statement's reliability. Because of the declarant's unavailability, conclusive proof of actual awareness is often impossible.⁶³ Therefore, courts have looked at the surrounding circumstances to determine whether a reasonable declarant knew and understood the ramifications of the statement.⁶⁴ The traditional approach has required apparent awareness by the declarant that the statement was contrary to his interests.⁶⁵ Some courts have even required proof that the declarant was subjectively aware of the danger to his interests.⁶⁶

The third requirement is closely related to the second, but merits elaboration. Rule 804(b)(3) imposes a temporal analysis made from the instant of the declaration. The Rule explicitly provides that it addresses statements that are contrary to the declarant's interests at the time they are made.⁶⁷ The Rule does

⁶¹ FED. R. EVID. 804(b)(3) ("[A] reasonable person in the declarant's position would not have made the statement unless believing it to be true.").

⁶² See, e.g., *United States v. MacDonald*, 688 F.2d 224, 232 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); *United States v. Satterfield*, 572 F.2d 687, 691 n.1 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978).

⁶³ See, e.g., WIGMORE, *supra* note 2, § 1456, at 321.

⁶⁴ *Weissenberger*, *supra* note 22, at 1120.

⁶⁵ *Id.*

⁶⁶ See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 299-300 (3d Cir. 1983) (holding testimony inadmissible under Rule 804(b)(3) because the plaintiffs failed to show that the declarants were "conscious" that the testimony was not in their best interests); see also *Jennings v. Maynard*, 946 F.2d 1502, 1506 (10th Cir. 1991) (concluding that the declarant must have understood that his statement to an Oklahoma State Bureau of Investigation agent could subject him to criminal liability).

⁶⁷ FED. R. EVID. 804(b)(3).

not allow for ex post consideration of the effects of the statement. What matters is whether the declarant perceived the statement as against his interests at the time of the declaration, not at some latter point.

Rule 804(b)(3)'s final requirement pertains to its scope. The exception does not apply to all interests, but only to legal ones. Statements may be admissible only if they are "contrary to the declarant's pecuniary or proprietary interest, or . . . tended to subject the declarant to civil or criminal liability."⁶⁸ Therefore, a statement against a person's general interests, regardless of the strength of those interests, is not admissible unless it carries legal ramifications.

In sum, Rule 804(b)(3)'s four requirements look at whether a reasonable person, aware of the consequences, would make a statement. This analysis boils down to a rational actor paradigm.⁶⁹ Like Rule 804(b)(3), rational actor theory considers the action of a reasonable person, acting consciously and fully aware of the consequences of acting.⁷⁰ Proponents of rational actor theory maintain that "actors strive to maximize their material self-interest."⁷¹ The Rule presumes that if such an actor consciously makes a statement against his legal interests, and at the instant of the declaration comprehends the consequences of that statement, the statement is likely to be true. Besides never being subjected to empirical scrutiny,⁷² this proposition fails to withstand common sense scrutiny.

Rule 804(b)(3) suffers from a fundamental psychological flaw. Rational actors do not consciously act against their personal interests.⁷³ Rather, the most basic articulation of rational actor theory instructs that actors are motivated only by

⁶⁸ *Id.*

⁶⁹ In this Article, I do not endorse rational actor theory as flawless. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998) ("Objections to the rational actor model in law and economics are almost as old as the field itself."). Rather, my argument is that as long as Congress adopts a rational actor paradigm for Rule 804(b)(3), it is essential that the rule remain faithful to rational actor theory.

⁷⁰ See William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 637 (2001) (discussing rational actor model).

⁷¹ Edward L. Rubin, *Putting Rational Actors in Their Place: Economics and Phenomenology*, 51 VAND. L. REV. 1705, 1715 (1998).

⁷² Welsh S. White, *Accomplices' Confessions and the Confrontation Clause*, 4 WM. & MARY BILL RTS. J. 753, 763 (1996).

⁷³ Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 638 (2000)

self-interest.⁷⁴ Rational actors possess “a ranked set of preferences that function according to basic logical principles.”⁷⁵ Rational actors, in turn, act in congruence with these preferences, allowing for the prediction of behavior based on the actor’s expected utility.⁷⁶ Gary Becker explained that “all human behavior can be viewed as involving participants who [1] maximize their utility [2] from a stable set of preferences and [3] accumulate an optimal amount of information and other inputs in a variety of markets.”⁷⁷ Although humans have bounded rationality, stemming from limited computational skills and seriously flawed memory, rational actors nonetheless strive to follow their set of preferences to maximize utility.⁷⁸ Therefore, if a person voluntarily acts in a manner that fails to reflect these preferences, and is aware that he is acting inconsistently with these preferences but chooses to act that way nonetheless, the person ceases to function as a rational actor. Yet, this is precisely the sort of irrational behavior that Rule 804(3) contemplates in admitting statements against interests.

Furthermore, in weighing Rule 804(b)(3)’s reliability, Congress conflated personal interests with legal interests. To paraphrase the rule’s well-accepted rationale, a person does not make a statement harmful to himself unless that statement is likely to be true.⁷⁹ Even if this rationale were to hold water, the purported reliability would rest on an individual’s personal interests, the strongest interests a person possesses. These are the interests that affect a rational actor’s decisionmaking process. Any influence to state a falsehood would arise from an individual’s personal interests in not telling the truth. The rationale of Rule 804(b)(3) thus requires an identity of personal and legal interests.

Common experience, however, tells us that this assumption of

⁷⁴ *Id.*

⁷⁵ Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 *LAW & SOC’Y REV.* 973, 976-77 (2000); see also Geoffrey Rapp, *The Economics of Shootouts: Does the Passage of Capital Punishment Laws Protect or Endanger Police Officers*, 65 *ALB. L. REV.* 1051, 1056 (2002) (arguing that a “rational actor” model may be appropriate in the context of violence against police officers because such violence may be less likely to result from emotional impulses).

⁷⁶ Rostain, *supra* note 75, at 977.

⁷⁷ GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976).

⁷⁸ Jolls et al., *supra* note 69, at 1479.

⁷⁹ See *supra* PART I.B.

the identity of personal and legal interests is highly flawed. Acting against personal interests is undesirable for the actor *per se*, whereas acting against legal interests may or may not be undesirable. A statement can be contrary to a person's legal interests, however, in the person's view it is nevertheless in his personal interest to make the statement. A person's personal and legal interests most notably fall out of line when a reasonable person makes a statement against his penal interests. When a reasonable person makes a conscious decision to make a statement against his penal interests, that person has concluded that some other interest overrides his penal interests. Perhaps the declarant is hoping to exculpate a friend or loved one. Or the declarant may be willing to incur civil liability to advance some other interest. When personal and legal interests fall out of line, the reliability rationale of the rule collapses, rendering no greater reliability to this type of hearsay than to any other.

Intuition also supports this criticism. When reasonable persons consciously act, they determine at that point in time that the act is in their interests, regardless of the presence of resultant effects that an outside observer might perceive as deleterious or undesirable. Such action in accordance with self-interests is the definition of a rational act.⁸⁰ Any person who acts otherwise is not behaving rationally. The result may be behavior that seems bizarre and irrational to an outside observer, but nonetheless is highly rational for the actor. Criminals voluntarily confess because they believe it is in their interests to do so. For some reason, perhaps a desire to expiate his guilt, to gain notoriety, or to strike a deal with the authorities, the suspect deems it in his personal interests to confess. Therefore, although the confession is contrary to the criminal's penal interests, the confession is still consistent with the criminal's personal interests.

Furthermore, the plain text of the rule overlooks a critical element of rational actor theory. An important part of the utility function of most people is bounded self-interest.⁸¹ People often care, and more importantly act as if they care, about others in certain circumstances.⁸² For instance, a wife who makes a self-incriminating statement to protect her husband from criminal prosecution acts in accord with her interests. She is fully aware of her action and decides, at that moment in time,

⁸⁰ Freeman, *supra* note 73, at 638; Rostain, *supra* note 75, at 976-77.

⁸¹ Jolls et al., *supra* note 69, at 1479.

⁸² *Id.*

that her optimal scenario is to save her husband from criminal prosecution. Therefore, the strongest interests influencing the wife are concerns for the situation of another person.⁸³

Equally compelling arguments apply to statements subjecting a person to pecuniary or proprietary liability. Although these statements may be financially harmful, they are not against the person's interests if made freely and consciously. The requirements of the rule again defeat the reliability rationale. If these statements were perceived by the declarant to be against his interests at the time of the declaration, and the declarant behaved as a rational actor, the declarant would never make the statement. Rather, there must be some other personal interests to explain the statement. Therefore, statements against pecuniary or proprietary interests can be just as calculated and susceptible to fabrication as any other hearsay statement.

Even if a person acts in a manner that he later deems to be against his interests, the person still considered the behavior in line with his interests at the point of action. For instance, a criminal who chooses to commit a crime made a conscious decision that criminal activity is in his best interests at that point in time. If at a subsequent time, the criminal is arrested, he likely will determine that the criminal act was not in his personal interests. This does not change the criminal's perception at the instant of acting that committing the crime was the right choice. In addition, many smokers who develop lung cancer may realize that smoking was not in their interests. This future realization does not change the fact that, at the instant of deciding to start to smoke, these individuals considered smoking consistent with their interests. Similarly, if the wife in the above example later regrets making the self-incriminating statement, that does not change the fact that she initially viewed the statement as consistent with her interests. Both Rule 804(b)(3) and rational actor theory evaluate the decisionmaking that occurs at this first moment in time, not the second.⁸⁴

⁸³ Cf. *United States v. White*, 240 F.3d 127, 138 (2d Cir. 2001) (affirming sentencing enhancement for obstruction of justice for a defendant who convinced his girlfriend to tell the police that she owned drugs that were actually his).

⁸⁴ See *supra* note 67 and accompanying text.

B. Dubious Reliability of Statements Against Penal Interests

Justice Oliver Wendell Holmes praised the reliability of statements against penal interests, commenting that “no other statement is so much against interest as a confession of murder”⁸⁵ This reliability guarantee is the most fundamental justification for admitting statements under Rule 804(b)(3). Congress made clear that reliability must be the focus of the rule when it deleted language concerning statements contrary to social interests.⁸⁶ Courts have consistently kept reliability concerns paramount in interpreting Rule 804(b)(3),⁸⁷ with the most notable example being the Supreme Court’s reasoning for refusing to extend the scope of the rule to collateral, non-inculpatory statements in *Williamson*.⁸⁸

The reliability of statements against penal interests that Justice Holmes lauded may make sense at first glance. Persons generally do not want to find themselves in prison, so it would seem logical that penal interests carry notable strength. Upon further reflection, however, this logic falls apart. As Professor Glen Weissenberger observed, while the rationale of Rule 804(b)(3) may have superficial appeal, “common experience also teaches that individuals will fabricate or tell half-truths despite the personal consequences in order to protect friends or family members or to incriminate enemies.”⁸⁹ Both a basic consideration of motives for lying and significant empirical research reveal extremely compelling reasons to fabricate self-inculpatory statements in criminal trials.

Several potential flaws reside in self-inculpatory statements. First, the declarant may have ulterior motives to deceive the authorities. Indeed, courts have been skeptical of inculpatory statements against penal interests because the declarant may be motivated to make false statements to curry favor with the authorities, or to shift or share blame for a crime.⁹⁰ This concern becomes intensified for statements made in the course of a plea-bargaining. During plea negotiations, persons have

⁸⁵ *Donnelly v. United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting).

⁸⁶ See *supra* note 57 and accompanying text.

⁸⁷ See *supra* note 56.

⁸⁸ See *supra* note 55 and accompanying text.

⁸⁹ Weissenberger, *supra* note 22, at 1118.

⁹⁰ Andrew R. Keller, Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 163-64 (1983).

patent motivations to curry favor with the police and to lie. Accordingly, courts have subjected statements made in the course of plea-bargaining to close scrutiny.⁹¹ The Advisory Committee appeared concerned with this flaw when it cautioned against allowing statements made to a grand jury to fall within the scope of Rule 804(b)(3).⁹² The Committee argued that the statements may not truly be against interests, but rather may be an attempt to gain favor with the authorities.⁹³ The note to Rule 804(b)(3) warns that 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.”⁹⁴

The declarant may also possess a desire to deceive authorities in order to inculcate another individual. The Fifth Circuit, in *United States v. Sarmiento-Perez*,⁹⁵ noted that “the enmity often generated in a conspiracy gone awry” could provide clear motive to falsify accusatory statements.⁹⁶ While bizarre, it is certainly within reason to envision situations where intense enmity and hatred would induce someone to take such extreme action.⁹⁷

In the eyes of many, the greatest concern as to the validity of a statement against penal interests stems from aggressive and coercive police interrogation techniques.⁹⁸ These methods can

⁹¹ See RICHARD O. LEMPert & STEPHEN A. SALTzBURG, A MODERN APPROACH TO EVIDENCE 491 (2d ed. 1982) (noting that because “statements to law enforcement officials may be part of a plea bargaining process or may be otherwise motivated by a desire to curry favor [S]uch statements are subject to close scrutiny”).

⁹² FED. R. EVID. 804(b)(3) advisory committee’s note to Subdivision (b), Exception (3).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 633 F.2d 1092 (5th Cir. 1981), *cert. denied*, 459 U.S. 834 (1982).

⁹⁶ *Id.* at 1102.

⁹⁷ See Keller, *supra* note 90, at 164 (“Other motives to falsify may be present even when there is no fear of reprisal for admitting a crime: the desire to share blame with another; the wish for revenge; the hope of diverting attention from oneself; and even publicity—seeking or simply lying.”).

⁹⁸ The crisis of coerced false confessions arising from improper interrogation techniques has received extensive scholarly attention. See, e.g., GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1992); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) [hereinafter Leo & Ofshe, *The Consequences of False Confessions*]; Albert W.

elicit emotional shock, which in turn distorts a person's memory during the interrogation.⁹⁹ Although especially high for suggestible criminal suspects,¹⁰⁰ this danger is equally conceivable for potential witnesses in criminal trials. Police interrogation methods can endeavor to dupe an individual into submitting a harmful statement with the ultimate intention of using that statement against another individual. Even though such psychologically-induced false confessions appear to be occurring with troubling frequency, police and criminal justice professionals seem to be doing little to stop them.¹⁰¹

A related problem involves false confessions that do not arise from police pressure, the so-called "voluntary false confessions."¹⁰² The bizarre psychology explaining these confessions causes great concern with the reliability of Rule 804(b)(3). Individuals who voluntarily provide false confessions often go to the police station and inform the authorities that they committed the crime.¹⁰³ Lawrence Wrightsman and Saul

Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719 (1997); Richard J. Ofshe & Richard A. Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Actor*, 74 DENV. U. L. REV. 979 (1997) [hereinafter Ofshe & Leo, *The Decision To Confess Falsely*]; Welsh S. White, *False Confessions and the Constitution: Safeguards Against Unworthy Confessions*, 17 HARV. C.R.-C.L. L. REV. 105 (1997); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987). For thorough discussions of police interrogation techniques, see GUDJONSSON, *supra*, at 24-49, and Ofshe & Leo, *The Decision To Confess Falsely*, *supra*, at 985-1050.

⁹⁹ GUDJONSSON, *supra* note 98, at 224 (citing HUGO MUNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908)).

¹⁰⁰ One of the most well-known examples of police convincing an impressionable suspect that he committed a crime involved Peter Reilly, who falsely confessed to killing his mother after a grueling interrogation. Two years after Reilly's conviction of first-degree manslaughter, the judge granted Reilly a new trial and the prosecutor declined objection to the defense's motion to dismiss the manslaughter charge. *See, e.g.*, DONALD S. CONNERY, *GUILTY UNTIL PROVEN INNOCENT* 53-79 (1977) (describing police interrogation techniques that resulted in Peter Reilly's confession); Johnson, *supra* note 98, at 722-23; White, *supra* note 98, at 125-28 (using Peter Reilly as an example of a suggestible suspect); David Howard, *New Mission: Recording Police Interrogations*, N.Y. TIMES, May 25, 1997, at 1 (describing Peter Reilly's story).

¹⁰¹ Richard A. Leo, *The Impact of Miranda Revisited*, 88 J. CRIM. L. & CRIMINOLOGY 621, 689-90 (1996) (citations omitted).

¹⁰² Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 603 n.423 (1999).

¹⁰³ *Id.* at 691 n.290.

Kassin cite three explanations for voluntary false confessions. The first cause, and most important one, is a deranged desire for the publicity and attention that the false confession will attract.¹⁰⁴ The individual has a pathological need to become infamous, even if the consequences mean imprisonment.¹⁰⁵ The danger is particularly real for high-profile crimes. The more well-known the offense, the more likely false confessors will emerge.¹⁰⁶ For example, over 200 people “confessed” to the Lindbergh kidnapping.¹⁰⁷ Second, Wrightsman and Kassin argue that the individual may wish to expiate guilt for a previous wrongful act.¹⁰⁸ This individual may feel the need to subject himself to punishment and use a false confession as the means to that end. Wrightsman and Kassin’s third reason is that the person may be unable to distinguish between fact and fantasy.¹⁰⁹ A person acting under this motivation is delusional and may have hallucinated or dreamt that he committed the crime.

Doctor Gisli Gudjonsson adds a fourth possible explanation, which bears particular relevance to Rule 804(b)(3). Gudjonsson argues that “people may volunteer a false confession . . . in order to assist or protect the real culprit.”¹¹⁰ While Gudjonsson believes this reason is most common in minor cases, he also believes it can occur in major criminal cases, such as homicide.¹¹¹ If Gudjonsson is correct and the reasoning he describes occurs with any discernible frequency, the trustworthiness of a statement against penal interests is all but eliminated. An example of this is the case of George Parker, who claimed he confessed to aggravated

¹⁰⁴ LAWRENCE WRIGHTSMAN & SAUL KASSIN, *CONFESSIONS IN THE COURTROOM* 76 (1993).

¹⁰⁵ GUDJONSSON, *supra* note 98, at 226.

¹⁰⁶ Leo, *supra* note 101, at 691 n.290.

¹⁰⁷ GUDJONSSON, *supra* note 98, at 226; Leo, *supra* note 101, at 691 n.290 (citing Miles Corwin, *False Confessions Not Good for Investigator’s Souls*, DENVER POST, May 4, 1996, at 22A).

¹⁰⁸ WRIGHTSMAN & KASSIN, *supra* note 104, at 77.

¹⁰⁹ *Id.*

¹¹⁰ GUDJONSSON, *supra* note 98, at 226.

¹¹¹ *Id.* Gudjonsson cites evidence that confessing to a crime in order to protect somebody else, such as a friend, is particularly common in juvenile cases. *Id.* One study of a specialized forensic unit for juveniles found that 23% claimed to have made a false confession to the police in order to protect a friend or a relative from possible prosecution. *Id.* (citing Graeme Richardson, *A Study of Interrogative Suggestibility in an Adolescent Forensic Population* 87 (unpublished M.Sc. thesis, Univ. of Newcastle Upon Tyne) (on file with author)).

manslaughter because he was in love with the woman who actually committed the crime.¹¹² For an individual like George Parker, his “confession” was not truly against his interests because his strongest interest was to protect his girlfriend.

Professor Paul Cassell agrees with Gudjonsson that a desire to protect others often results in false confessions.¹¹³ In fact, Cassell suggests that a motivation to protect others leads to even more false confessions than coercive interrogation techniques.¹¹⁴ According to Cassell, “[c]ommon sense suggests that suspects will more often ‘confess’ for understandable reasons (such as protecting a loved one) than because police have somehow convinced them they actually committed a crime.”¹¹⁵ As support, Cassell cites Gudjonsson and Sigurdsson’s study of false confessions among Icelandic prisoners, which revealed that “48% [of false confessions] stemmed from ‘protecting a significant other,’ such as a peer, a friend, or a relative.”¹¹⁶ In addition, Cassell suggests that this figure may be greater in the United States given the “Icelandic ‘inquisitorial legal system.’”¹¹⁷ Furthermore, the Gudjonsson and Sigurdsson figure covers wrongful confession. Cassell estimates that because suspects are more likely to redact police-induced false confessions than voluntary false confessions, the proportion of police-induced confessions is likely to be approximately 38%.¹¹⁸

This concern surrounding false, self-inculpatory statements is intensified by the declarant’s ability to assert his Fifth Amendment privilege after making the initial statement. Courts have held that invoking the Fifth Amendment privilege against self-incrimination satisfies Rule 804’s unavailability requirement.¹¹⁹ After offering the self-inculpatory statement,

¹¹² See Bedau & Radelet, *supra* note 98, at 150-51 (citing *State v. Parker*, 93 N.J. 260, 460 A.2d 665 (1983) (describing the case of George Parker)).

¹¹³ Paul G. Cassell, *Protecting the Innocent From False Confessions and Lost Confessions—And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998).

¹¹⁴ *Id.* at 519.

¹¹⁵ *Id.*

¹¹⁶ *Id.* (citing Gisli H. Gudjonsson & Jon Sigurdsson, *How Frequently Do False Confessions Occur?: An Empirical Study Among Prison Inmates*, 1 PSYCHOL. CRIME & L. 21, 23 (1994)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *United States v. Sasso*, 59 F.3d 341, 349 (2d Cir. 1995) (“The declarant’s invocation of his Fifth Amendment privilege against self-incrimination constitutes unavailability.”); *United States v. Matthews*, 20 F.3d 538, 545 (2d Cir. 1994) (holding that the unavailability condition was met

the declarant can refuse to make the statement again and can even refuse to acknowledge that the initial declaration was ever made. As a result, the consequences of making the self-inculpatory statement are minimized.

These reliability concerns led to the corroborating evidence requirement for admission of self-inculpatory statements that serve to exculpate a defendant, suggesting an implicit acknowledgement by Congress that these statements retain inherently dubious reliability. The House Judiciary Committee recognized that statements “tending to exculpate the accused are more suspect and . . . should have their admissibility conditioned upon some further provision insuring trustworthiness.”¹²⁰ As a result, if a court determines a statement to be contrary to the declarant’s criminal interests and would serve to exonerate the defendant, the court must consider whether corroborating circumstances clearly indicate the trustworthiness of the statement.¹²¹ Although the determination of whether corroborating evidence exists lies within the discretion of the trial court,¹²² the court should consider several factors, including (1) the time and the party to whom the statement was made, (2) the existence of corroborating circumstances in the case, (3) “the extent to which the declaration is” truly against the declarant’s interests, and (4) “the availability of the declarant as a witness.”¹²³ Some courts have interpreted the corroborating evidence requirement

because the declarant was a codefendant who elected not to testify); FED. R. EVID. 804(a)(1) (defining unavailability to include assertion of a privilege). If granted immunity, however, the witness no longer satisfies the unavailability requirement of Rule 804. Weissenberger, *supra* note 22, at 1083.

¹²⁰ FED. R. EVID. 804 House Judiciary Committee Report.

¹²¹ *United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978) (finding corroborating circumstances clearly indicating trustworthiness because the defendant was only marginally involved in the crime, as opposed to the declarant who was the mastermind, and because the chance of fabrication was slight because the statement was spontaneous); *United States v. Oropeza*, 564 F.2d 316, 325 (9th Cir. 1977) (finding insufficient corroborating evidence to indicate trustworthiness because the declaration was not spontaneous, the declaration was given to its proponent at trial, and the declaration was not truly inculpatory of the declarant), *cert. denied*, 434 U.S. 1080 (1978).

¹²² *United States v. Vega*, 221 F.3d 789, 803-04 (5th Cir. 2000), *cert. denied*, 531 U.S. 1155 (2001); *United States v. Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978); *United States v. Guillette*, 547 F.2d 743, 754 (2d Cir. 1976), *cert. denied*, 434 U.S. 839 (1977).

¹²³ *Oropeza*, 564 F.2d at 325; *Guillette*, 547 F.2d at 754.

as erecting a significant bar. The First Circuit has instructed that minimal corroboration is insufficient because “Congress meant to preclude reception of exculpatory statements against penal interests unless accompanied by circumstances solidly indicating the trustworthiness.”¹²⁴ At the very least, the corroboration requirement demonstrates judicial acknowledgement that a statement against penal interests is suspect.

III. PROPOSED REFORMULATION OF RULE 804(b)(3)

These deficiencies force us to reconsider the wisdom behind Rule 804(b)(3), and ponder an approach that more effectively guarantees reliability. This reformulation would entail two prongs, both of which individually address the shortcomings identified earlier.¹²⁵ First, the language of the rule must better comport with human reasoning. Reasonable people do not consciously act against their interests. As an alternative, an inquiry into whether the statement, if false, would be against the person’s interests contains stronger indicia of reliability because it is consistent with rational actor theory. The second modification is simple: return to the common law rule by eradicating any hearsay exception for statements pertaining to penal interests. Both empirical studies and common experience indicate that the reliability rationale is weakened tremendously for statements against penal interests.¹²⁶

A. *Restructuring the Focus of Rule 804(b)(3)’s Inquiry*

The underlying goal of Rule 804(b)(3) is praiseworthy. Our justice system should create rules of evidence that enable the admission of statements that are unlikely to be false. Unfortunately, the current language does not achieve this end. As discussed earlier, reasonable persons act in their own interests.¹²⁷ Someone who consciously and truly acts contrary to his interests is no longer acting reasonably. Therefore, when a

¹²⁴ *United States v. Barrett*, 539 F.2d 244, 253 (1st Cir. 1976) (“[T]here is no question but that Congress meant to preclude reception of exculpatory hearsay statements against penal interest unless accompanied by circumstances solidly indicating trustworthiness. This requirement goes beyond minimal corroboration.”).

¹²⁵ See *supra* PART II.

¹²⁶ See *supra* PART II.B.

¹²⁷ See *supra* PART II.A.

reasonable person consciously makes a declaration contrary to his legal interests, that person is acting in accordance with some stronger, personal interests.

It is possible to minimize, if not eliminate, this flaw. A more sensible inquiry queries whether a statement, if false, would go against the individual's personal interests. This approach acknowledges that statements made consciously and reasonably are perceived by the declarant to be in furtherance of his interests, while simultaneously grounding the reliability in the fact that the statements would be against the individual's interests if false. Unlike the current structure of Rule 804(b)(3), this formulation is consistent with the thought processes of rational actors.

This formulation would play out in two ways. First, the exception would only apply to statements that have significance to the declarant's personal interests.¹²⁸ For example, a mundane observation about the weather would be inadmissible because if that statement were false, it would not be against the individual's interests. Only considerations important to a person are ranked sufficiently high to affect rational choice.¹²⁹ In other words, to achieve sufficient reliability to justify admission, the statement must be of the sort that a reasonable person would not make if it were untrue.

Some examples may be instructive. A straightforward illustration involves an individual's monetary interests. If a debtor ("D") says he owes a creditor ("C") money, that statement would be admissible under this reformulation. The statement is not reliable because it goes against D's interests, because if it truly went against D's interests, he would not have made the statement.¹³⁰ In addition, it is not necessarily against D's interests to admit to owing a debt. D may be influenced by a bounded self-interest that causes him to consider the situation of C.¹³¹ Moreover, it may be in D's interest to acknowledge the debt because of the legal ramifications of lying or acting in bad faith. D's statement is reliable, however, because if the

¹²⁸ As I will discuss in the next section, these personal interests should not extend to penal interests that serve to exculpate an accused defendant because of the intensified reliability concerns discussed in Part II.B. *See infra* PART III.B.

¹²⁹ *See* Rostain, *supra* note 75, at 977.

¹³⁰ *See supra* PART II.A.

¹³¹ *See supra* notes 81-82.

statement were untrue, it clearly would have been against D's interests to make the declaration. No reasonable person would have made such a statement if it were false, so it must be true.

Under the same fact pattern, if D told C that he has money, that statement would fall under the rule because it would be against D's interests if the statement were false. If D were penniless, it would be against his interests to tell a creditor that he in fact had money. As such, D's statement is reliable not because an acknowledgement of possessing money is against D's interests, but because if the statement was untrue, the statement would be against D's interests. No rational actor would fabricate in this situation, so D's statement carries sufficient guarantees of reliability to warrant admission.

The second way this formulation would play out involves the limited admissibility of the statements to the portions that retain enhanced reliability. Under this restructured rule, the declaration would be admitted only to the extent to which it would go against an individual's interests. In the example mentioned above, if D stated that he owed C \$500, that statement would be probative only for the limited proposition that D owed at least \$500. If D lied to the extent that D actually owed less than \$500, it would have been against D's interests to make the statement. No reasonable actor would have made such a false statement, so the statement must be true. D's statement would not be probative, however, for the proposition that D does not owe more than \$500. If D actually owed C \$1,000, D's acknowledgement of owing \$500 would be false and still would be aligned with D's personal interests. Therefore, D's statement retains no special reliability for the proposition that he does not owe more than \$500, and should not be admitted for that purpose.

Along similar lines, if a property owner ("O") stated his property line extends to a certain point, the statement is reliable for the proposition that O's property does not extend beyond that point. If O's property actually extended beyond that point, O's statement would be against his interests. Because no rational actor would make such a false statement, the statement must be true. Again, however, this statement would have limited admissibility. O's statement would not be probative for the proposition that O owns no less than that designated amount, because the reliability guarantee collapses. If O in fact owned less property, O's original statement could be both false and consistent with his personal interests.

Needless to say, admitting evidence of a limited purpose is commonplace in American courtrooms. Judges frequently present juries with evidence admissible only for a specific purpose. For example, evidence of prior acts is not considered character evidence if admitted under Federal Rule of Evidence 404(b).¹³² To be admissible under Rule 404(b), the evidence must serve some other purpose besides showing action in conformity therewith, such as evidence of motive, common plan, or intent.¹³³ The opposing party may request the judge to provide the jury with a limiting instruction, informing the jury of the proper scope of the evidence.¹³⁴

It is also common for courts to parse out-of-court statements so that only those segments with reliable probative force are admissible. For example, statements made for medical diagnosis are only admissible to show the injuries suffered, and how they were suffered, but not to prove liability.¹³⁵ The reason is that the added reliability of a statement against medical interests pertains only to the declarant's interests in receiving proper medical care. This added reliability of truthfulness does not extend to how the injury was caused. The Court also required similar parsing with Rule 804(b)(3) in *Williamson*.¹³⁶ The Court opined that the exception should not extend to collateral, non-inculpatory statements because they lack adequate indicia of reliability.¹³⁷ Therefore, under *Williamson*, only those portions of a declaration that are inculpatory are admissible.

¹³² FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

¹³³ *Id.*; see, e.g., *United States v. Mack*, 258 F.3d 548, 552-53 (6th Cir. 2001) (holding the admission of a prior unindicted bank robbery proper for the limited purpose of proving identity, and not for showing the defendant's propensity for criminal activity); *United States v. Butch*, 256 F.3d 171, 176-77 (3d Cir. 2001) (permitting the admission evidence of an accused drug trafficking conspirator's prior dealing with coconspirators to rebut defendant's claim that he acted without criminal intent).

¹³⁴ FED. R. EVID. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

¹³⁵ FED. R. EVID. 803 advisory committee's note ("[A] patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light.").

¹³⁶ *Williamson v. United States*, 512 U.S. 594, 598-602 (1994).

¹³⁷ *Id.* at 605; see *supra* note 55 and accompanying text.

B. Eradicating Admission of Statements Against Penal Interests

The reliability of statements pertaining to penal interests is simply too suspect to justify a hearsay exception. As discussed earlier, explanations abound for why persons make self-incriminating statements.¹³⁸ Depending on the circumstances, these fabrications can unfairly exculpate or inculpate criminal defendants, both of which are socially undesirable scenarios. In criminal trials, where society has such compelling interests, these flaws are unacceptable. The solution is simply to remove any inclusion of penal interests and limit Rule 804(b)(3) to statements against a declarant's personal interests.

This modification would hardly be a ground-breaking venture for evidentiary law. The exclusion of statements against penal interests has strong roots in Anglo-American jurisprudence. In fact, deletion of the clause pertaining to penal interests would mark a return to the common law and the American rule prior to adoption of the Federal Rules of Evidence. The common law rule, presented in *Sussex Peerage* and other English cases,¹³⁹ refused to admit statements against penal interests.¹⁴⁰ Prior to enactment of the Federal Rules, "the overwhelming majority of American jurisdictions" adopted this English rule.¹⁴¹

In addition, the Supreme Court firmly rejected statements against penal interests prior to the enactment of Rule 804(b)(3). In *Donnelly v. United States*,¹⁴² the Court reviewed a murder conviction in which the trial judge excluded testimony offered by the defendant that a deceased third party confessed to the murder.¹⁴³ Justice Pitney's opinion relied heavily on *Sussex Peerage* and American case law in holding the evidence inadmissible.¹⁴⁴ The Court reasoned "it is almost universally

¹³⁸ See *supra* PART II.B.

¹³⁹ Another English case restricting the declaration against interests exception was the *Berkeley Peerage Case*. See *Donnelly v. United States*, 228 U.S. 243, 273 (discussing the *Berkeley Peerage Case*).

¹⁴⁰ *Sussex Peerage Case*, 8 Eng. Rep. 1034 (H.L. 1844).

¹⁴¹ James B. Haddad & Richard G. Agin, *A Potential Revolution in Bruton Doctrine: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of Codefendant's Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use?*, 81 J. CRIM. L. & CRIMINOLOGY 235, 236 n.10 (1990).

¹⁴² 228 U.S. 243 (1913).

¹⁴³ *Id.* at 272.

¹⁴⁴ *Id.* at 273.

held that this must be an interest of a pecuniary character.”¹⁴⁵ Justice Pitney further noted 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.”¹⁴⁶

Furthermore, although the Federal Rules include the penal interests clause, there is far from unanimous agreement on this approach. Even states that have adopted rules of evidence that track the Federal Rules differ on the admissibility of statements against penal interests. At least six of these “Federal Rules” states, which include Arkansas, Florida, Maine, Nevada, North Dakota, and Vermont, continue to exclude inculpatory statements against penal interests.¹⁴⁷

CONCLUSION

We cannot help but laud the objective of Rule 804(b)(3). In enacting the rule, Congress sought to advance our legal system’s liberal thrust in admitting reliable evidence that assists the fact-finder. Notwithstanding this liberal thrust, however, any evidence presented to the fact-finder must be reliable. This concern with reliability is most pressing for hearsay declarations, which are inherently suspect. Therefore, the exceptions to the general bar against admitting hearsay are grounded in some enhanced reliability in the particular declaration. Congress believed Rule 804(b)(3) secured this enhanced reliability.

Congress was wrong. Statements against legal interests retain no special reliability to warrant a hearsay exception. The current structure of Rule 804(b)(3) is marred with psychological inconsistencies and errors that make the admitted hearsay far less reliable than it initially may seem. In fact, under the very rational actor theory on which the current rules rest, statements against legal interests provide no stronger guarantee of trustworthiness than any other hearsay declaration.

As I argue in this Article, however, it is possible to reformulate Rule 804(b)(3) in a manner that would achieve the reliability guarantees that Congress desired. Instead of

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 273-74.

¹⁴⁷ GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES 16 (1987).

considering the impossibility of whether a reasonable person is behaving against his interests, the rule should consider whether a statement, if untrue, would be against the person's non-penal interests. Unlike the present rule, this reformulation is consistent with the actions of reasonable persons.