Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About

Paul Bergman

University of California, Los Angeles

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Evidence Commons

Click here to let us know how access to this document benefits you.

Recommended Citation


Available at: https://uknowledge.uky.edu/klj/vol75/iss4/4

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
INTRODUCTION

This essay is about ambiguous hearsay statements. In all of the vast hearsay literature, this topic has been given scant attention by both courts and commentators; yet, the topic is important for a number of reasons. First, the scholarly attention that it has received reveals an interesting divergence of views. Second, the results of work done by linguistics researchers are now available to inform legal thinkers about ambiguity. Finally, the enactment of the "catch-all" hearsay exceptions in the Federal Rules of Evidence means that ambiguity itself may render a proffered piece of hearsay inadmissible. At least, ambiguity may allow one to argue to the trier of fact that admitted hearsay lacks probative value. These factors combine to recommend a new look at this largely neglected topic.

To set the scene for the discussion, recall that the hearsay rule exists primarily to protect a party's right to cross-examine adverse testimony. That is, when a witness testifies in court, opposing counsel has the right to cross-examine the witness in an effort to detract from the probative worth of the testimony. The issues that cross-examiners typically probe when they seek to undercut adverse testimony may be grouped into categories

---

* Copyright © 1987 by Paul Bergman.

** Professor of Law, U.C.L.A. B.A. 1965, U.C.L.A.; J.D. 1968, Cal. Berkeley. My colleagues Al Moore, Leon Letwin and Norm Abrams graciously read the manuscript and offered valuable comments; I hope the final draft does them justice. I also thank the various supermarket tabloids for suggesting the form of the title.

1 Fed. R. Evid. 803(24), 804(b)(5) (hearsay with "equivalent circumstantial guarantees of trustworthiness" to specified exceptions admissible when other factors met).

reminiscent of the Four Horsepeople of the Apocalypse: Memory, Sincerity, Perception and Ambiguity. Because one usually cannot inquire into these matters when faced with hearsay evidence, these four factors are regarded as the "dangers" against which the hearsay rule protects. In turn, hearsay rule exceptions have been carved out in situations where at least some of the dangers are obviated.

Courts, however, typically do not examine the admissibility of proffered items of hearsay in terms of individual dangers. The present rule holding hearsay inadmissible dates back three centuries; many of the present exceptions to the rule date back to the early 1700's. As a result, the rule and its exceptions have crystallized into relatively fixed foundational requirements, with attorneys and judges usually focusing their attention on specific foundational elements rather than on the underlying dangers. For example, one who claims that a hearsay assertion should be admitted as an "excited utterance" may argue that the assertion was made close in time to an event, but usually will not discuss the relationship between the closeness in time and such "dangers" as memory and sincerity.

The enactment of the "catch-all" exceptions in the Federal Rules of Evidence has caused a portion of the crystallized hearsay world to remain molten and malleable. The "catch-alls" permit the admission of hearsay, even if no statutory exception applies, if the hearsay has "circumstantial guarantees of trustworthiness" which are equivalent to the statutory exceptions. When a hearsay statement, not satisfying a statutory exception, is offered into evidence, the search for equivalency may take at least two forms. One form is to match foundational elements

3 The term "dangers" was first used in Morgan, Hearsay Dangers and the Application of the Hearsay Rule, 62 Harv. L. Rev. 177, 185 (1948). Of course, in many instances opposing counsel in fact will be able to cross-examine a witness whose hearsay statement has been admitted. In the archetypal hearsay situation, however, the hearsay declarant is not in court.

4 See Wigmore, supra note 2, at § 1420.

5 See Fed. R. Evid. 801.

6 Wigmore, supra note 2, at § 1364 (history of hearsay rule begins in 1500's).

7 See Fed. R. Evid. 803, 804.

8 See Wigmore, supra note 2, at § 1430 (dying declarations); § 1455 (declarations against interest).

9 Fed. R. Evid. 803(24), 804(b)(5).
against those already crystallized in existing exceptions. The other is to analyze admissibility in terms of the dangers for which the hearsay rule was created.

When faced with hearsay offered under the "catch-all" exceptions, courts currently tend to follow the latter approach. At least at the appellate level, courts typically analyze trustworthiness factors surrounding the making of statements rather than rely on established foundational categories. Many opinions have discussed the admissibility of hearsay under the "catch-all" exceptions. The expectation that each of the hearsay dangers would have received about equal appellate attention has not been realized, at least where ambiguity is concerned. A computer search of appellate cases decided since the enactment of the Federal Rules of Evidence turned up no cases citing the ambiguity of an assertion as a reason for its exclusion.

Whether this finding is surprising may turn on one's interpretation of the term "ambiguity." As shown in Section I, evidence scholars have used the term in quite different ways. I use it in the oft-understood sense of describing a statement whose meaning is doubtful or uncertain. Using this definition, if a hearsay assertion from a non-testifying witness is ambiguous, its admission exposes opposing counsel to a danger that cross-examination cannot readily overcome. A court, faced with an ambiguous utterance offered under the "catch-all" exceptions, might rule either that the ambiguity renders the assertion untrustworthy and therefore inadmissible, or that the ambiguity so affects the assertion's probative value that the assertion's value

---

1 See McCormick, supra note 2, at § 324.1. See also infra notes 85-100 and accompanying text.

2 This search was conducted personally by the author, a true neophyte of the computer age. Clearly, though, few such cases exist.

3 See Webster's New Collegiate Dictionary 35 (1980).

4 Although this Article is limited to situations arising under the hearsay "catch-all" exceptions, it would be appropriate to use its analysis in situations arising under the specific statutory exceptions as well. In the latter instance, both the courts and the parties typically focus on whether specific foundational requirements have been met, tending to obscure the argument that an assertion is ambiguous. Note, however, at least with some of the specific statutory exceptions, that an assertion whose meaning is ambiguous may not qualify for admission because the ambiguity prevents the assertion from meeting a foundational requirement. See Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 964-65 (1974).
is outweighed by its prejudicial impact.\textsuperscript{14} When an ambiguous statement is nonetheless admitted, the ambiguity provides the opposing counsel with a way of attacking the credibility of the assertion.

This essay offers an interpretation of the danger of ambiguity that differs in some respects from that traditionally offered. It relies on literature developed by linguists and others to aid in recognition of ambiguous statements. Most of us are familiar with the catch phrase, "What we have here is a failure to communicate." We typically understand it to refer to the complete absence of communication, or to communication blocked by non-rational, emotional responses. We do not see ourselves readily as producers or victims of a failure to communicate in either instance. This essay attempts to demonstrate that certain features of our English language are prone to create ambiguity, that all of us are prospective producers and victims, and that when a victim cannot cross-examine the maker of an ambiguous hearsay assertion, a court may appropriately exclude that assertion.

Section I sets out the four hearsay dangers in more detail, focusing on the subtly different interpretations that ambiguity has received from scholars. I conclude that ambiguity is not produced only by the failings of those unfamiliar with the English language, as some have said, but rather by certain characteristics of our language. Section II explores features of our language which are especially likely to produce ambiguity. Section III reviews the way in which the federal appellate courts have analyzed hearsay assertions offered under the "catch-all" exceptions, and concludes that ambiguity is almost totally ignored as a basis for excluding hearsay. Finally, Section IV sets forth and discusses a number of cases in which ambiguity might have figured into the decision, but did not. I do not argue that these cases were decided incorrectly and have not selected them because they happen to corroborate the points raised in the essay. Instead, cases have been selected because they are "leading"

\textsuperscript{14} See Fed. R. Evid. 403 (permits exclusion of relevant evidence if probative value substantially outweighed by danger of unfair prejudice, confusion, or waste of time). These rulings should be substantially equivalent.
cases, and I offer the discussion to illustrate the types of analyses I hope courts will undertake in the future.

I. THE AMBIGUITY OF AMBIGUITY

Imagine that a clerk in a small convenience market has been robbed during the early morning hours. Witness A enters the market shortly after the robbery and is told by Declarant, "The robber was tall." The defendant, who is about 6 feet tall, is now on trial for the robbery. The whereabouts of Declarant are unknown and Witness A is called by the prosecutor to testify to what Declarant said. The purpose of the testimony, according to the prosecutor, is to link the defendant to the robbery. A's testimony is clearly hearsay, and the risks of Declarant's faulty memory, sincerity and perception are apparent. But how would we describe the risk of ambiguity or faulty narration?

We begin by considering the views of Professor Edmund Morgan, who, in a 1948 law review article, was the first to describe the testimonial dangers protected against by the hearsay rule. Unfortunately, Morgan, who referred to this danger as both "use of language" and "narration," was ambiguous about the nature of the danger. Morgan may be understood as associating the danger with unknown personal idiosyncracies in a speaker's use of words. Referring to this danger he stated, "[I]n deciding what idea Witness intended to convey, Trier has to rely upon assumptions as to the use of language by Witness and upon his own power of translating language into ideas." For instance, in the hypothetical robbery case, there is a risk that Declarant used the term "tall" for a physical characteristic most

---

15 The risk of faulty memory entails such issues as the length of time that intervened between the observation and the assertion, and what other events occurred during that time period. In the realm of perception, we want to know how well Declarant was able to see the robber, what the lighting was like, and any personal matters (such as fears for Declarant's own safety) that might have affected Declarant's ability to observe accurately. As to sincerity, we are interested primarily in Declarant's frame of mind—was he speaking honestly, or did he have a vendetta against tall people? Did Declarant have a vendetta against the defendant and, knowing that the defendant was tall, made the assertion to implicate him in the robbery? In Declarant's absence, the cross-examiner cannot raise such issues.

16 Morgan, supra note 3, at 177.

17 Id. at 178.
other people would refer to as “stocky.” Declarant was not intending to mislead anyone, but was using language in a different way than most people. Therefore, in the absence of cross-examination, the trier of fact cannot be sure that the reality it associates with the term “tall” matches Declarant’s reality.

Elsewhere in the essay, however, Morgan seemed to regard the narrative risk more as an adjunct to the risk of insincerity. He coupled the terms “sincerity” and “misuse of language,” and gave examples in which, by careful wording, a witness could tell a half-truth and thereby convey a purposefully false impression.\(^{18}\) In the same vein, he mentioned the case of a prosecution for bookmaking, in which part of the evidence was that a telephone caller gave his initials, asked for “Russ,” and placed a bet. Referring to the risk of misinterpretation of the caller’s words, Morgan stated: “It is quite possible, though perhaps highly improbable, that the speaker was using a code in some secret transaction other than gambling on the races . . . the language may have been used for the express purpose of conveying a totally wrong impression to all interceptors.”\(^{19}\) These passages and examples suggest that, in Morgan’s view, the risks of insincerity and unusual use of language were closely aligned. In fact, that view has been echoed in the latest edition of the McCormick evidence treatise, which states that “[s]ome writers subdivide inaccuracy of narration into ambiguity and insincerity, resulting in four rather than three factors. However, it seems apparent that ambiguity and insincerity, as well as honest mistake, all manifest themselves as inaccuracy of narration.”\(^{20}\)

In any event, having in mind that the hearsay rule primarily protects the right to cross-examine adverse testimony, Morgan was not impressed with the danger of misuse of language as an explanation for the rule. He stated:

[I]n any case cross-examination may expose defects in sincerity, use of language, memory or perception, but in the vast ma-

\(^{18}\) Id. at 185-88.

\(^{19}\) Id. at 198.

\(^{20}\) McCormick, supra note 2, § 245, at 726. The McCormick treatise’s treatment of the risk of insincerity, however, has not been a model of consistency. The Second Edition included insincerity only as an aspect of the 3 other infirmities, a grouping that one commentator has termed “inexplicable.” Tribe, supra note 13, at 958 n.8.
jority of lawsuits its principal utility will be in limiting or eliminating the danger of deception through faults in memory and perception. . . . The truth is that the danger that Trier may be led astray by the peculiar use of language upon which he must rely in making a finding is not a unique characteristic of hearsay. In the judicial consideration of hearsay, it is generally overlooked, and it may be cogently urged that to make the presence of this danger in itself a decisive factor would be to make the definition of hearsay uselessly broad.21

In an article written thirteen years after Morgan's, Professor John Maguire perceived the risks of inexact narration and of insincerity as fundamentally different.22 Insincerity, Maguire believed, is an express deviation from actual belief, but a "purely verbalistic shortcoming . . . has no moral content;"23 it is simply the risk that a declarant, although striving to convey as correct an account as possible, is incapable of doing so.24 Having shorn the risk of ambiguity (which he termed inexact verbalization) from intentional misstatement, Maguire, like Morgan before him, viewed this risk as a rather trivial danger. Maguire wrote: "Aside from the young child with a limited and unanchored vocabulary, or the foreigner deficient in the common local tongue yet attempting to use it when testifying, the risk of inexact verbalization is not commonly very threatening."25 Maguire's characterization of the narration danger has become widespread. For instance, in a leading evidence textbook, authors Lempert and Saltzburg give this example of ambiguity: "If the jurors discover that W has only recently learned to speak English and that she has frequently confused red with yellow, they will be wary of giving too much weight to her testimony."26

Divorcing the risks of ambiguity and insincerity may be analytically correct, but doing so only seems to heighten the

21 Morgan, supra note 3, at 188, 199.
23 Id.
24 Id.
25 Id.
26 R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 351 (2d ed. 1982). See also 4 J. WEINSTEIN'S EVIDENCE ¶ 800(01), at 800-9-1 (1979): "He may be . . . incapable of translating his memory into language that will have the same meaning for his listeners." Id.
former’s insignificance. Everyday experience teaches that persons often choose their words intentionally to convey something other than what they really mean. But the risk that many persons are not capable of expressing themselves adequately appears much lower. If forced to defend the hearsay rule only on the ground that it protected against this risk, few would leap at the opportunity. Given the small dimensions of the box into which the danger of ambiguity has been placed, one commentator not surprisingly concluded, “Well-known writers on trial technique ... seldom even consider the narration problem. . . .”

Another thirteen years having passed, Professor Laurence Tribe came forward with an article concerned, at least in part, with the danger of ambiguity. Tribe adhered to Maguire’s distinction between insincerity and faulty (but innocent) miscommunication, but Tribe (using the term “ambiguity”) noted a broader spectrum of innocent miscommunication than Maguire. For Maguire, faulty narration was produced by an inability to communicate clearly. Tribe, on the other hand, seemed to recognize that, regardless of the communicative ability of a speaker, what the speaker says still may be ambiguous. Although Tribe did not explicitly distinguish his formulation from Maguire’s, when discussing ambiguity Tribe used illustrations which have nothing to do with inability to communicate. For example, Tribe pointed out that ambiguity is not a danger when a hearsay statement is admitted under the hearsay exception for declarations against interest, because a statement cannot be admitted under this rationale unless it is sufficiently unambiguous to be found against the declarant’s interest. Similarly, Tribe noted that treatises and statements of medical history to physicians likewise may be ambiguous. In none of these situations would we think generally that ambiguity might arise because a declarant lacked the ability to communicate.

Tribe’s article suggests, then, that ambiguity is a feature of assertions themselves, not simply of the limited language ability

---

29 Id. at 964-65.
30 Id. at 966.
of certain speakers. The act of reducing actual events and objects to verbal form may produce ambiguity. Although the shift from Maguire's conception of inexact verbalization to Tribe's notion of ambiguity seems small, we might expect that Tribe's broader conception would lead him to see ambiguity as a more serious risk than did Maguire. Maguire, recall, viewed the risk of inexact verbalization as generally unthreatening. Tribe, however, emphasized the need for cross-examination to expose potential ambiguity:

It may be, for example, that the differential treatment [of different hearsay exceptions] corresponds to a judicial assumption that cross-examination is a more vital and effective tool in exposing weaknesses of perception and memory than in exposing ambiguity and insincerity . . . Yet this seems inherently implausible . . . The role of cross-examination with respect to ambiguity is particularly important.31

Thirteen years having passed since Tribe's article, this essay seeks to amplify and to give additional content to Tribe's broader formulation of the danger of ambiguity.32 If ambiguity is considered a feature of statements rather than speakers, it poses a legitimate hearsay danger. People who are undoubtedly sincere and fully conversant in language arts may make assertions that, in the light of events, are ambiguous. Moreover, ambiguity is a unique hearsay danger. The dangers of sincerity, memory, and perception all involve issues that are external to whatever a hearsay declarant says. For example, return to the earlier hearsay assertion: "The robber was tall." The time lag between the event and the statement (memory), the physical condition and location of the declarant (perception), and the possible bias of the speaker (sincerity) each can be assessed for trustworthiness by a court without paying attention to the precise words uttered by the declarant. As matters external to the statement, they typically are assessed without examination of the statement itself. If two weeks have elapsed between the time of the robbery and the

31 Id. at 967-68, 969 n.42.
32 The 13 year gaps are a curious anomaly that does suggest a historical imperative that this essay be published in 1987. I in no way suggest, however, that the essay deserves to be as influential as those by Morgan, Maguire and Tribe.
declarant's statement, or if the declarant habitually wears a T-shirt sporting the slogan, "Tall people are geeks," then we know that memory and sincerity are dangers without analyzing the speaker's words. On the other hand, an ambiguity determination compels us to examine precisely what a declarant said.

Even if we agree that ambiguity is analytically separate from its companion dangers, this brief review of its scholarly treatment may indicate why ambiguity has received such sparse attention from appellate courts. To the extent that ambiguity is linked with sincerity, courts, making a trustworthiness evaluation under the "catch-all" exceptions, are more likely to focus on the latter than on the former. Sincerity—motivation—is a part of the external world quite familiar to judges and attorneys, and a declarant's relationship, if any, to parties in a case provides insight into possible motivations. To the extent that ambiguity is a product of speakers with limited language ability, it is simply not a factor that can be expected to arise with any frequency.

What of the third possibility, only hinted at by Morgan, that any assertion can be ambiguous because we cannot be sure that a declarant attaches the same meaning to a word as ordinary people, especially ordinary people sitting as triers of fact? This observation is of course correct; unless we can question someone, we can never be certain that a speaker does not, for example, belong to a cultural group whose term for what most of us call "spaghetti" is "revolver." But the observation proves too much, and it too has the effect of consigning ambiguity to the hearsay scrapheap. Every word is ambiguous, having no inherent meaning except that which individuals or groups assign to it. Only when two people agree on a word's meaning does the word have any communicative value. Moreover, the more precisely we need to know what a word means (often in lawsuits), the more likely divergence exists between the meaning a speaker intends and the meaning a listener gives to an assertion. The meaning given to words is highly dependent on individual experiences, and because no two individuals have shared the same experiences, each is

3 Motivation is a recurring factor employed when courts make a trustworthiness determination. See MCCORMICK, supra note 2, § 324.2, at 909. See also infra text accompanying note 93.

34 Those who expect a bit of "jabberwocky" here are to suffer disappointment.
likely to interpret an assertion differently.\textsuperscript{35} For example, to return to the hypothetical robbery, the declarant’s sense of what constitutes a “tall” person is likely to be somewhat at variance with a listener’s sense. The United States Supreme Court has stated this principle rather poetically: “A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”\textsuperscript{36}

If the inherent ambiguity of symbolic language were recognized as a primary hearsay danger, it would with one stroke wipe out the admissibility of all hearsay unless the declarant was present in court to explain the meaning she intended by her words. That, to use Morgan’s words, “would be to make the definition of hearsay uselessly broad.”\textsuperscript{37} Our rules of evidence are nothing if not a pragmatic compromise between our need for an adequate amount of information to resolve disputes and our desire to insist that the information have an indicia of trustworthiness. That is, for decisions to be consistent enough with reality to encourage persons to leave their disputes to the legal system, the rules of evidence must be sufficiently lax to permit parties to offer enough evidence to allow an image of reality to emerge. At the same time, the rules somehow must constrain evidence lest verdicts be based on rumor, innuendo, and prejudice. Unless we can be confident that an assertion is ambiguous, the pragmatic approach of the rules of evidence points to the admissibility of hearsay if the only reason for its exclusion is the possibility of ambiguity inherent in all spoken language. If anything, “liberalization [of the rule against hearsay] will probably continue as a general rule to dominate the course of development.”\textsuperscript{38}

The inherent ambiguity of language has not, and undoubtedly will not, serve as a basis for excluding hearsay evidence. It may, however, incline one toward the view that ambiguous statements carry the badge of their own weakness, and therefore little risk exists that a trier of fact will overvalue

\textsuperscript{35} See, e.g., Myers, \textit{The Dynamics of Human Communication} 103-07 (1976).

\textsuperscript{36} Towne v. Eisner, 245 U.S. 418, 425 (1918).

\textsuperscript{37} Morgan, \textit{supra} note 3, at 199.

\textsuperscript{38} McCormick, \textit{supra} note 2, at § 327.
an ambiguous assertion. In Tribe's words: "Unlike the other infirmities, the ambiguity of a hearsay act or utterance is usually apparent on its face and can easily be evaluated by the trier." For example, assume that all agree the assertion "The robber was tall" is somewhat ambiguous, because the declarant and the trier may have different personal experiences concerning the height at which people are considered tall. The argument then goes that the trier can be trusted to recognize the ambiguity and evaluate the evidence accordingly.

Thus, an argument that ambiguity deserves a rightful place among the four hearsay dangers faces something of a dilemma. On the one hand, because even the simplest assertion (e.g., "The light was red") is potentially ambiguous, we cannot premise an exclusionary rule of evidence on such an all-encompassing factor. On the other hand, perhaps an exclusionary rule is not necessary, because we can trust the trier of fact to recognize ambiguity and factor it into the evaluative process. If ambiguity is a genuine rather than hypothetical hearsay danger, certain factors must exist giving particular statements a greater potential for ambiguity—factors that are likely to go unnoticed by a trier of fact. Work by linguistics researchers indicates that such factors are indeed present in our language. These factors provide the subject of Section II.

II. LANGUAGE FEATURES LIKELY TO PRODUCE AMBIGUITY

Until this point the danger of ambiguity has resembled the standard bad dreams of childhood—when you open your eyes and look around, it seems to vanish. Yet the frequent failure of people to communicate effectively, whether in social or professional relationships, suggests that factors of which we are little aware may block understanding. Communication issues have been studied largely in recent years, and some of the findings are relevant to concerns about the admissibility of ambiguous hearsay. Before turning to those findings, I want to eliminate from consideration certain connotations of ambiguity that do not in fact bear on our concerns.

39 Tribe, supra note 13, at 969 n.42.
We may begin by eliminating from consideration two familiar instances in which ambiguity is present on the face of an assertion. "Lexical" ambiguity may arise when a word has multiple meanings. For example, the statement, "I am going to the bank," may signify an imminent robbery, an afternoon of trout fishing, or perhaps a deft billiards shot. In a legal context this type of ambiguity creates little more than a theoretical danger, because the surrounding circumstances typically will provide ample evidence of a declarant's probable meaning. Moreover, the possible ambiguity likely will be apparent on the face of the assertion and will be evaluated accordingly.

The second type of ambiguity, "structural" or "syntactic" ambiguity, results from careless construction of a sentence. For example, the sentence, "College demands change," is structurally ambiguous. Both "demands" and "change" might be taken as either a verb or a noun. The ambiguity disappears when proper structural signals are included in the sentence. "College demands will change," is no longer structurally ambiguous. Although most hearsay declarants lack the erudition of Professor Henry Higgins, this form of ambiguity too is of little concern. In a setting in which an assertion is typically part of a series of events, those events almost certainly will provide meaning to a structurally ambiguous sentence. And again, the potential ambiguous meaning will in all likelihood be apparent to a trier of fact.

In each of these instances, ambiguity which can trouble a linguist very much is of little concern to lawyers. Linguists often restrict their analyses to the morphology of sentences. In so doing, they intentionally focus on sentences in isolation from each other and are not concerned with a sentence as part of a chain of proof. Lawyers at trial, by contrast, offer assertions into evidence as part of larger stories, with the hope that the trier of fact will draw helpful inferences. An assertion that might be ambiguous if used for one purpose might not be if used for

---

41 *Id.*
42 G. Shaw, *Pygmalion* 109 (1916) (Professor Higgins, a character in the play, Pygmalion, is a professor of phonetics.).
another. The instrumental use of assertions and the surrounding context as a basis for inferences render these linguistic forms of ambiguity largely irrelevant.

Because lawyers offer assertions as a basis for inferences, however, a form of ambiguity may arise in a legal context that does not arise when one studies only sentence structure. This potential ambiguity grows out of the nature of circumstantial evidence. Circumstantial evidence leads to a conclusion only by means of an underlying premise. By choosing different premises, one can draw opposite conclusions from the same piece of evidence. For instance, return to the assertion, "the robber was tall," and assume the declarant makes that statement on the witness stand. The prosecution may adopt the premise, "People who are about six feet tall are more likely to be identified as tall than people who are less than six feet tall," and urge that the remark tends to link the six foot tall defendant to the crime. The defense counsel, however, seeking to attack the witness' credibility, may adopt the premise, "People who cannot identify someone apart from a general estimation of their height are less observant than people who can give more exact descriptions," and urge that the trier of fact should give no weight to the identification. In the sense that circumstantial evidence can be the subject of contradictory premises, it may be thought of as "ambiguous." This, however, is a function of inferential reasoning, and not a form of ambiguity that renders evidence inadmissible.

With these ambiguity considerations safely off to the side, we next consider features of our language that tend to produce ambiguity that are not likely to be readily apparent on the face of an assertion.

---

44 See Tribe, supra note 13, at 966-67.
45 See BIN DER & BERG MAN, supra note 43, at 82-89.
46 Quite the contrary; as long as a relevant inference may be drawn from the evidence, the evidence is admissible even though stronger competing inferences also might be drawn. This is incorporated into the definition of relevance: evidence is relevant if it has "any tendency" to make a fact more or less probable. Fed. R. Evid. 401. Of course, admissibility may be denied if the weight of prejudicial inferences is greater than that of legitimate ones. Fed. R. Evid. 403.
A. Abstraction

The various levels of abstraction of words produce ambiguity. For example, to convey the idea that one can get from one location to another, one may say, "I own an object with wheels," or, "I own a car." The first statement conveys far less information than the second. An object with wheels might be a car, roller skates, a motorcycle, or a bicycle. Yet, the term "car" is itself something of an abstraction. Is the car old or new? Is it a sedan or a van? The more details one omits the more abstract one becomes. Abstraction is "saying less and less about more and more."47

Certain words are inherently more abstract than others. Consider the words "love," "cafeteria," and "dime," words which differ in their level of abstraction. If a speaker says, "I am in love," a listener would have little or no ability to know what the speaker intends to encompass by the term "love." "Love" is an abstract emotion each of us interprets differently according to our own experiences. For some, the term will convey tenderness and warmth; for others, sadness; for still others, anger. Thus, if we are asked to draw inferences about John's conduct from evidence that John said, "I love Mary," these inferences are as likely to come from ourselves as from any meaning that John intended to convey.

"Cafeteria" is certainly a less abstract term than "love." That is, many details of a speaker's cafeteria are likely to match those of any listener. Nevertheless, the word is abstract enough that ample room for misunderstanding remains. For example, assume that a hearsay assertion purports to describe certain events that occurred in a cafeteria. Knowing the appearance and atmosphere of the cafeteria might be important in evaluating the trustworthiness of the assertion. The speaker's cafeteria might be crowded, dark, and noisy—the listener's quite different. For this purpose, then, the term "cafeteria" is rather ambiguous.

Many terms, of course, are almost never ambiguous. The word "dime," for instance, is one to which the speaker and hearer will almost always attach identical meanings. In general,

47 Myers, supra note 35, at 61.
tangibles are less abstract than intangibles; 48 words that group together many details are more abstract than those that refer to fewer details. Although there is no bright dividing line, the more abstract a term, the greater the likelihood of ambiguity.

Interestingly, personal communication experts recommend a trial-like approach to ambiguity problems caused by abstraction: "Check it out." That is, they suggest that the way to clear up uncertainty is to ask follow-up questions designed to elicit the speaker's actual meaning. 49 This advice is akin to telling attorneys to cross-examine the hearsay speaker if they believe that testimony is ambiguous. Of course, this is precisely the option attorneys do not have when the hearsay declarant is unavailable.

This discussion of abstraction recalls the earlier distinction between structural ambiguity and ambiguity that depends on the use to which an assertion is put. 50 Although a term's abstractness does not vary with context, context may well determine whether the potential ambiguity is important. Examine these two statements, assuming both are offered to support the declarant's ability to identify Jones:

1. I was sitting next to the window when Jones sat down next to me.

2. I was able to see Jones by looking out the window.

The second statement compels the trier of fact to infer a great many unspoken details about the window to believe that the declarant's identification of Jones is reliable. How large was the window? Was it open or closed? What was the quality of the glass? Was it as filthy as this author's office window? Was there glare? In the context of the second sentence, the details subsumed in the term "window" are important. The declarant's ability to identify Jones depends on whether the declarant's window matches those conjured up in the mind of the trier of fact. In the first sentence, by contrast, the window serves only to locate the declarant at a particular point. The window's details


50. See supra notes 35, 40 and accompanying text.
matter little, and therefore the ambiguities are not as important as they are in the context of the second assertion.

Because the importance of ambiguity depends greatly on the use to which parties put an abstract term, a general rule such as, "Assertions containing ambiguous terminology are not admissible," would accomplish little. At its core, the problem of ambiguity involves a statement's relevance as much as it does its hearsay features. For this reason, problems of ambiguity often are best addressed to the court's sound discretion under Federal Rule 403. The more abstract an assertion is, and the more the details subsumed in an abstract term are important to disputed issues, the greater the risk of ambiguity, and the less the probative value. The court must weigh this reduced probative value against the potential prejudice of the jury giving unintended meaning to an assertion. The key to the sound exercise of discretion lies in a court's recognizing the degree of risk of ambiguity.

B. Polarity

People frequently begin the description of an event, emotion, or phenomenon by confessing that, "Words alone cannot express..." Such a confession recognizes that our language is often poorly suited to the complex world in which we live. In fact, the language of a cultural group often can be a clue to the importance of some aspect of the culture. For example, Eskimos have words to describe 18 different kinds of snow. The Navaho use different terminology to convey the idea that it is raining, depending on whether the speaker knows it is raining because the speaker went outside and got wet, or because the speaker looked outside and saw it rain, or because someone told the speaker it was raining. By comparison, the English language has words that describe many different kinds of garbage. To the extent that our language does not contain ready-made terms to describe subtle (yet possibly important) nuances and shadings that we know exist in the real world, our language is polar. That is, we have words that describe the opposite ends of complex

---

51 See supra note 14.
52 Myers, supra note 35, at 63-66.
reality, but no words for all the meanings in between. As a result, a speaker may choose the polar term that more closely fits what she experienced. The term, however, may be only a clue to the reality, not the reality itself.

The English language is replete with words which describe the world in polar terms. Examine the list of polar opposites below, and try to think of a word which expresses a middle point between each pair of words, as “gray” expresses a middle point between “white” and “black”:

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>white</td>
<td>gray</td>
<td>black</td>
</tr>
<tr>
<td>bad</td>
<td></td>
<td>good</td>
</tr>
<tr>
<td>success</td>
<td></td>
<td>failure</td>
</tr>
<tr>
<td>stingy</td>
<td></td>
<td>generous</td>
</tr>
<tr>
<td>polite</td>
<td></td>
<td>rude</td>
</tr>
<tr>
<td>honest</td>
<td></td>
<td>dishonest</td>
</tr>
<tr>
<td>safe</td>
<td></td>
<td>dangerous</td>
</tr>
<tr>
<td>sane</td>
<td></td>
<td>insane</td>
</tr>
</tbody>
</table>

One is likely to have difficulty finding the one word which captures the middle ground in these examples. Yet, ironically, most people or events that we use language to describe generally fall into this middle ground. That is, most people are neither totally stingy nor totally generous. Our behavior typically consists of elements of safety and dangerousness. Yet, we have no readily available single words to describe these gradations.

Because our language is characterized by polarization, assertions are frequently at least two steps removed from reality. The mere act of describing an event in verbal terms is one step away from reality; polarization creates a further distortion. The first distortion is inherent in any symbolic language system. Polarization can be overcome if people recognize the tendency

---

53 Id. at 71 (people “tend to think, and therefore to speak, in terms of opposites in our language”). See also H. DEAN & K. BRYSON, EFFECTIVE COMMUNICATION 61 (2d ed. 1961) (English is an “either-or” language and tends to cause people to perceive others as equal or unequal, dependent or independent, and to label statements as true or false); J. PEARSON, INTERPERSONAL COMMUNICATION 67 (1982) (“Polarization is the error of mistaking contraries (the phenomena between which there is “middle ground”) for contradictories (two phenomena which are authentic dichotomies”).

54 With slight modification, the chart is from MYERS, supra note 35, at 71.
of our language to divide the world into polar opposites and take the time to explain what they really mean. Speakers are likely, however, to take the easy way out by choosing a polar term in preference to a more accurate, but longer-winded, description. As a result, many assertions are ambiguous in that the declarant’s words often will not reflect reality, but rather a distortion toward one of a pair of polar opposites.

C. Unconventional Meanings

A third cause of ambiguity lies in the tendency of many persons to use language unconventionally. Grammarians differentiate between standard and nonstandard language communities. The former, including most lawyers and judges, use language largely in conformity with the formal rules and usage conventions of the English language. Many more persons, however, speak nonstandard, or “popular,” English. The nonstandard English takes a variety of forms, including slang, jargon, regionalisms, and colloquialisms. Particular nonstandard uses of words may vary among different cultural groups, age groups, sexual groups, occupations, and levels of education, to name just a few. But whatever the category, the use of nonstandard English creates potential misunderstanding between speakers and listeners. For example, the sentence, “The seat covers were in a plain wrapper,” might be understood by most speakers of standard English in one way. If the speaker is a truck driver, for whom a “seat cover” is a female occupant of a car and a “plain wrapper” is an unmarked police car, the sentence has an entirely different meaning.

Hence, when confronted with hearsay assertions, judges must be aware that a speaker’s nonstandard language might have a different meaning from their own formal English. The witness who repeats an assertion in court may be unable to clarify the potential ambiguity. First, the witness may not use language in the same nonstandard way as the declarant. Second, even if the witness is a member of the same language subgroup, there are

---

55 Id. at 72.
56 DEAN & BRYSON, supra note 53, at 139.
57 The example is taken from PEARSON, supra note 53, at 64.
obvious evidentiary difficulties in asking the witness what the declarant really meant to say in standard English. Short of calling an expert witness, a court may have to recognize that the potential ambiguity might make the assertion inadmissible.

D. Form vs. Function

Ambiguity may also arise because the intended function of an assertion may not be identical to the function suggested by its form. Linguists have identified five forms and functions of language: expressive, designative, interrogative, evaluative, and directive. An expressive statement refers to the speaker’s internal state: “I am hungry.” A designative statement refers to events or conditions external to the speaker: “We are close to food.” An interrogative statement asks for information either about someone’s internal state or about external events or conditions: “Are you hungry?” or “Are we close to food?” An evaluative statement makes a value judgment: “The food is good.” Finally, a directive statement orders action: “Bring me food.”

Confusion results when the form of a statement is at variance with its intended function. People often make statements in a form that does not match the intended function. The result is the frequent expression of exasperation, “Why don’t people say what they mean?” For instance, recall the designative statement above, “We are close to food.” This, in form at least, is typical of assertions offered under the “catch-all” hearsay exceptions. The form, however, may be misleading. Instead of a designative function, the speaker might have intended to indicate that he was hungry; or that he was demanding food; or that the nearby food was good; or that he was wondering if food was close by. Although the assertion was in designative form, it potentially could have been intended to fulfill any of the other functions and, thereby, take on a drastically different meaning.

E. Chronology

At trial, witnesses typically testify to events in chronological order. There is good reason for this: the order in which events

---

58 Makay & Gaw, supra note 49, at 104.

happen is a key determinant in the inferences that one will draw from these events.\footnote{See Binder & Bergman, supra note 43, at 12, 266.} For example, assume a witness testifies, "Jones was driving 60 m.p.h.; Jones hit a pedestrian." Unless we know whether Jones was speeding prior to or after hitting the pedestrian, we cannot logically infer whether speeding contributed to the mishap. Perhaps Jones hit the pedestrian and sped away at 60. Lawyers often are careful to elicit stories in sequential order, because they want to shape the inferences that triers of fact draw from evidence.

Outside the courtroom, however, people are prone to disregard chronology when describing events;\footnote{Id. at 264 (because witnesses not likely "on their own to describe discrete events sequentially," one must consciously urge them to do so).} a disregard that is likely to be particularly pronounced in hearsay situations. Most hearsay assertions offered in court, it is fair to say, are not detail-laden descriptions of events. They are more likely to consist of a brief sentence or two, the brevity often serving to mask chronological sequence. Even when a declarant mentions events in sequence, his failure to describe additionally the length of time of and between events also may create inferential uncertainty. In the example above, for instance, assume that the declarant had stated, "Jones was driving 60 m.p.h., and then Jones struck a pedestrian." Most persons in hearing this readily would form an image of Jones speeding along and being unable to stop in time to avoid striking a pedestrian. To make that inference, however, we must superimpose our own chronology on the statement, a chronology which has Jones speeding immediately prior to colliding with the pedestrian. If the declarant had been referring to Jones' speed five or ten minutes prior to the time of the collision, the inference is far less certain.

Chronological uncertainty, then, is a frequent cause of ambiguity. The less clearly the order of events can be perceived from an assertion, the less certain the listener can be of receiving the same message that the speaker intended to send.

**F. Filling**

Filling is a psychological phenomenon that occurs whenever we listen to another's story. The term refers to our natural
tendency to amplify stories by adding details and meanings to them. The details and meanings may well not be those a declarant meant to convey, but rather a product of each hearer’s personal experiences. The stories of each will be different because both speaker and listener have unique past experiences. We have little control over our tendency to fill; filling is a mental process that “allows the expectancy arising from past experience to become the actuality of present experience. . . . The human mind works in this fashion; nothing can be done to change that.”62

To understand this phenomenon, examine the following assertion, “Jones robbed Smith at gunpoint.” In your mind, formulate a story of what happened, based upon this assertion. Even better, write a brief narrative account of the event, or draw a diagram. Undoubtedly you will be able to do all of these things, even though the assertion is virtually void of detail. Your past experience will provide the setting of the robbery, the sexes of the robber and victim, and a myriad of surrounding details.

Filling is unique among the ambiguity factors. All of the factors discussed above are traceable to the lack of opportunity to ask questions of a declarant. The filling phenomenon is more pervasive; it suggests that even if we could elicit additional information from a declarant, we would still tend to embellish a story with details drawn from our own experiences. We react not simply to an assertion, but to an assertion with its “penumbra” of meaning supplied by us. Filling thus serves both as a cause of ambiguity and as a reason why we are less apt to detect it. Filling creates ambiguity by allowing for as many different interpretations of a statement as there are triers of fact. Filling also conceals the ambiguity by allowing each of us to think that we know what a statement means. For example, in their book on interviewing techniques, Binder and Price advise lawyers to be aware of filling, so that they can understand a client’s story rather than one drawn partially from their own experiences and expectancies.63 Unless lawyers and judges consciously are aware of this phenomenon, they will fill in the

63 Id.
meaning of hearsay assertions and fail to recognize ambiguity.

G. Conclusion

The factors described above suggest that ambiguity may arise apart from any insincere intent on the part of a speaker and apart from a speaker’s having been raised by a remote cultural group that speaks no English. Ambiguity derives from inherent characteristics of our spoken language combined with our psychological makeup. Far from being a makeweight argument that rarely comes into play, it signifies an independent danger that only cross-examination could go far toward obviating.

From the standpoint of hearsay doctrine, these ambiguity factors suggest a number of possibilities. The first, rejection of all hearsay from witnesses who are not in court, all probably would reject. We cannot have a system that relies heavily on the verbal telling of events while at the same time rejecting all evidence that shares the universal potential to be ambiguous. The second possibility is to admit hearsay despite its ambiguity and rely on jurors, aided by argument of counsel, to discount it appropriately. This may be sufficient when the ambiguity is plain on its face and the probative value of a legitimate interpretation outweighs the potential prejudicial effect of an erroneous one. Many of the factors noted above, however, are not intuitively obvious; a juror or even a judge may well overvalue an assertion that in reality is ambiguous. This leads to the third possibility, a ruling that a hearsay assertion is inadmissible due to its ambiguous nature. Although it is impossible to define abstractly which hearsay assertions are most likely to be inadmissible, courts should at least be prepared to make such rulings in appropriate cases. At present, however, courts show little or no inclination to do so. Section III summarizes the factors courts have discussed when determining the admissibility of hearsay under the “catch-all” exceptions.

III. Trustworthiness and the Residual Hearsay Exceptions

Recall that the impetus for judicial analysis of hearsay in terms of the rationale for its exclusion was given by the adoption of Rules 803(24) and 804(5) of the Federal Rules of Evidence.
These "catch-all exceptions" provide that, although a hearsay statement is not made admissible by any established hearsay exception, a judge may admit the statement if it has "equivalent circumstantial guarantees of trustworthiness." Prior to the adoption of these rules, the admissibility of hearsay depended largely on whether a statement qualified under one of an array of specific exceptions. When a statement is offered under one of the specific exceptions, analysis generally is confined to whether the particular foundational requirements of an exception have been satisfied. For example, when a statement is offered as a "dying declaration," a court will analyze, among other things, whether the declarant believed death was imminent, rather than whether the statement is free from underlying hearsay dangers. The "catch-all" exceptions, however, eliminate the security of required foundations in favor of a general "trustworthiness" standard, encouraging courts to analyze hearsay according to its underlying dangers.

Ambiguity, however, has been notably absent from the admissibility analysis under the "catch-all" exceptions. The appell-
late court opinions suggest that ambiguity is rarely considered an element of trustworthiness. It may be, of course, that trial judges are so alert to the danger of ambiguity that all ambiguous utterances are weeded out at trial, but this seems unlikely. If anything, the narrative danger historically has been regarded as the least significant of the hearsay dangers, making its rigorous application unlikely. Moreover, appellate courts usually do not even mention the narrative danger in their discussions of hearsay admissibility. This slighting may be because courts tend to examine the surrounding "external" circumstances when attempting to discern if the hearsay is trustworthy, an examination that overlooks ambiguity, which often has little or nothing to do with the external circumstances surrounding the making of a statement.

The general absence of ambiguity analysis may be due, in part, to the courts' general tendency to apply the residual exceptions rather liberally to permit the admission of hearsay evidence that would have been inadmissible under the more narrowly drawn hearsay exceptions. Whether the "catch-all" exceptions should have been engrafted onto the list of at least twenty-nine other hearsay exceptions was a hotly contested issue in Congress. The Senate, the driving force behind adoption of the "catch-all" exceptions, noted in its Report that, "It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." Although one could not say accurately that the "catch-all" exceptions have totally eviscerated the hearsay rule, neither could one state accurately that these exceptions are applied only "very rarely." Noting that the "very rarely" language does not appear in the language of the statutes, courts have embarked on a case-by-case analysis of whether a particular hearsay statement is "trustworthy." As one commentator has remarked, "Judicial enthusiasm for the residual exceptions mocks the caution of Congress." Judicial awareness of the danger of ambiguity may do little to remove the welcome mat that hearsay tends to receive; but that awareness

---

65 See McCormick, supra note 2, § 327, at 917.
may bar the admissibility of untrustworthy hearsay in appropriate cases. In addition, lawyers' and judges' awareness of the danger of ambiguity may prevent triers of fact from overestimating the reliability of admitted hearsay.

We come, then, to a review of the factors courts have identified in their search for "equivalent trustworthiness," a search that undoubtedly would bring a smile to the Mona Lisa's lips. The specifically enacted exceptions vary not only in the trustworthiness of the hearsay they typically make admissible, but also each exception individually authorizes the admissibility of hearsay that runs a wide gamut of trustworthiness. For example, one is likely to believe that birth and death certificates are highly trustworthy, at least when compared to an "excited utterance." As to the latter's trustworthiness, psychologists tell us that under stressful conditions, person's reports may be sincere, but that excitement reduces perceptual abilities. No matter how well-established the exception, the trustworthiness of a statement that often begins with "Oh my God!" is doubtful. Many other examples could be given to illustrate the variation in trustworthiness of statements admitted under different established hearsay exceptions.

Moreover, two assertions that qualify for admission under the same statutory exception may vary widely in trustworthiness. When evidence, whether hearsay or not, is offered, judges typically do not evaluate its trustworthiness—that is a jury question. Therefore, when a hearsay assertion is offered, for example, as an excited utterance, a judge will do little more than determine whether an event was "startling" and whether the statement was made "under the stress of excitement." The judge probably will give short shrift to an argument that, although the statement complies with these foundational elements, its lack of trustwor-

---

71 See Fed. R. Evid. 803(9) (records of vital statistics admissible if report made pursuant to requirements of law).
72 See Fed. R. Evid. 803(2) (statement relating to startling event or condition admissible if made while declarant under stress of excitement by event or condition).
73 E. Loftus, Eyewitness Testimony 33 (1979). The role that stress plays on a witness at the point of perception is captured in the Yerkes-Dodson law, named in honor of the two men who first noted it in 1908. "The law states basically that strong motivational states such as stress or other emotional arousal facilitate learning and performance up to a point, after which there is a decrement." Id.
thiness renders it inadmissible.\textsuperscript{74} Thus, two excited utterances, one seemingly highly accurate, the other reeking of mendacity, may be equally admissible under the excited utterance exception.

A judge, urged to admit a statement under the residual exceptions, may get a strained neck looking for equivalent trustworthiness because of each type of admissibility variation. Need a statement be as trustworthy as a birth certificate, or may a judge look for the lowest common denominator, whichever exception she considers it to be? If the latter, may she look further to the least trustworthy hearsay that the exception might make admissible?

Not surprisingly, there would be little consensus on the answers to these questions. Consensus, however, may not be necessary. The specific exceptions are nothing if not a pragmatic collection of principles that developed largely independently of each other. That is, the excited utterance exception probably developed because judges considered statements made under stressful conditions to be generally trustworthy, not because "excited utterances" were equivalent to "dying declarations." Therefore, judges are following in their common law ancestors' footsteps if they look to the trustworthiness of particular assertions that are before them and do not attempt to rate them against a mythical standard of equivalency. As one authority suggests: "Generally, however, the question [of equivalency] has not been raised in terms, and a sort of consensus average seems to be assumed."\textsuperscript{75}

If comparison shopping is out, how is a court to decide whether an assertion offered under the "catch-all" exceptions is as trustworthy as those typically offered under the recognized exceptions? The logical way, it appears, is to analyze the trustworthiness of an assertion in terms of the hearsay dangers that the exclusionary rule protects against in the first place. That is,

\textsuperscript{74} This is not always the case, however. Certain hearsay exceptions do require judges to determine that an assertion is trustworthy as a condition of admissibility. For example, when an assertion is offered as a "declaration against interest" by a defendant in a criminal case, the judge must find the statement trustworthy before it can be admitted. \textit{See} Fed. R. Evid. 804(b)(3). Usually, however, trustworthiness is a concern exclusive to juries.

\textsuperscript{75} \textit{McCormick, supra} note 2, § 324.1, at 908.
an out-of-court assertion made under circumstances that obviate all hearsay risks would qualify for admission under the "catch-all" exceptions. This seems to be the case, for example, with marriage certificates, one of the recognized hearsay exceptions. Clergypeople and public officials undoubtedly are sincere when they record the names of a married couple; the record is sufficiently concise to allay fears of ambiguity; the record is prepared so close in time to the ceremony that memory problems are minimal; and the person who performs a ceremony is unlikely to have problems perceiving who has married. An assertion offered under the "catch-all" exceptions that similarly overcomes the traditional risks also should qualify as trustworthy.

To demand that assertions offered under the "catch-all" exceptions overcome all hearsay risks, however, would demand more than is required under many of the recognized exceptions. For example, an assertion offered as a "declaration against interest" is likely to be sincerely made because most people do not make statements lightly that could harm them. Also, the assertion must be sufficiently unambiguous so that it is interpreted as being against the speaker's interest. On the other hand, memory and perceptual difficulties remain. One may question whether a speaker recalls the event accurately because the assertion offered as against interest may be made long after the event to which it refers. Also, the fact that a speaker makes an assertion against her interest is no guarantee that she accurately perceived the events giving rise to the assertion.

Conversely, consider an assertion offered as a "then existing mental condition." If the assertion reflects a concurrent mental state, the speaker is likely to have little difficulty perceiving his own mental state. Also, the concurrency eliminates any memory problems. Concurrency, however, is certainly no guarantee that

70 Fed. R. Evid. 803(12) (statement of fact in marriage certificate admissible if certificate issued within reasonable time of act).
71 Fed. R. Evid. 804(b)(3).
72 Id.
73 Id.
74 See Tribe, supra note 13, at 964-65 (declarant unaware of "substantial defects of memory and perception of which a declarant cannot be conscious").
75 Fed. R. Evid. 803(3).
the person is sincerely reporting his mental state or that the words he uses to report it are not ambiguous.\(^2\)

Hence, a judge trying to decide whether an assertion qualifies under the "catch-all" exceptions seemingly should be satisfied if an assertion, like declarations against interest and assertions of mental state, overcomes two of the four hearsay dangers. In fact, although the specific statutory exceptions are not models of consistency, one general theme is that many overcome two, but only two, of the hearsay dangers.\(^3\) Thus, one may consider assertions that overcome two dangers to have "equivalent circumstantial guarantees of trustworthiness." Probing the recognized exceptions a bit further, however, one sees that the hearsay dangers are not fungible; it seems incorrect that "overcoming any two will do." Instead, as Tribe noted, the hearsay dangers are paired off consistently. One pair, the "left leg" of Tribe's "Testimonial Triangle," consists of the dangers of sincerity and faulty narration, dangers which require one to consider whether an assertion accurately reflects a declarant's belief. The "right leg" pair consists of the dangers of memory and perception, dangers which require one to consider whether an assertion accurately reflects reality. The recognized hearsay exceptions tend to overcome one danger leg, but not the other. Hence, Tribe can point to strong "left leg" exceptions such as those for statements of medical history to a physician, excited utterances, and business records; and strong "right leg" exceptions such as statements of presently existing mental state.\(^4\)

What is initially interesting about the trend of decisions under the "catch-all" exceptions is that they depart from the "left leg-right leg" groupings identified by Tribe. Instead of thinking about "one good leg," judges typically examine the factual circumstances in each case that seem to affect the trustworthiness of a hearsay assertion. United States v. Hinkson\(^5\) exemplifies the usual analysis. In Hinkson, the defendant, "Crazy Fred," was charged with murder. The prosecution's theory was

\(^2\) For example, is there any more ambiguous response in our culture than that typical reply to the question, "How are you?", "Fine"?

\(^3\) See Tribe, supra note 13, at 966.

\(^4\) Id. at 964-65.

\(^5\) 632 F.2d 382 (4th Cir. 1980).
that "Crazy Fred" killed the victim as part of an attempt to become the leader of a motorcycle gang, believing that committing a murder would prove his high qualifications for the position. The defendant offered hearsay evidence that a third party had confessed to the murder under one of the "catch-all" exceptions, Rule 803(24). The appellate court held that evidence of the confession was not trustworthy and that the district judge had properly excluded it. The court noted that the alleged confessor delighted in aggrandizing himself with his biker image, and thus the confession might have been little more than bragadocio. Moreover, no physical evidence connected the alleged confessor to the crime, and the confession conflicted with other evidence.

Thus, the analysis for admissibility of hearsay under the "catch-all" exceptions is very different than under one of the specific statutory exceptions. When hearsay is offered pursuant to the latter, courts tend to look not at an assertion's trustworthiness, but at whether it satisfies foundational criteria. When hearsay is offered under the "catch-all" exceptions, courts discuss trustworthiness rather than possible foundational criteria such as the "left leg-right leg" distinction. Not surprisingly, the factors courts discuss when determining trustworthiness track the dangers that first gave rise to the hearsay rule—with the exception of ambiguity. Consider the McCormick textbook's summary of factors courts rely on when determining whether a statement qualifies under the catch-all exceptions:

[A]s the volume of decided cases increases, certain recurring factors are acquiring recognition as significant in deciding whether to apply the residual exception. Among them are: whether the statement was under oath, the duration of the time lapse between event and statement, motivation to speak truthfully or otherwise, and whether declarant had firsthand knowledge. These are factors that . . . fairly fall within the

---

86 Id. at 383, 384. The statement did not qualify as a declaration against interest because the alleged confessor was not unavailable and, in fact, testified at the trial, denying confessing to the murder. Id. at 386.

87 Id.
description equivalent circumstantial guarantees of trustworthiness.18

Next, consider how closely these factors track the hearsay dangers. "Whether a statement was made under oath" is a factor that primarily affects the sincerity of a statement.89 If there is any benefit to the oath at all,90 it is its role as a subtle reminder to a witness of the solemn nature of her testimony and the potential charge of perjury. If the oath accomplishes its role, it goads a witness into making a statement that accurately reflects her belief and, therefore, guards against the risk of insincerity.

The second factor is "the duration of the time lapse between event and statement."91 The factor that considers the time between an event and a statement obviously is aimed at guarding against the risk of faulty memory. For example, the case of United States v. White92 discussed the admissibility of a hearsay declaration made three months after an event. Holding the statement admissible under Rule 803(24), the court commented:

We have recognized that the length of time between an event and the declarant's statement concerning it is a significant indicator of reliability, noting that when an instrument is ex-

18 McCormick, supra note 2, § 324.1, at 908 (citations omitted). For a similar summary, see United States v. Barlow, 693 F.2d 954, 962 (6th Cir. 1982), where the court stated:

In making this [trustworthiness] determination the trial court should consider the declarant's relationship with both the defendant and the government, the declarant's motivation to testify before the grand jury, the extent to which the testimony reflects the declarant's personal knowledge, whether the declarant has ever recanted the testimony, and the existence of corroborating evidence available for cross-examination.

This list omits mentioning the danger of faulty memory. Perhaps that is because Barlow involved the admissibility of grand jury testimony, which undoubtedly was not given closely following the events described in the testimony. As the McCormick treatise makes clear, however, faulty memory is typically a trustworthiness concern.

91 McCormick, supra note 2, § 324.1, at 908.

92 The philosopher Beccaria suggested that the oath be abolished because its only function was to force people to commit perjury. C. BECCARIA, ON CRIMES AND PUNISHMENTS XI, "Oaths" (1769). He stated: "Laws and the natural sentiments of man contradict one another when oaths are administered to the accused, binding him to be truthful when he can best serve his own interests by being false." Id.

91 McCormick, supra note 2, § 324.1, at 908.

92 611 F.2d 531 (5th Cir. 1980).
executed close in time to the event which is the subject of the
statement there is little danger of lost recollection.\textsuperscript{93}

The third factor cited in the McCormick treatise is the "mo-
tivation to speak truthfully or otherwise." This is a direct
reference to the risk of insincerity, because motive may produce
a story that does not sincerely reflect the speaker's belief.\textsuperscript{94}

The final factor cited by McCormick, "whether the declarant
had firsthand knowledge,"\textsuperscript{95} is a bit more difficult to classify.
In part, the requirement of firsthand knowledge has nothing
whatsoever to do with the hearsay rule. The rule that a lay
witness cannot testify unless he or she has personal knowledge
of events is "more ancient than the hearsay rule."\textsuperscript{96} To this
extent, "firsthand knowledge" speaks to the requirement that
the declarant must have perceived personally whatever her as-
sertion describes, and not to the risk of faulty perception. For
example, the court in \textit{United States v. Carlson}\textsuperscript{97} seemed to have
the basic requirement of percipiency in mind rather than the
hearsay danger of faulty perception when it held a hearsay
assertion admissible under Rule 804(b)(5), stating "Tindall was
relating facts surrounding a cocaine transaction in which he
participated and of which he possessed firsthand knowledge;
therefore, there was no reliance upon potentially erroneous sec-
ondary information . . ."\textsuperscript{98}

Courts also use firsthand knowledge as an indication that an
assertion is free from the danger of faulty perception. For ex-
ample, the \textit{Carlson} court reasoned that, because the declarant
related information about a transaction in which he had partic-
ipated, "the possibility of faulty recollection was minimized."\textsuperscript{99}

\textsuperscript{93} \textit{Id.} at 538.
\textsuperscript{94} See McCormick, \textit{supra} note 2, \$ 324.1, at 908.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.} at \$ 247, at 731. \textit{See}, e.g., \textit{State v. Conway}, 171 S.W.2d 677 (Mo. 1943)
(testimony of officer not admissible concerning money in possession of accused when
arrested, apparently based on reports of others); \textit{Robertson v. Coca Cola Bottling Co.}
of Walla Walla, Wash., 247 P.2d 217 (Or. 1952) (testimony of bottling plant manager
not admissible as to strength and thickness of glass in bottle based upon measurements
made by third parties).
\textsuperscript{97} 547 F.2d 1346 (8th Cir. 1976).
\textsuperscript{98} \textit{Id.} at 1354.
\textsuperscript{99} \textit{Id.}
Similarly, in *United States v. Barlow*, the court admitted grand jury testimony against the defendant under the residual exception in Rule 804(b)(5). The court noted that the declarant had personal knowledge, and then stated, "This information, however, was within her [declarant's] personal knowledge . . . . [T]he likelihood that Ms. Humphries' recollection was faulty is clearly remote. Given the events of the days surrounding the theft she undoubtedly would have recalled whether the appellant was with her on the night in question."%101

These cases indicate that the factors courts typically discuss when determining trustworthiness are responsive to the dangers of faulty memory, faulty perception, and insincerity. Ambiguity, however, seemingly was left at the station when the trustworthiness train pulled out. Nevertheless, ambiguity may render an assertion untrustworthy even if the remaining dangers have been overcome. Tribe's "left leg-right leg" image is one way to categorize the hearsay dangers. Another is to view the risks of faulty memory and perception and the risk of insincerity as "external" risks—risks that can be evaluated by looking at circumstances surrounding the making of a statement. How much time elapsed between event and assertion? Did the declarant have a motive to distort? Was the assertion made under oath? Did the declarant have a good opportunity to perceive the event described in the assertion? Each of these questions can be reasonably answered by looking at the environment in which an assertion is made, but none addresses the issue of whether an assertion is reasonably free from ambiguity. Because courts do not explicitly analyze assertions for their potential ambiguity, the critical distinction between ambiguity and the other three hearsay dangers makes it unlikely that ambiguity is considered even implicitly when courts determine trustworthiness under the "catch-all" exceptions.

This essay has attempted to explain why ambiguity is a legitimate hearsay risk. Indeed, ambiguity is built into the very existence of a symbolic language system. It is inconceivable, however, that the inherent ambiguity of language is a sufficient

---

100 693 F.2d 954 (6th Cir. 1982).

101 Id. at 965.
basis to consider hearsay untrustworthy. At the very least, such a rule would bar all hearsay from non-testifying declarants. Therefore, this essay further has attempted to identify particular aspects of our language that might serve as a guide to assertions that run more than a routine narrative risk. To test the utility of these aspects, the remainder of the essay focuses on a few cases in which hearsay was admitted under one of the residual exceptions, and in which the narrative risk has gone largely or completely unnoticed. It then considers the degree to which the factors described in Section II indicate that the assertions were ambiguous. The cases chosen are not “cripples,” ripe for an ambiguity kill. Each was selected because it admitted hearsay and is in some sense “leading,” either because it is cited often in other cases, or because it is cited in widely used treatises or casebooks. If analysis aided by the “ambiguity factors” suggests that ambiguity was a legitimate risk in this limited milieu, then the ambiguity danger is one that deserves regular consideration by courts. Admittedly, the analysis will be incomplete. One cannot conclude that an assertion is definitely untrustworthy because of ambiguity any more than one can conclude definitely that a declarant had insufficient memory or spoke insincerely. Admissibility of hearsay, whether under a statutory or a residual exception, involves a balancing of probative value versus potential prejudice, a function left to the trial court’s sound discretion.

IV. AMBIGUITY EXITS THE HEARSAY CLOSET

Consider Huff v. White Motor Corp.\(^ {102} \) Huff died when his truck-tractor sideswiped a guardrail, collided with an overpass support and burst into flames. Huff’s widow filed suit against the vehicle’s manufacturer, alleging that the truck’s defective design caused the fuel to ignite.\(^ {103} \) One issue on appeal was the admissibility of a statement Huff made to a friend while in the hospital a few days after the tragedy. In the statement, Huff said that “as he was approaching the curve or starting into it his pant leg was on fire and he was trying to put his pant leg out and lost control and hit the bridge abutment and then the

\(^{102}\) 609 F.2d 286 (7th Cir. 1979).
\(^{103}\) Id. at 289.
truck was on fire.” The defendant sought to introduce the statement as evidence that the fire was not caused by any defective vehicle design. The appellate court held that, if on retrial Huff were found to be lucid when he made the statement, it was trustworthy and should have been admitted by the trial court.

Assume that the plaintiff's counsel in Huff had objected to the admissibility of Huff's statement on the ground that the statement was ambiguous. Because a pre-collision fire in the cab suggests driver negligence rather than a design defect as the cause of the fuel's ignition, ambiguity in the statement concerning the sequence of events certainly would undercut the statement's trustworthiness. In this regard, note that, according to the court's summary of the evidence, the truck struck both a guardrail and a bridge abutment. The statement tells us that the fire had started before the truck hit the bridge abutment. One cannot glean the sequence of the fire and the collision with the guardrail from the statement, yet this is the vital chronology. If striking the guardrail had produced the fire, a manufacturing defect might well be to blame. This chronological ambiguity certainly is understandable: the statement was short and spoken in the hospital by a severely injured person who died of his injuries a few days later.

The Huff opinion also provides an example of ambiguity caused by polarity. Fires come in many different sizes and have many different causes, yet we have few verbal alternatives between “no fire” and “fire” to describe each variation. Huff's statement tells us that his pant leg and the truck were both on fire. Were these the same fire? Did they share a common cause? The lack of a convenient verbal middle ground available to Huff, combined with his obviously distressed physical condition which

104 Id. at 290.
105 Id.
106 The court did note in passing that the assertion was “unambiguous.” Id. at 292. There is, however, no discussion of ambiguity, whereas the opinion emphasized sincerity.
107 Id. at 289.
108 Although knowing the proximity of the curve in relation to the guardrail and bridge abutment might help clear up the chronological ambiguity, this information cannot be discerned from the court's opinion.
would have little inclined him to search for just the right phrase, prevents us from learning more about the fire. If there were indeed separate fires, events could have happened this way: when Huff's truck struck the guardrail, igniting gas caught his pant leg on fire. Huff tried to put it out, lost control, and the truck struck the bridge abutment. Then another separate fire engulfed the truck. This interpretation suggests that a manufacturing defect could have been responsible for Huff's death. Did events occur this way? We do not know—after all, the statement is ambiguous.

Consider how the "filling" phenomenon may affect a person's reaction to a statement such as the one in Huff. Did a mental image about how the accident occurred form in your mind as you read Huff's brief hospital statement? Most likely it did, and that image might be surprisingly detailed as to the type of truck, the highway section where the events took place, etc. Much of that image, of course, is a product of each reader's own experience rather than anything in the statement. Once that image forms, it tends to block any ability to see ambiguity—the statement seems to have clear meaning. It may be, then, that ambiguity will be detected less often than, say, obvious motivation to slant a story. If attorneys and judges are more alert to the possibility of ambiguity and to the factors that tend to produce it, however, the trustworthiness of individual hearsay assertions will be assessed more accurately.

The above discussion of Huff exemplifies the sort of analysis judges and attorneys might use to detect and evaluate the risk of ambiguity. Let us now utilize this analysis in the context of another case, Bill v. Farm Bureau Life Insurance Co.¹⁰⁹ In Bill, the plaintiffs sought to recover on a life insurance policy covering the life of their teenage son. The policy was void if the death was by suicide. The evidence showed that the son, Leroy, was found dead in a barn's hayloft with twine connecting an overhead beam to a noose around his neck. The hearsay evidence in dispute consisted of a conversation between a physician and Leroy's parents, the beneficiaries under the life insurance policy, which took place shortly after the discovery of Leroy's body.

¹⁰⁹ 119 N.W.2d 768 (Iowa 1963).
According to the physician, he asked the father, "Is there any doubt in your mind that your son committed suicide?" In response, the father shook his head back and forth in a lateral direction. The trial judge had excluded the evidence on the ground that to admit it as the father's admission would require the jury to speculate that the head shaking was the equivalent of a negative response. The appellate court reversed, holding that the jury could reasonably interpret the father's head motion as a negative response.\textsuperscript{110}

Although the appellate court's opinion appears eminently supportable on its own rationale, I suggest that its discussion overlooks the more genuinely ambiguous aspects of the evidence. The issue in the case was not whether Leroy had died by his own hand, but whether he had done so intentionally. If Leroy had taken his own life accidentally, or in some other non-intentional way, the parents were entitled to the proceeds of the policy. Recall that ambiguity may be produced because many people use language in unconventional ways. To speakers of "standard" English, such as physicians and attorneys, the term "suicide" undoubtedly connotes an intentional act. The plaintiffs, however, were farmers; the father's understanding of the term "suicide" may not have included the requirement that the death be intentional. It is certainly plausible that the father considered any way in which Leroy met death by his own hand, accidentally or not, to be suicide.

Moreover, the "polarization" phenomenon may have contributed to potential ambiguity in \textit{Bill}. "Suicide" is a term in our culture that applies to all those who take their own lives. We lack a ready term for those who take their own lives unwittingly, accidentally, or in some other fashion. Hence, it is understandable that the father simply would have accepted the physician's terminology, rather than search for different words. Indeed, in the case's context, it is particularly understandable because the conversation took place soon after Leroy's death.

Finally, note that the appellate court treated the father's head motion as a designative statement, the equivalent of the statement, "There is no doubt in my mind that my son com-

\textsuperscript{110} Id. at 769-73.
mitted suicide." Under the circumstances, however, there is a strong possibility that the father's gesture was an expressive assertion, an assertion that tells more about the father's internal feelings than about the way his son died. Entirely eliminate the gesture, whose possibly speculative character was the focus of court attention, and assume instead that the father had answered the physician's query with an audible "no." Given the circumstances in which it was made, we easily can regard the response as an expression of grief over his son's death. "No," in other words, was the father's way of saying, "I am devastated." This interpretation is strengthened by the father's failure to make even an audible response. To see this more clearly, assume the physician had asked the question another way: "Is there any doubt in your mind that your son's death was accidental?" and that the father had shaken his head back and forth. We might still regard the father's response as more of an expression of grief than a reply to the doctor's query. If that is the case, the ambiguous nature of the father's response is clear.

*Bill* demonstrates that, in some situations, a court's assessment of an assertion's ambiguity may be aided by further foundational inquiry. For example, in *Bill*, the differences in language use between professional persons and farmers might have the tendency to render the father's reference to suicide ambiguous. But did the father use language in unconventional ways? After all, many farmers have professional backgrounds. The *Bill* court could have considered additional information—it might have evaluated the father's use of language during his testimony; it might have read his deposition, seeking indications of unconventional language use. Acquaintances could have testified about his use of language. Regarding whether the father's response was designative or expressive, what was the remainder of the conversation, if any, between the father and the physician? These types of inquiry are not uncommon—for example, courts often need to examine the language ability of a criminal defendant to decide whether he understood the *Miranda* warning. The foun-

---

111 The father did testify in *Bill*, but the court discussion does not indicate any attention to the issues described in this Article. *Id.* at 772.

112 See *Jackson v. Denno*, 378 U.S. 368, 391 (1964) (Court held that an independent
dational inquiry need not be lengthy or complex, or in some cases even necessary. Nevertheless, if attorneys and judges are alert to the danger of ambiguity and are aware of features in our language that tend to produce ambiguity, some inquiry on the record into relevant circumstances may help to define how great the danger is.

A third case for consideration is a wrongful death case, Robinson v. Shapiro.\textsuperscript{113} Robinson, the decedent, was working on repairs to a chimney and died when the gate he was holding, to get from the roof to a stairway, collapsed. The gate was wedged in place and could not be swung open and then swung shut. Had the gate been open, getting from the roof to the stairway would have been routine. With the gate closed, however, the decedent and other workers had to hang onto it as they swung themselves onto the stairs. Critical evidence on the plaintiff's behalf was supplied by a co-worker, who testified that, prior to his fall, the decedent had stated that the building superintendent had forbidden the workers to remove the gate because the closed gate turned the roof area into a makeshift pen for the superintendent's dog and opening the gate would allow the dog to escape.\textsuperscript{114} The court upheld the admissibility of the decedent's statement under the residual exceptions, holding that it was trustworthy.\textsuperscript{115}

Are there narrative dangers in the decedent's statement? One danger may be based on the tendency to "fill"—to build the entire transaction between the superintendent and the decedent based on the decedent's single statement. For example, it is difficult to know what the supervisor actually said. Perhaps the supervisor said only that the gate was not to be removed; the decedent, seeing the dog on the roof, told the co-worker that the gate was not to be removed because the superintendent was using it as a pen for the dog. The co-worker, of course, would

\textsuperscript{113} 646 F.2d 734 (2d Cir. 1981).
\textsuperscript{114} Id. at 737-38.
\textsuperscript{115} Id. at 742.
be unlikely to question the decedent as to who said what. Although this possibility would not seem critical to liability under the *Robinson* facts, it does suggest the narrative difficulties that can arise when filling occurs.

An alternative conversational possibility, also consistent with the decedent’s remarks and also a product of filling, does impact on the question of liability. Perhaps the decedent asked the superintendent if the gate could be opened. The superintendent replied that, because the gate does not swing normally, the workers could open it only if they walked through and immediately refastened it so the dog could not escape. Because this procedure is rather complex, the decedent decides that it is better to leave the gate closed and simply use it as support when climbing on and off the roof. Rather than report all this, however, the decedent merely tells his co-worker not to remove the gate because of the dog. This alternative creates a plausible description of events, perhaps with different legal consequences. Because of our tendency to form pictures of events based on sparse data, however, we tend to not see alternate ways in which the same event can unfold. The filling problem was particularly acute in *Robinson*, because the witness was the co-worker, who testified to the decedent’s version of what the supervisor had said. Yet, the court engaged in a typical trustworthiness analysis, focusing on factors external to the statement without examining potential ambiguity in the statement itself.

This discussion illustrates the ambiguity embedded in the word “remove.” The *Robinson* court (and perhaps the decedent as well) interpreted “remove” as indicating that the gate could not be opened at all. In the context of this case, however, the term is abstract and polar. The gate might have been removed for a short or long period of time. Likewise, one could have removed the gate with or without an intention to restore it to its wedged condition. There are no ready terms to describe these potential variations. Because of this, we are uncertain what meaning the decedent intended to convey to the co-worker.

The hearsay assertions in *Huff, Bill*, and *Robinson* are potentially ambiguous. This is not to say that the assertions involved in each case were inadmissible. Ambiguity bears on the trustworthiness of an assertion, and a judge could reason that in a case’s particular circumstances, an assertion is sufficiently
trustworthy to be admissible in spite of the risk of ambiguity. By doing so, the judge would be weighing the probative value of evidence against its potential prejudicial effect. The greater the risk of ambiguity, the less relevant an assertion becomes; the less relevant an assertion, the greater the likelihood of prejudicial impact. When courts engage in this weighing process, we expect the record to reflect that the judge has exercised his or her discretion. Only if the record reflects the reasons for a ruling can one evaluate the way in which discretion was exercised and be certain that all necessary factors were considered. The ultimate shortcoming of these cases, then, is not that they admit untrustworthy hearsay. It is that they ignore an important aspect of the trustworthiness determination.

To return to a thought mentioned in the Introduction, the rules of evidence try to strike a balance between admitting all information that would bear on the determination of an issue and admitting only information with particular earmarks of trustworthiness. Types of evidence thought to be especially untrustworthy—rumor, speculation, hearsay—are excluded because triers of fact may be tempted to give them greater credence than they are worth. Ironically, as long as evidence does not fall within excluded categories of evidence, judges usually admit it even though its trustworthiness is questionable. For example, testimony in a personal injury case that the defendant was backing out of her driveway at 50 mph is likely to be admitted, even though the witness admits to having consumed four martinis and two Twinkies just before making the observation. This

---

116 Fed. R. Evid. 403. See supra note 14 and accompanying text.
117 See, e.g., People v. Green, 164 Cal. Rptr. 1 (Cal. 1980) (reason for rule is to furnish appellate court with record necessary for meaningful review of trial court's use of discretion).

116 Even when an ambiguity issue is recognized by a court, it may not be seen as an issue that affects trustworthiness. In deMars v. Equitable Life Assurance Soc'y of the United States, 610 F.2d 55 (5th Cir. 1979), the court held that a letter from a physician stating the physician's opinion of the decedent's cause of death was not trustworthy and was admitted in error by the trial court. It also held, however, that the admission was harmless because the letter was ambiguous regarding the cause of death. Apparently, the deMars court did not perceive that the ambiguity of the letter was itself a reason to find it untrustworthy.
evidence "carries the badge of its own weakness,"\textsuperscript{119} and hence is less likely to be overvalued by triers of fact.\textsuperscript{120}

It is unclear which approach a court should follow when determining the admissibility of hearsay under the "catch-all" exceptions. One might argue that even if hearsay is somewhat ambiguous, a court should admit it anyway, relying on the jury to discount its probative worth by reason of the ambiguity. This, however, would be at odds with the way in which hearsay normally is handled. Hearsay is one of the strictly excluded categories of evidence, admissible only if an exception applies. Therefore, if the foundation for a hearsay exception is lacking in some respect, the court excludes the hearsay assertion. The court does not assess the trier of fact's ability to discount from probative value. If this approach were taken when an ambiguous assertion is offered under the "catch-all" exceptions, a court should exclude the evidence rather than rely on the trier of fact's ability to discount. Indeed, the typical failure of courts to recognize the danger of ambiguity in the cases already decided under the "catch-alls" is some evidence that ambiguous assertions do not "carry the badge of their own weakness."

I concede that courts' recognition of the danger of ambiguity is unlikely to stem the modern trend to admit hearsay. It may be that in the usual case, in which ambiguity in an assertion is recognized, a judge will consider the ambiguity to affect the weight of evidence, not its admissibility, and rely on opposing

\textsuperscript{119} I thank my helpful colleague, Professor Norm Abrams, for this nice phrase.

\textsuperscript{120} Current questions surrounding the admissibility of testimony from witnesses who have been hypnotized previously also illustrate the dilemma between our need to admit pertinent information and our need to exclude types of information considered untrustworthy, in part because of its likely effect on triers of fact. For example, State v. Hurd, 432 A.2d 86, 95 (N.J. 1981) held such evidence admissible if appropriate safeguards were followed during the hypnotic session, reasoning that jurors could understand the inherent weaknesses of evidence and weigh it accordingly. People v. Shirley, 641 P.2d 775 (Cal. 1982), on the other hand, held that any testimony from a witness who had been hypnotized previously was inadmissible as to any information covered in the hypnotic session. The California court reasoned that cross-examination would be largely ineffective to expose its unreliability. See id. at 804 n.51. This is another way of saying that exclusion is required because of the risk that the trier of fact will be unable to discount the testimony sufficiently. The issue, a recurring one in the law of evidence, may soon be resolved for hypnosis. The United States Supreme Court has granted certiorari in Rock v. Arkansas, 55 U.S.L.W. 1073, 1076 (U.S. Nov. 11, 1984) (No. 86-130).
counsel to urge the shortcomings of the assertion during argument. There undoubtedly will be cases, however, where an assertion's ambiguity, perhaps combined with other factors, impels a judge to exclude it. This essay may at least serve as a string around a trial judge's finger reminding her that ambiguity is a legitimate and definable hearsay concern.

CONCLUSION

A few centuries ago, Sir Walter Raleigh was executed in the Tower of London after being convicted of treason. The conviction rested in part on the hearsay testimony of a fisherman, who testified that "a Portuguese gentleman" had told him that Raleigh intended to murder the King. One would think that the possibility that the fisherman's testimony would be admissible today had been safely put to rest. Yet, if a federal judge believed that the Portuguese gentleman's statement was made under conditions suggesting its trustworthiness, Sir Walter might fare no better today than he did under Elizabeth.

The modern trend to admit hearsay is evidenced in the "catch-all" exceptions themselves; in the frequency with which those exceptions are used to admit grand jury testimony, and in the many decisions, some of which were discussed above, that admit statements not under oath that are made in circumstances considered "trustworthy." The risk of ambiguity has been lost in that trend. Although no claim is made that the risk is sufficiently large to reverse the trend, ambiguity should at least serve as a factor that courts take into account when considering the trustworthiness of an assertion. The factors discussed in Section II of this essay may enable attorneys and judges to assess ambiguity with some degree of accuracy. We must not forget that the hearsay rule was enacted to protect against very real dangers and we should be reluctant to admit hearsay unless satisfied that it has overcome these dangers. The residual exceptions provide repeated opportunities for courts to develop factors that impact on the trustworthiness of hearsay. Ambiguity, I suggest, should be one of those factors.

121 Unfortunately, not before he wrote a number of poems that were the bane of one person's junior high school education.
122 CRIMINAL LAW BULLETIN Vol. 8 p. 100.