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CALIFORNIA'S DORMANT HEARSAY EXCEPTION: SECTION 1200(b) OF THE EVIDENCE CODE

Kandis Scott*

I. INTRODUCTION

The hearsay rule is intended to improve the accuracy of fact finding by excluding unreliable evidence. Unfortunately the rule has been so rigidly interpreted and applied as to exclude truthful evidence and thereby cause injustice.¹ To avoid this result, courts and legislatures have proposed changes to the rule and its application. Some advocate eliminating the rule entirely;² others suggest giving the trial judge the discretion to admit hearsay on an ad hoc basis.³ California chose to preserve the hearsay rule with its established exceptions, but also specifically invited the creation of additional exceptions. That alternative to a rigid hearsay rule was codified in 1965 because it was "calculated to encourage growth and development in this area of the law, while conserving the values and experiences of the past as a guide to the future."⁴ California Evidence Code section 1200(b) excludes hearsay evidence unless it falls within exceptions provided by law.⁵

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¹ 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1427 (Chadbourn rev. 1974).
² The Uniform Rules of Evidence admit hearsay statements of witnesses available for cross-examination. UNIF. R. EVID. 63(1) (1953). The Model Code of Evidence admits the hearsay of available and unavailable witnesses. MODEL CODE OF EVID. RULE 503. These dramatic proposals would be limited in criminal cases by the guaranty of confrontation in the sixth amendment of the United States Constitution.
³ See FED. R. EVID. 803(24), 804(b)(5); cf. CAL. EVID. CODE § 352 (West 1966); FED. R. EVID. 403 (giving court discretion to exclude evidence of questionable probative value).
⁴ FED. R. EVID. 801 advisory committee notes.
⁵ CAL. EVID. CODE §§ 1200, 1220-1341 (West 1966). Section 1200 provides in pertinent part:
(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
The opportunity for growth and development is found in the definition of "law" which includes "constitutional, statutory, and decisional law." In this way the legislature encouraged the courts to continue the common law development of exceptions to the hearsay rule. Unfortunately, the courts have allowed this authority to lie dormant leaving the codifiers' promise of flexibility unfulfilled.

This article explains California Evidence Code section 1200(b) and suggests that the courts create new exceptions for trustworthy and necessary hearsay evidence. It goes on to criticize the hearsay exceptions for fresh complaints and invoices which could be more carefully designed if adopted openly under section 1200(b). Finally it proposes new exceptions and encourages judicial development of the hearsay rule.

II. CALIFORNIA EVIDENCE CODE SECTION 1200(B)

The history of Evidence Code section 1200(b) shows the intent to authorize courts to create new exceptions to the hearsay rule. Initially the California Law Revision Commission followed the Uniform Rules of Evidence and limited exceptions to those enumerated in the proposed evidence code. In July 1964 however, the Commission reversed itself and permitted the judiciary to continue developing new exceptions to the hearsay rule. Although the reasoning of the Commission

(b) Except as provided by law, hearsay evidence is inadmissible. Cal. Evid. Code § 1200 (West 1966).
7. In People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964), the California Supreme Court held that an exception for declarations against penal interest existed despite the fact that it was not mentioned in the California evidence codification of 1872. The statutes did not freeze the law of evidence. Spriggs is cited with approval in the Senate Committee on the Judiciary Comment to California Evidence Code § 1200. Cal. Evid. Code § 1200 legislative committee comment (Deering 1966).
9. The New Jersey Supreme Court proposal which inspired this change made hearsay inadmissible "except as permitted by rule of law established by statute or decision or by exceptions provided [in the Evidence Rules]." California Law Revision Comm'n Minutes, Memo 64-49, at 2 (July 1964) (emphasis added) (unpublished memo in the offices of the Commission). The Commission also agreed to change the comment to the new statute, to read: "Under Section 1200, exceptions to the hearsay rule may be found either in statutes or in decisional law." Cal. Evid. Code § 1200 legislative committee comment (Deering 1966) (emphasis added).
in making this change has not been preserved, the Commission's final recommendation favors the inclusion of court-made exceptions:

The Code will not, however, stifle all court development of the law of evidence . . . . [T]he Evidence Code is deliberately framed to permit the courts to work out particular problems or to extend declared principles into new areas of the law. As a general rule, the code permits the courts to work toward greater admissibility of evidence but does not permit the courts to develop additional exclusionary rules.¹⁰

Thus California courts can declare new exceptions to the hearsay rule under section 1200(b) without straining to extend the old exceptions.

Section 1200(b) does not tell the courts how to decide which hearsay to admit. The most reasonable way to decide would be to use the traditional standard which permits exceptions to the hearsay rule for evidence that is trustworthy and necessary.¹¹ Turning first to the necessity test, one finds it is a trivial barrier to admission of hearsay. Most new exceptions would meet the minimal standard of necessity now used. Necessity means "practically convenient."¹² The necessity test, as interpreted in other jurisdictions, demands only a showing that the same quality evidence is not available.¹³


¹¹ 5 J. Wigmore, supra note 1, at §§ 1420, 1422; C. McCormick, McCormick's Handbook of the Law of Evidence § 305 (1954) [hereinafter cited as McCormick (1954)].

This two-part test, slightly modified, is the standard used by the federal courts in applying the "catchall exception." Fed. R. Evid. 803(24), 804(b)(5).

¹² See, e.g., Dallas County v. Commercial Union Assurance Co., 286 F.2d 632 (5th Cir. 1969).

¹³ 5 J. Wigmore, supra note 1, at § 1421. In federal court hearsay is necessary if it is more probative than other evidence which can be procured through reasonable efforts. Fed. R. Evid. §§ 803(24), 804(b)(5). United States v. American Cyanamid, 427 F. Supp. 859 (S.D.N.Y. 1977) (unnecessarily expensive and time consuming to call witnesses); United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y. 1976), aff'd, 540 F.2d 574 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977) (most powerful evidence to resolve conflict); Ark-Mo Farms v. United States, 530 F.2d 1384 (Ct. Cl. 1976) (to call
California does not require even that minimal showing of necessity to create a new hearsay exception, but it may go too far. Parties pressing for new exceptions will argue that the existing rules inhibit their ability to prove their cases. In any event when a court is asked to define a new hearsay exception, as it would under section 1200(b), it should consciously examine the need for such evidence.

As to the meaning of trustworthiness, California courts can find guidance in the common law and the Federal Rules of Evidence. Under common law hearsay is trustworthy if it does not present all four hearsay dangers: misperception, failed memory, ambiguity or misstatement by the declarant, and insincerity. The presence of these dangers and counsel's inability to adequately cross-examine an out-of-court declarant produce a risk of inaccuracy so great that the evidence is excluded. When some of these dangers are absent, the usefulness of the evidence exceeds its potential unreliability and the hearsay will be admitted as an exception.

Hearsay is also trustworthy if the circumstances sur-

witnesses would unnecessarily prolong trial); cf. United States v. Mathis, 559 F.2d 294 (5th Cir. 1977) (that available witness is frightened about testifying is insufficient necessity).

14. People v. Brust, 47 Cal. 2d 776, 785, 306 P.2d 480 (1957). It may be that either reliability or necessity would be sufficient to justify admission of hearsay evidence. In People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964), the California Supreme Court noted that "[w]hen hearsay evidence is admitted it is usually because it has a high degree of trustworthiness." Id. at 874, 389 P.2d at 381, 36 Cal. Rptr. at 845. The court went on to say, "[u]navailability provided a necessity for the evidence, thus affording a basis for its admissibility in addition to the trustworthy character of the declaration." Id. at 875, 389 P.2d at 381, 36 Cal. Rptr. at 845 (emphasis added). The court held that unavailability was not a condition to admission as a declaration against penal interest; the Legislature disagreed. Cal. EviD. Code § 1230 now requires unavailability. See also People v. Solcido, 246 Cal. App. 2d 450, 54 Cal. Rptr. 820 (1966).

15. R. LEMPERT & S. SALTBURG, A MODERN APPROACH TO EVIDENCE 334 (1977); 5 J. WIGMORE, supra note 1, at § 1422.

16. This was exactly the approach taken by Judge Weinstein in admitting hearsay evidence in United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968). There a barmaid could not identify the defendant as the person who had passed her counterfeit money. The disputed hearsay evidence was the witness' assertive conduct of pointing out the patron at the time of the crime to a police officer who was able to identify the defendant in court. The court noted that the evidence was needed because there was no better evidence of identity available. The gesture was trustworthy because it was made immediately after the counterfeit money was passed so there was no danger of defective memory. Pointing is such a simple movement that there is likely to be no error in communication. The barmaid, who had no motive to lie, testified and was subject to cross-examination.
rounding its utterance assure its reliability. For example, in Dallas County v. Commercial Union Assurance Co., a fifty-six-year-old newspaper was admitted because the circumstances of its writing guaranteed its accuracy. The reporter had no motive to lie; in fact an error would cause him embarrassment or punishment, and would have been detected by readers and corrected. The court admitted the newspaper in evidence as a matter of judicial discretion.

The final way to examine the trustworthiness of hearsay is in the manner of the Federal Rules of Evidence. Rules 803(24) and 804(b)(5) make hearsay evidence admissible if it meets certain requirements and has circumstantial guarantees of trustworthiness equal to those of the codified exceptions. The courts evaluate the proffered evidence by comparing it to evidence admissible under one of the existing exceptions. Although California and federal laws differ regarding new hear-

17. This approach, developed by Wigmore, differs only in form from the conventional analysis. See 5 J. Wigmore, supra note 1, at § 1422.
18. 286 F.2d 388 (5th Cir. 1969).
19. Id. at 397.
20. Fed. R. Evid. 803(24) excepts from the hearsay rule "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Fed. R. Evid. 804(b)(5) is identical except that it is applicable only when the hearsay declarant is unavailable as a witness as defined in Fed. R. Evid. 804(a). Both sections require a party to give notice before using the exception. Notice is not required under Cal. Evid. Code § 1200(b).
21. See United States v. Leslie, 542 F.2d 585 (5th Cir. 1976); United States v. Iaconetti, 540 F.2d 574 (2nd Cir. 1976); United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976); Ark-Mo Farms v. United States, 530 F.2d 1384 (Ct. Cl. 1976). An excellent example of the catchall exception is Huff v. White Motor Co., 609 F.2d 286 (7th Cir. 1979). There, the widow of a truck driver brought a wrongful death action against a truck manufacturer claiming that fire caused by a defective fuel system caused her husband's death in a crash. The defendant offered a statement by the dead husband made to a friend and relative visiting him in the hospital two days after the crash that his pants had been on fire and he had lost control of the truck while trying to put out that fire. The court held the hearsay statement admissible if the declarant had the mental capacity to make the statement. The court held that trustworthiness of the statement is to be measured at the time the hearsay statement is made. Huff's statement had several circumstantial guarantees of trustworthiness: (1) it was voluntary and not in response to questions; (2) it was a statement of recent facts, not opinion; (3) the declarant had no motive to lie, in fact the statement was against his pecuniary interest in that it suggested that his error caused the accident; and (4) the witness was a person with whom the driver would be open about this topic.
say exceptions, the federal test of trustworthiness is useful because both schemes strive for flexibility.\textsuperscript{22}

California courts should create new hearsay exceptions under Evidence Code section 1200(b) when hearsay evidence is necessary and trustworthy. By ignoring the invitation of section 1200(b) the courts have made the potential for growth and flexibility of the hearsay doctrine more promise than reality in California.

III. The New California Exceptions

Since 1967 California courts have created new hearsay exceptions only for the "fresh complaints" of sex crime victims and for bills, invoices or statements of charges offered to prove damages. In doing so the courts did not refer to section 1200(b) of the Evidence Code and failed to analyze the problems in terms of necessity and trustworthiness. Consequently courts and lawyers are faced with obscure reasoning which weakens the precedential value of the cases. This article will show that both exceptions, with small changes, can be supported by clearer analysis.

A. Fresh Complaints

Fresh complaint is a term of art denoting an out-of-court statement made by a sex crime victim\textsuperscript{23} traditionally admitted in evidence on the issue of credibility only.\textsuperscript{24} The classic example of a fresh complaint is a rape victim's report of the assault to her family after she has composed herself. The statement may be addressed to anyone and need not be made

\textsuperscript{22} J. Friedenthal, Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code, prepared for the California Law Revision Commission 46 (January, 1976). Section 1200(b) anticipates courts' excepting a category or class of evidence from the hearsay rule. In contrast, the federal rules give trial courts discretion to admit hearsay ad hoc. This difference does not make the federal test for reliability inapplicable.

\textsuperscript{23} Hereinafter victims are referred to as female and assailants/defendants as male for convenience and brevity despite the fact that this is not always accurate. Traditionally rape victims have been female and that fact makes this sexual identification a bit more natural.

\textsuperscript{24} McCormick (1954), supra note 11, at § 49 n.27; 4 J. Wigmore, supra note 1, at § 1134. In England and Canada fresh complaints fall within the res gestae exception to the hearsay rule. 6 J. Wigmore, supra note 1, at § 1760. Some United States jurisdictions admit fresh complaints as res gestae or spontaneous declarations. Id. at § 1761; 4 J. Wigmore, supra note 1, at § 1139.
while the speaker is upset and excited so long as it is spoken reasonably soon after the crime. Originally only statements made by rape victims were characterized as fresh complaints. Now however, the fresh complaint doctrine also includes statements made by children who are sexually abused and nonvictims. California has enlarged the fresh complaint doctrine dramatically: fresh complaints may be used as substantive evidence.

In its traditional use a fresh complaint tends to support credibility either as a prior consistent statement or as an explanation of an inferred inconsistency. The absence of a complaint where one would be expected creates an inference which contradicts the victim's testimony that she had been attacked. Proof that a complaint was made rebuts this inference. The classic statement of the rule in California is found in People v. Burton: "It is natural to expect the victim of such a crime would complain of it, and the prosecution can show the fact of complaint to forestall the assumption that none was made and that therefore the offense did not occur."

25. Historically the fresh complaint doctrine derived from the rule of "raising a hue and cry" which required a victim of a crime of violence to prove she raised a hue and cry after the attack as an element of her case. See 6 J. Wigmore, supra note 1, at § 1760.


28. In California a hearsay statement may be admitted as a prior consistent statement only when the declarant is impeached in a manner which creates an inference of recent fabrication. CAL. EVID. CODE § 791 (West 1966). See Fed. R. Evid. 801(d)(1)(B); 4 J. Wigmore, supra note 1 at §§ 1135, 1138.

29. 4 J. Wigmore, supra note 1 at §§ 1137-1138. For example in People v. Alfaro, 61 Cal. App. 3d 414, 132 Cal. Rptr. 356 (1976), the court admitted a rape victim's statement to a doctor as a prior consistent statement, CAL. EVID. CODE § 791 (West 1966), and on the alternate ground of "fresh complaint." 61 Cal. App. 3d at 428, 132 Cal. Rptr. at 364. Because prior consistent statements admitted to rehabilitate are admitted as substantive evidence in California, CAL. EVID. CODE § 1236 (West 1966), no limiting instruction would be appropriate. As an alternate ground, the fresh complaint theory must have justified substantive use of the evidence. Thus, the fresh complaint must have been an exception to the hearsay rule. Interestingly, the statement to the doctor was made two to four hours after the victim's earlier statement to the police—something less than the freshest complaint.


31. Id. at 351, 359 P.2d at 443-44, 11 Cal. Rptr. at 75-76; see People v. Belasco, 125 Cal. App. 3d 974, 178 Cal. Rptr. 461 (1981); People v. Brown, 35 Cal. App. 3d 317,
tim testifies and makes her credibility an issue.  

Failing to distinguish the issues of credibility and substance, California courts have relied inappropriately on People v. Burton when admitting fresh complaints as substantive evidence. Moreover, as hearsay exceptions, fresh complaints are admissible even when the declarant is unavailable: a situation in which the complaints lack effective guarantees of trustworthiness. If the courts had created the new hearsay exception directly, by evaluating the necessity and trustworthiness of the evidence, the problem presented by the unavailable declarant would have been apparent. Even now under


32. People v. Graham, 21 Cal. 261 (1862); McCormick (1954), supra note 11, at § 297; 4 J. Wigmore, supra note 1, at §§ 1135-1136; B. Writkin, supra note 26, at § 543.


34. In People v. Crume, 61 Cal. App. 3d 803, 132 Cal. Rptr. 577 (1976), the defendant was charged with lewd conduct with his adopted daughters. The prosecution offered one victim's testimony describing one of several earlier uncharged lewd acts to show the defendant's disposition and intent towards the victim. The victim also testified that she had complained about this incident by telling her mother the defendant was "bothering" her. The court found this admissible under the fresh complaint exception. "Evidence of a complaint by a non-consenting victim of a sex offense is admissible as an exception to the hearsay rule." Id. at 813, 132 Cal. Rptr. at 583.

In People v. Panky, 82 Cal. App. 3d 772, 147 Cal. Rptr. 341 (1978), the court admitted tape recordings of a victim's phone calls to the police reporting her rape and identifying the assailant under the "[f]resh complaint exception to the hearsay rule." Id. at 778, 147 Cal. Rptr. at 345. The victim's first phone call to police was immediately after her rape and robbery. In her second call about 3 weeks later the victim reported that she had seen the defendant on the street. The court admitted the hearsay statements of the witness under three hearsay exceptions: fresh complaints (citing Burton), spontaneous statements, and state of mind. The applicability of the latter two exceptions is questionable.  

Both Crume and Panky relied on Burton, though Burton found fresh complaints admissible only as to credibility of the complaining witness.

Several other cases have admitted fresh complaints for the truth of their contents without explicitly calling it an exception. By referring to the fresh complaint rule and the spontaneous declaration exception as alternate grounds for admission, these cases acknowledged the new exception implicitly. In People v. Ferguson, 1 Cal. App. 3d 68, 81 Cal. Rptr. 418 (1969), the husband's phone call to police after his wife was raped in his presence was admitted. See People v. Butler, 249 Cal. App. 2d 799, 57 Cal. Rptr. 798 (1967).

In other cases, the record and the reasoning do not indicate the purpose for which the fresh complaint was admitted. See In re Marianne R., 113 Cal. App. 3d 423, 169 Cal. Rptr. 848 (1980); People v. Alfara, 61 Cal. App. 3d 414, 132 Cal. Rptr. 356 (1976); People v. Hernandez, 18 Cal. App. 3d 651, 96 Cal. Rptr. 71 (1971).  

35. The California Supreme Court has recognized there are problems with the fresh complaint exception. On Oct. 15, 1980 the court ordered that People v. Akins,
DORMANT HEARSAY EXCEPTION

section 1200(b) the courts can fashion a sound hearsay exception for fresh complaints conditioned on availability of the declarant.

1. Necessity for Fresh Complaints

Sex crimes often occur in private without witnesses other than the assailant and the victim. Conviction or acquittal may depend on the relative credibility of the accused and accuser. The trier of fact needs evidence to corroborate either story. The need is more dramatic in a case where the victim is a child who is found incompetent to testify or unable to testify fully. Absent witnesses or physical evidence fresh complaints may be vital to the successful prosecution of a sex crime. In these circumstances however, the impact of the evidence may be so great that to admit it would violate the defendant's sixth amendment right to confrontation. Thus the necessity for admitting a fresh complaint to prove the truth of the matter asserted varies with the specific case; often when the need is greatest, the hearsay is least reliable and the defendant's right to confront the witness against him may compel exclusion of the evidence.

2. Trustworthiness of Fresh Complaints

Even if needed, hearsay should also be trustworthy in terms of the four hearsay dangers. The fresh complaint of an adult or older child is likely to be clearly expressed and therefore presents little problem of ambiguity or mistransmission. Small children, on the other hand, may speak baby-talk or

167 Cal. Rptr. 377 (1980) (Dist. 2, Div. 1), not be published in the official reports. The appellate court in Akins had extended the exception to include the complaint of a physically abused child.

36. People v. Burton, 55 Cal. 2d 328, 359 P.2d 433, 11 Cal. Rptr. 65 (1961). "[T]he interests of justice were best served by introduction of the statements, since the evidence was conflicting and . . . the jury could use all the help it could get." United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976).


40. U.S. CONST. amend. VI.

41. See supra text accompanying notes 15-16.

lack the vocabulary to accurately describe an event. A family member usually hears the child’s first complaint and is most likely to understand the child’s personal vocabulary which diminishes the danger of mistransmission.

Inaccuracies attributable to faded memories also do not present a problem because fresh complaints must be timely. Although exciting events are often misperceived, the actions constituting a sex crime should be sufficiently clear. The identification of the assailant is less likely to be accurate but does not present dangers of misperception greater than those found in other examples of in-court and out-of-court statements.

The danger that the complaint was fabricated is not troublesome where the witness is available. If the declarant testifies to having made the statement and that it was true, she in effect adopts the statement and no serious hearsay problems arise. The opportunity to cross-examine her fur-

43. People v. Orduno, 80 Cal. App. 3d 738, 145 Cal. Rptr. 806 (1978) (“pee-pee in my bummy”); People v. Brown, 35 Cal. App. 3d 317, 110 Cal. Rptr. 859 (1973) (sodomy different than rape). If the victim is unable to describe the incident, there is no complaint.

44. If a child describes sexual abuse in accurate terms, there is no danger of mistransmission. However, one asks how a child acquired such a vocabulary and whether the witness distorted the declarant’s report. See People v. Crume, 61 Cal. App. 3d 803, 132 Cal. Rptr. 577 (1976). In Crume the thirteen year old witness testified that the defendant “[t]ried to make me copulate his penis . . . .” Id. at 813, 132 Cal. Rptr. at 583. The witness was attempting to describe not an act of sexual intercourse, but an act of oral intercourse. The witness probably acquired the term “copulation” from “oral copulation” as used in the statute, see CAL. PENAL CODE § 288a(b)(1) (West Supp. 1982), and as used by police and court officials.


47. A characterization of ambiguous acts and an identification made after a brief glimpse under the worst conditions by a minor incompetent to testify would lack sufficient trustworthiness. The trial court’s discretion to exclude confusing and misleading evidence is a necessary guarantee of reliability in such circumstances. CAL. EVID. CODE § 352 (West 1966); FED. R. EVID. 401.

48. Fabrication is not a problem when the victim testifies and can be cross-examined. If one considers the difficulties of an advocate in this area, cross-examination may not be such an effective device. Defense counsel is limited not only by rules, but by the negative effect harsh examination of a sympathetic witness would have on the jury. This problem has grown since concern for rape victims has heightened. But see CAL. EVID. CODE §§ 782, 1103(b)(4) (West Supp. 1981); see FED. R. EVID. 412. On the other hand, children are easy witnesses to lead.

49. UNIF. R. OF EVID. 63(1)(1953); see FED. R. EVID. 801(d)(1) advisory committee note (d)(1); 2 S. GARD, JONES ON EVIDENCE § 8:1 (6th ed. 1972). The fresh complaint rule applies when the out-of-court declarant testifies consistently with her out-of-court statement. If the testimony were inconsistent with the earlier complaint, the prosecution would offer the complaint as a prior inconsistent statement which is ad-
DORMANT HEARSAY EXCEPTION

other diminishes the chance that the jury will be misled by an insincere complaint.50

When the declarant is unavailable, such as a child found incompetent to testify,51 the danger of fabrication is more significant. A young child who does not understand sexual behavior or appreciate that certain behavior is socially wrong would probably complain only because of pain or fear, not because he or she has learned that complaining or accusing is appropriate behavior.52 On the other hand the small child may not be that naive and it may be difficult to determine whether the complaint is make-believe or exaggerated.53 Children may lie and change their stories to avoid possible punishment.54 One common defense tactic is to claim the child is fabricating in retaliation against a strict parent.55 On balance a fresh complaint is trustworthy in terms of the "hearsay dangers" only when the declarant testifies.

In deciding whether fresh complaints should be admissible as a hearsay exception under section 1200(b), one may also compare the complaint's reliability to that of the established exceptions. Because fresh complaints have been admissible traditionally as a means of bolstering a victim witness' credibility, they are most like other exceptions relevant to credibility: prior statements and identifications.56

missible substantively in California. CAL. EVID. CODE § 1235 law revision commission comment (West 1966).

50. See CAL. EVID. CODE § 1235 law revision commission comment (West 1966).
52. People v. Figueroa, 134 Cal. 159, 66 P. 202 (1901).
53. Wigmore described the contradictory aspects of a child: "[O]n the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds . . . ." 2 J. WIGMORE, supra note 1, at § 509.
56. The fresh complaint exception is not comparable to the exceptions for excited utterances, FED. R. EVID. 803(2), CAL. EVID. CODE § 1238 (West 1966); present sense impressions, FED. R. EVID. 803(1), CAL. EVID. CODE § 1241 (West 1966); statements for purpose of medical diagnosis, FED. R. EVID. 803(4), CAL. EVID. CODE §§ 1250-1252 (West 1966); or declarations against interest, FED. R. EVID. 804(b)(3), CAL. EVID. CODE § 1230 (West 1966).

Although the modern doctrine of excited utterances or spontaneous declarations does not impose a strict time requirement, immediacy is significant in that it makes it more likely that the declarant is under stress. FED. R. EVID. 803(2) advisory commit-
Prior consistent statements and identifications amount to adoptions of the out-of-court declaration in court and are arguably not even hearsay. Although not adopted by the witness, prior inconsistent statements may be cross-examined. The same analyses apply to fresh complaints. Another, more realistic, justification for admitting prior statements is the inability of a jury to obey an instruction limiting the use of the evidence to the issue of credibility. Jurors are especially likely to use fresh complaints as substantive evidence because they come in with the appearance of substantive evidence. Under Burton the prosecution may introduce evidence of fresh complaint in its case-in-chief, despite the fact that it is rebuttal evidence, and the content, not the mere fact of com-

teet notes (1) and (2). A statement is rarely found spontaneous after a delay of weeks. See United States v. Napier, 518 F.2d 316 (9th Cir. 1975). A fresh complaint is admissible despite the fact that the declarant has calmed down. People v. Burton, 55 Cal. 2d 328, 351, 359 P.2d 433, 444, 11 Cal. Rptr. 65, 76 (1961); People v. Hernandez, 18 Cal. App. 3d 651, 96 Cal. Rptr. 71 (1971); People v. Ferguson, 1 Cal. App. 3d 68, 81 Cal. Rptr. 418 (1969). Thus, unlike spontaneous declarations, fresh complaints do not impose a serious requirement of spontaneity to assure trustworthiness.

Present sense impressions are reliable because the contemporaneity of event and statement negate the likelihood of fabrication, Fed. R. Evid. 803(1) advisory committee note (1) and (2). Fresh complaints, however, do not require contemporaneity.

Statements for purposes of medical treatment are reliable because the declarant is motivated by self-interest to tell the truth. When making a fresh complaint, however, the declarant has no motive to be truthful about the cause of her condition. An analogy to statements for purposes of medical treatment, therefore, fails.

Declarations against interest are admitted based on the assumption that one does not speak against his or her own interest unless the statement is true. But this reasoning does not show that fresh complaints are trustworthy. It is unlikely that a victim would feel prohibiting embarrassment because attitudes towards public discussion of sex have changed.

57. See supra note 49; Fed. R. Evid. 801(d)(1).
58. This is not without its difficulties and is not always effective. See R. LEMPERT & S. SALTZBURG, supra note 15, at 480-86.
59. "It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true." CAL. EVID. CODE § 1236, law revision commission comment (West 1966).
60. For example in People v. Nash, 261 Cal. App. 216, 67 Cal. Rptr. 621 (1968), a rape victim, having just been assaulted, reports the rape to her mother in the presence of her grandmother. Later the victim describes the crime to the police. At trial the victim testifies and is corroborated by all three witnesses' recounting the contents of her fresh complaints. Clearly the prosecutor did not use three witnesses' repetition of the victim’s hearsay accusation just to rebut the possible jury assumption that the victim did not report the rape. It would be impossible for the jury to disregard the three witnesses' testimony when determining the issue of guilt.
61. This would seem to be a necessary rearrangement because silence creates the impression of incredibility and therefore there is only the absence of evidence to
plaint, is admissible. The content can include the nature of the offense and the identity of the offender; further details are excluded. Fresh complaints have guarantees of trustworthiness equivalent to those for prior statements and for similar reasons should be admitted for the truth of their contents.

Finally, the circumstances surrounding the declarant's statement sometimes make the complaint as reliable as existing exceptions. A complaint made to a family member, rape crisis center or police officer usually is made candidly to the appropriate person. Another fact suggesting trustworthiness is that complaining promptly is predictable or assumed to be a natural reaction. Fresh complaints also may be corroborated by physical evidence of injury, semen, or torn clothes. But not all circumstances tend to support the trustworthiness of the complaint. Many sexual assaults on small children, such as lewd acts or oral copulation, may not cause visible injury. Moreover, bruises and torn clothes do not normally corroborate an identification, a very significant aspect of many fresh complaints. Finally a complaint may be an intentional ploy to gain an advantage over the accused. On balance

rebut. 4 J. WIGMORE, supra note 1, at § 1135. Moreover, it would be misguided to exclude this evidence because of formalities about order of proof alone.


63. As noted, a fresh complaint exception is necessary only where the complaints are consistent with trial testimony. See supra note 49. Prior consistent statements are admissible for their substance only if made before an inconsistent statement or before bias or motive arose. CAL. EVID. CODE §§ 1236, 791 (West 1966). Those restrictions are inappropriate with the fresh complaint exception because the complaints are now admissible on the issue of credibility without limitation and to impose restrictions would extend the "pious fraud" of limiting instructions. See United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964), cert. denied, 377 U.S. 979 (1964). Furthermore fresh complaints are rarely numerous because they must be made promptly. Fresh complaints are most like prior identifications because they often contain identifications and because freshness and availability are appropriate requirements of admission. See CAL. EVID. CODE § 1238 (West 1966).

64. See 5 J. WIGMORE, supra note 1, at § 1422; Dallas County v. Commercial Union Assurance Co., 286 F. 2d 388 (5th Cir. 1969).


67. Such corroborations enhance the reliability of the statement, but it diminishes the need for the statement. Wigmore recommends admission of fresh complaints where there is other evidence of assault or nonconsent. 6 J. WIGMORE, supra note 1, at § 1761.

the circumstances of the complaint do not present a strong argument for trustworthiness of a complaint but may be decisive in a specific case.69

To summarize, fresh complaints should be admitted as exceptions to the hearsay rule under section 1200(b). Although not very necessary in the usual case in which the victim testifies, fresh complaints are trustworthy. Their admission does not present the four hearsay dangers except where the declarant is unavailable. Fresh complaints are analogous to prior statements admissible as exceptions to or exclusions from the hearsay rule. Finally, the circumstantial guarantees of reliability surrounding the making of a fresh complaint are not strong, but they do not suggest unreliability.

In admitting the hearsay statements of the victims of sex crimes70 for the truth of the facts asserted, California courts have not confronted the problems presented when the declarant is unavailable. The courts' inadequate rationale, however, suggests that the limits of the exception are not settled. The seriousness of sex crimes both dramatizes the need for all available evidence and militates against admitting the evidence where the declarant is unavailable and the dangers of relying on hearsay are too great. The California courts still have the opportunity to exercise their authority under Evidence Code section 1200(b) and redesign the exception for fresh complaints so that it is conditioned on the declarant's availability at trial.

B. Invoices

California courts have carved out a hearsay exception for invoices and repair or medical bills, admitting them as evidence of damages to "corroborate" certain facts.71 For exam-

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69. Other indicia of trustworthiness are that the complaints are based on personal knowledge, United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), and that the complaints are statements of fact rather than opinion, Huff v. White Motor Co., 609 F.2d 286 (7th Cir. 1979). Neither is significant in itself.

70. Only once have the courts extended the doctrine to a non-victim witness. See People v. Ferguson, 1 Cal. App. 3d 68, 81 Cal. Rptr. 418 (1969). The court of appeal has attempted to extend the doctrine to a victim of non-sexual child abuse. See People v. Akins, 167 Cal. Rptr. 377 (1980) (California Supreme Court ordered that the case not be published in the official reports, Oct. 15, 1980).

ple an auto body shop repairs a dented fender and sends a bill which states: "Removed dents from left front fender $150.00." If offered in evidence the bill is a hearsay assertion that the shop provided the specified services, that it charged $150.00, and if the bill is marked "paid," that the charges were paid. Besides these three obvious out-of-court assertions, the statement implies that the services were necessary, i.e., the shop did not remove dents from an undamaged fender, and, if marked "paid," that the charges were reasonable.7 Therefore, under common law, an automobile owner who sues claiming that the defendant damaged the fender, must subpoena the person who did the repairs to testify to the facts stated in the bill or subpoena the custodian to qualify the bill as a business record.7 This is no longer the only way to prove damages in California.

The courts have created a hearsay exception for invoices without referring to Evidence Code section 1200(b) and without making the kind of analysis required under common law or the Federal Rules of Evidence.74 Perhaps this is the reason the new exception is unnecessarily restricted by the requirement that the bill corroborate other evidence.75 In other jurisdictions invoices are admissible to prove their explicit and implied assertions regardless of corroboration.76 The

$25,000 was inadmissible to prove that the repairs were made because no witness corroborated that fact. An expert's testimony based on photos of the damaged turbine which coincided with the repairs listed in the invoice did not satisfy the corroboration requirement. Only two other cases discuss this exception: Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (1975) (tort claim for injuries arising out of an assault) and McAllister v. George, 73 Cal. App. 3d 258, 140 Cal. Rptr. 702 (1977). In McAllister, a dental bill had been excluded at trial. The appellate court said that it should have been admitted despite a hearsay objection to corroboration of plaintiff's testimony, but its exclusion was not prejudicial. The itemized statement of charges included work which was not necessitated by the defendant's assault and which would be irrelevant in the action. Because the plaintiff did not offer any evidence to show what part of the bill was attributable to the battery the bill was inadmissible as irrelevant.

72. Id. at §§ 1, 4.
75. Judge Bernard Jefferson contends that corroboration is the guarantee of trustworthiness which makes the bill admissible as an exception to the hearsay rule. B. JEFFERSON, supra note 71, at § 1.3. However, the requirement of corroboration makes the hearsay invoice unnecessary because testimony alone could prove all the facts inferred from a statement of charges.
76. United States v. Ashley, 413 F.2d 249 (5th Cir. 1969); Hemminger v. Scott,
requirement of authentication and the dictates of good advocacy mean that the contents of an invoice will not be the only evidence of damage usually. Moreover, the necessity and trustworthiness of paid invoices are sufficient to justify their unrestricted exception from the hearsay rule.

1. Necessity for invoices

While not absolutely necessary, a paid invoice is a reasonable, practicable, and convenient way to prove damages. In criminal cases, where the large burden of proof encourages the prosecution to produce the best possible evidence, the convenience or necessity of invoices is realistically unimportant. The burden of proof on the prosecution compels the production of high quality evidence where possible. It is unlikely that a good prosecutor would risk using a mere invoice to prove a contested fact, such as the value of a stolen object. A civil litigator, however, would use the documentary evidence


77. Except in unusual cases, see, e.g., Hemminger v. Scott, 111 A.2d 619 (D.C. Mun. Ct. App. 1955) (repairer beyond court’s subpoena power), the repairer, doctor or custodian of the records can be subpoenaed to testify to the facts contained in the bill or about its preparation. Ordinarily invoices are admissible business records if the proper foundation has been laid. See, e.g., CAL. EVID. CODE §§ 1270-1272 (West 1966).


79. Some crimes are defined in terms of dollar amounts, for example grand larceny and petty theft, or the penalties are adjusted according to the dollar amount involved in the crime, as with vandalism. See, e.g., CAL. PENAL CODE § 487 (West 1970); CAL. PENAL CODE § 594(b) (West 1970 & Supp. 1982).


when the damages are trivial and do not justify the expense of an expert, as in a small "fender bender" case. The bill would also be offered as the only evidence of damages when inadvertence, error, or the vagaries of litigation leave no better proof. In both the error and the disproportionate expense situations, refusal to admit an invoice to show damages would produce a result unfair to the proponent. A hearsay exception for paid statements of charges thus provides a practical, convenient means of proof and thereby furthers the interests of justice.

2. Trustworthiness of Invoices

Under all three measures of trustworthiness, invoices are sufficiently reliable to be excepted from the hearsay rule. The admission of receipted invoices on the issue of damages does not present substantial hearsay dangers. An invoice is not likely to be inaccurate because of mistransmission, misperception, or failed memory. Good business practice compels accurate record keeping by the creditor that is subject to correction by the debtor.

There is a possibility that the invoice will not be a truthful statement of the goods or services provided, the amounts charged or the fact of payment if there is collusion between the provider of the goods or services and the litigant. Collusion is unlikely however, because most people are truthful and businesses have a special self-interest in maintaining ac-


83. The adversary system should prevent deceitful padding of bills. A litigant may verify the accuracy of the bill before trial by deposition, physical inspection, or by requiring multiple estimates. Where discovery is likely to be uneconomical, the informal techniques of investigation and evaluation should suffice. Moreover, at trial the opponent of the evidence can question the person who provided the services or the proponent about collusion. Finally, the party opposing the evidence can call his or her own witness to contradict. "The repair shop was in that particular business and if the defendant had any reason to suspect foul play in the transaction he had the opportunity to come forward with evidence on the subject." Hemminger v. Scott, 111 A.2d 619, 620 (D.C. 1955). The cost of contesting the accuracy of a statement of charges may make these suggestions merely theoretical.

84. R. LEMPRT & S. SALZBURG, supra note 15, at 47. See also Huff v. White Motor Co., 609 F.2d 286, 292 (7th Cir. 1979); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977); Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).
accurate records and a reputation for honesty in the community. Generally the person preparing the invoice is not under any pressure from the litigant to make the hearsay statement (the bill), does not prepare the bill in a coercive atmosphere or location, and is not preparing it in response to leading questions. Cross-examination of the proponent of the invoice should safeguard against falsification. Moreover, if the authenticated invoice is suspicious, the court can exclude it because it presents a "substantial danger of misleading the jury." Therefore, the risk of inaccuracy is not great when admitting receipted invoices.

One should also evaluate the trustworthiness of proffered invoices by comparing them to evidence admitted under existing exceptions as is done under the federal rules. The business records exception is most like the new exception. The exception for invoices is usually applied to a business record not offered under the business records exception because the requisite foundation was not laid by the "custodian or other qualified witness." Like other business records, invoices are reliable because they are regularly prepared and systematically checked so that the preparers are habitually accurate. These employees have the duty to prepare proper records and are subject to discipline if they fail. The business must rely on its own records and therefore is motivated to make them reliable.

Because the business records exception has been liberalized in California and the federal system, the exception for

85. United States v. Love, 592 F.2d 1022 (8th Cir. 1979); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977).
86. United States v. Love, 592 F.2d 1022 (8th Cir. 1979).
87. Huff v. White Motor Co., 609 F.2d 286 (7th Cir. 1979); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977).
88. CAL. EVID. CODE § 352 (West 1966); FED. R. EVID. 403; Hemminger v. Scott, 111 A.2d 619, 620 (D.C. 1955). The danger of fabrication alone, however, is insufficient to justify exclusion of the invoice.
89. Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968). See FED. R. EVID. 803(6); CAL. EVID. CODE § 1271 (West 1966). An invoice for repairs or treatment must be prepared by a person in that “business,” and be prepared as a “regular practice.” For example a repairer who insisted on cash payments or a neighbor who repairs cars on weekends would not qualify. See FED. R. EVID. 803(6); CAL. EVID. CODE § 1271(a) (West 1966); see, e.g., United States v. Kim, 595 F.2d 755 (D.C. Cir. 1979).
90. FED. R. EVID. 803(6) advisory committee notes; E. CLEARY, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE 720 (2d ed. 1972) [hereinafter cited as MCCORMICK (1972)].
paid invoices departs from it only slightly. Recognizing the slight difference, federal courts have admitted business documents under Federal Rules of Evidence 803(24) or 804(b)(5) where the business records exception was inapplicable.\footnote{In United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976), delivery receipts were admitted following a foundation which consisted of testimony by a witness who was familiar with the delivery receipts, their use and preparation, but was not an employee of the carrier who prepared the documents in the ordinary course of its business. The receipts were admissible as business records and under the residual exception for trustworthy hearsay. \textit{Fed. R. Evid. 803(24).} Karme v. Comm'r of Internal Revenue, 673 F.2d 1062 (9th Cir. 1982) (foreign bank records lacking business records foundation admitted under \textit{Fed. R. Evid. 803(24)). See also Ark-Mo Farms v. United States, 530 F.2d 1384 (Ct. Cl. 1976); Ashley v. United States, 413 F.2d 249 (5th Cir. 1969)(decided prior to the adoption of the Federal Rules).} In California the foundational requirements for the business record exception have been relaxed in a statutory procedure permitting a business to comply by mail with a subpoena duces tecum.\footnote{CAL. EVID. CODE § 1561 (West Supp. 1982). See, e.g., People v. Blagg, 267 Cal. App. 2d 598, 73 Cal. Rptr. 93 (1968); B. Witkin, \textit{California Evidence} § 588 (2d ed. 1966 & Supp. 1982); J. Cotchett & F. Haight, \textit{California Courtroom Evidence} 395 (1981). \textit{Compare CAL. EVID. CODE § 1271 (West 1966) (custodian must testify to satisfy business records exception) with § 1561 (West 1966) (duly authorized custodian certifies by affidavit, need not testify); but see People v. Dickinson, 59 Cal. App. 3d 314, Cal. Rptr. 561 (1976) (dicta limiting admission of records by affidavit to civil cases).} No testimony is necessary if the records are accompanied by an affidavit alleging most of the foundational facts for the business record exception. Lack of such a formalistic affidavit does not make an invoice so untrustworthy as to justify its exclusion. Therefore, an invoice without corroboration is as trustworthy as a document admitted under the business records exception to the hearsay rule.\footnote{Invoices are as reliable as testimony based on writings. If the person who provided the services testified about them, she would probably have to refresh her memory by reviewing the records. \textit{See Fed. R. Evid. 612; CAL. EVID. CODE § 771 (West 1966). The testimony generated may be nothing more than a recital of the document's contents. It denies the reality of trial to admit such oral testimony while excluding or restricting admission of the invoice. If the witness admits no memory of the services, the past recollection recorded exception may apply. \textit{See Fed. R. Evid. 803(5); CAL. EVID. CODE § 1237 (West 1966).} See supra text accompanying notes 84-88.} Finally, invoices are prepared under circumstances which militate against unreliability.\footnote{Among the California cases, only in Rodgers v. Kemper Constr. Co., 50 Cal.} One special assurance of trustworthiness is that invoices falling within the new California exception have been paid so the litigant acknowledged the propriety of the bill and its assertions.\footnote{95. Among the California cases, only in Rodgers v. Kemper Constr. Co., 50 Cal.}
In addition to the three usual approaches to trustworthiness, corroboration and authentication are relevant in assessing the reliability of hearsay invoices.

Corroboration is the justification for the present California exception for bills. Similarly, many federal cases admitting evidence under the residual exceptions have stated that corroboration is one reason for finding a hearsay statement reliable. Nonetheless, to admit hearsay because it is corroborated is not a good approach. First, it is unusual. Few traditional hearsay exceptions are limited to situations in which there is corroboration. In states which have permitted the substantive use of invoices on the question of damages, neither courts nor legislatures have required corroboration. Second, corroboration, unlike must circumstantial guarantees of reliability, looks to information outside the hearsay declaration and the situation in which it was made, recorded or

App. 3d 608, 124 Cal. Rptr. 143 (1975), was the bill partially unpaid. In Lucas v. Bowman Dairy Co., 50 Ill. App. 2d 413, 200 N.E.2d 374 (1964), however, the court accepted estimates noting that they were not as persuasive as receipted bills but were sufficient when offered by a party with expertise in the repairs proposed.

A bill marked "paid" would be admissible as declaration against interest if the person who sent the bill and marked it paid were unavailable. Fed. R. Evid. 804(b)(3); Cal. Evid. Code § 1230 (West 1966). Acknowledging payment forecloses collection and thus is against the provider's pecuniary interest. McCormick (1972), supra note 90, at 672. One assumes the person sending the bill would not make the statement unless it were true.

Furthermore if an insurance company pays the bill, there is the additional protection of the company's internal policies intended to minimize unwarranted claims and unjustified payments.

96. See supra note 75.

97. See e.g., United States v. Metz, 608 F.2d 147 (5th Cir. 1979); United States v. Hitaman, 604 F.2d 443 (5th Cir. 1979); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Thevis, 84 F.R.D. 57 (N.D. Ga. 1979). But see United States v. Bailey, 581 F.2d 341 (3d Cir. 1978) (crucial hearsay excluded because inadequate guarantees of reliability and corroboration); United States v. Ward, 552 F.2d 1080 (5th Cir. 1977) (corroboration alone supported the decision to admit hearsay statement of an unavailable witness).

98. An example of the peculiar results that arise from relying on corroboration is found in United States v. Leslie, 542 F.2d 285 (5th Cir. 1976). One reason that the court found hearsay to be reliable was the fact that three unavailable declarants told similar stories out of court and thereby corroborated one another. In other words hearsay is admitted on the grounds that it is similar to other hearsay, which itself is admissible because it is substantially the same as the first.


100. See supra note 76.
remembered. Therefore if corroboration is a test for admission of hearsay evidence, the trial judge must evaluate the truth of the statement in ruling on admissibility — an inappropriate task. Finally, where there is corroboration there is less need for hearsay. The authentication requirements make corroboration of invoices especially unnecessary. For example, to authenticate an invoice by content the proponent would testify that a certain service was provided, that the document was the bill received for that service and that he paid the bill. Although authentication does not always show the reliability of an invoice, it does expose suspicious circumstances to the judge who may exclude the evidence as misleading. For this reason the authentication requirements are strong support for an invoices hearsay exception.

Without reference to section 1200(b), the courts have carved out a helpful exception to the hearsay rule for paid

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102. The Seventh Circuit has held that looking for corroboration in deciding whether a declaration fits under Fed. R. Evid. 803(24) or 803(b)(5) violates the equivalency standard (that the excepted statement must have equivalent circumstantial guarantees of trustworthiness) set out in those rules because it asks the judge to consider the probability that the statement is true. Huff v. White Motor Co., 609 F.2d 286, 292-94 (7th Cir. 1979).

103. We do not feel that the trustworthiness of a statement offered pursuant to the rule should be analyzed solely on the basis of the facts corroborating the authenticity of the statement. Since the rule is designed to come into play when there is a need for the evidence in order to ascertain the truth in a case, it would make little sense for a judge, in determining whether the hearsay is admissible, to examine only facts corroborating the substance of the declaration. Such an analysis in effect might increase the likelihood of admissibility when corroborating circumstances indicate a reduced need for the introduction of the hearsay statement.


104. McAllister v. George, 73 Cal. App. 3d 258, 262, 140 Cal. Rptr. 702, 704-05 (1977), discusses the difference between an objection based on lack of foundation or authentication and an objection based on hearsay.

Wigmore recommended that the hearsay rule be changed to permit the admission of an authenticated written statement without calling its author unless the court thinks the statement so important that it calls the author for cross-examination on request of the opponent. 5 J. WIGMORE, supra note 1, at § 1427.


106. For example, a witness to the preparation of a hand-written bill cannot help the court evaluate the accuracy of the contents of the bill. See Fed. R. Evid. 901(b)(1), (2); Cal. Evid. Code §§ 1413, 1415 (West 1966).

invoices offered to prove damages. The use of these hearsay bills in court does not present a real danger of failed memory, misperception or ambiguous communication. The new exception is comparable in trustworthiness to that for business records without formalistic foundational testimony or affidavit. There are also substantial circumstantial indicia of reliability surrounding the preparation of the statement of charges. The requirement that the bill be authenticated will usually provide enough information to justify its exclusion if it is suspect. Finally the dictates of good advocacy often assure that a statement of charges is corroborated by other evidence. Unfortunately, this exception is limited to use as corroborated only. The courts, under section 1200(b), should redefine the exception and permit unlimited admission of invoices to prove damages. 108

IV. Future Exceptions

The California Evidence Code permits the courts to resolve specific problems and to work towards greater admissibility of evidence. Despite the Code’s promise of flexibility the courts have failed to meet the need for further expansion of the exception to the hearsay rule.

The courts, for example, should widen the exception for contemporaneous statements. 109 This descendant of the non-

108. The California Evidence Benchbook supports the requirement of corroboration for the hearsay exception for invoices. B. Jefferson, supra note 71, at § 1.3. In illustration five, a medical bill is said to be inadmissible where the litigant cannot corroborate it because his injuries and treatment are beyond the realm of a lay person’s experience. Judge Jefferson insists that a qualified witness, here an expert, must testify to the nature or extent of services rendered and that those services were necessary as a result of the defendant’s behavior.

Unless the bill itemizes damages causally linked to the defendant’s behavior it should be excluded as irrelevant but that does not mean there must be expert testimony on the issue. McAllister v. George, 73 Cal. App. 3d 258, 140 Cal. Rptr. 702 (1977). In fact it will often be true that the person providing the services will have no personal knowledge about what necessitated the treatment or repairs. If the custodian of the records were called to lay a foundation, the invoice detailing technical medical treatment or the business record, would be admissible without any testimony about the nature of the services provided. The costly condition of expert testimony should not be imposed on the new exception.

109. Section 1241 of the California Evidence Code provides: “Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and (b) Was made while the declarant was engaged in such conduct.” Cal. Evid. Code § 1241 (West 1966).
hearsay "verbal act" is restrictive because it limits the out-of-court statements to explanations of the declarant's ambiguous conduct made while the declarant was engaged in the conduct. In contrast Federal Rule of Evidence 803(1) excepts from the hearsay rule statements which describe or explain any event regardless of the actor or the time that the statement is made.

Several states have adopted the broader present sense impression exception. The fact that the statement must be made close in time to an event inhibits intentional misrepresentation and assures little loss of memory between the event and the statement. If the witness made the hearsay declaration she may be cross-examined; if another made the statement, the witness will often have perceived the event and can support the out-of-court statement by describing the event and the circumstances of the statement. Furthermore because present sense impressions are not uttered under the stress of an exciting event there is less danger of distorted...
perception or misspeaking. Precise contemporaneity is often not possible and should not be required. The trial judge in his or her discretion may exclude comments made too long after an event to be reliable. Relying on section 1200(b) California courts should admit hearsay under a new judicial exception comparable to the federal exception for present sense impressions.

“Learned treatises” or publications made by a neutral person are another hearsay exception in need of expansion under section 1200(b). Presently, learned treatises are restricted to proof of facts of "general notoriety and interest," adding little to the rules regarding judicial notice. It would be appropriate to create an exception for reliable published matters so long as an expert is available to explain the test. Treatises are trustworthy because they are written impartially for professionals who will correct any inaccuracies. Therefore, the hearsay dangers are insignificant in comparison to the strong likelihood of accuracy. Furthermore technical

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119. 6 J. Wigmore, supra note 1, at § 1693 n.3. California courts must take judicial notice of "facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." Cal. Evid. Code § 451(f) (West Supp. 1982). They may take judicial notice of facts of common knowledge within the territorial jurisdiction of the court "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Cal. Evid. Code § 452(h) (West 1966). If a party gives adverse parties notice and furnishes the court with information the court must take judicial notice of matters specified in § 452. Cal. Evid. Code § 453 (West 1966). Thus, a learned treatise admissible under § 1341 is likely to be matter for compulsory judicial notice. Judicially noticed facts must be accepted by the jury, Cal. Evid. Code § 457 (West 1966), but the jury may reject admissible hearsay.

120. The advisory committee notes to the Federal Rules of Evidence recognize the danger that the jury will misunderstand the technical literature if not explained by an expert. A new California exception could be conditioned on the availability of an expert as is done in Fed. R. Evid. 803(18).

121. Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980) (reports prepared for U.S. Dept. of Transportation on crashworthiness); Fed. R. Evid. 803(18) advisory committee notes; McCORMICK (1972), supra note 90, at 743-45; 6 J. Wigmore, supra note 1, at § 1692.

122. See McCORMICK (1972), supra note 90, at 743-45; 6 J. Wigmore, supra note 1, at § 1690.
literature is often necessary or at least convenient\textsuperscript{123} because it obviates the need to produce costly experts.\textsuperscript{124} Under section 1200(b) the California courts should admit learned treatises to prove more than facts of general notoriety.\textsuperscript{125}

The most needed new exception to the hearsay rule in California is a residual exception comparable to that in the Federal Rules of Evidence.\textsuperscript{126} A new exception is needed to permit trial courts to admit evidence on an ad hoc basis because section 1200(b) appears to authorize appellate courts to carve out exceptions for classes or categories of evidence only.\textsuperscript{127} Ironically, certain code sections permit the discretionary exclusion of evidence\textsuperscript{128} despite the policy favoring admissibility,\textsuperscript{129} but there is no California authority to support discretionary admission.\textsuperscript{130}

A new catchall exception would not change the quantity of the evidence admitted, but rather it would improve the quality of analysis used. Trial courts now torture the existing exceptions or use bad reasoning to admit hearsay in the interest of justice. Appellate courts uphold these fair rulings on equally unsatisfactory grounds which may ultimately lead to bizarre interpretations of clear and useful statutory exceptions. Other times these courts add to the disarray by relying on the doctrines of harmless error and judicial discretion to sustain lower courts, rendering appellate decisions useless as

\textsuperscript{123} In Ark-Mo Farms v. United States, 530 F.2d 1384 (Ct. Cl. 1976), hydrological data contained in a government study was admitted over a hearsay objection despite the fact that only one expert testified to the techniques used by the staff in gathering data and making calculations. The court admitted the study under the residual exception rule, Fed. R. Evid. 803(24), by analogy to the shop book rule after noting that it would unreasonably prolong the proceedings to bring all the staff to court.

\textsuperscript{124} See 6 J. Wigmore, supra note 1, at § 1691; Friedenthal, supra note 22, at 69.

\textsuperscript{125} J. Weinstein & M. Berger, supra note 114, at 803-260 - 803-262.

\textsuperscript{126} Fed. R. Evid. 803(24), 804(b)(5).

\textsuperscript{127} See Friedenthal, supra note 22, at 46.


\textsuperscript{129} See supra text accompanying note 10.

\textsuperscript{130} Cf. Rule 102 of the Federal Rules of Evidence which states “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” Fed. R. Evid. 102.
The effect of this practice may be the creation of a catchall exception for discretionary admission of hearsay without any reasoned justification for the new rule. A catchall exception, modeled after the Federal Rules should improve the quality of analysis.

First a new catchall exception should be defined in terms of need and trustworthiness. This would create a basis for trial courts' rulings which would enhance predictability and clear records on appeal. Secondly the disadvantages of ad hoc exceptions such as lack of predictability, unfair surprise, and difficulty in trial preparation, may be remedied by imposing a notice requirement like that in the Federal Rules of Evidence or liberally granting trial continuances. Ad hoc exceptions would also encourage in limine motions, thus strengthening the pretrial hearing process. Finally trial judges could admit specific reliable hearsay evidence when appropriate in civil cases without weakening the guarantees of the confrontation clause in criminal cases.

People v. Nichols illustrates the usefulness of such an exception. Nichols was prosecuted for felony murder arising out of a fire which killed two children, ages two and five. On the night of the fire, he twice called the Hutchins' home where his estranged wife was staying and spoke with Mr. Hutchins. That evening while the estranged wife, friends and the children were at the house, there was a persistent ringing of the front doorbell. The children looked through the window and said that their step-father, Nichols, was at the door, but no one answered the door. Shortly thereafter the fire broke out.

131. Except to some extent when constitutional values are implicated, appellate courts will rarely reverse trial courts for mistaken rulings of evidence law unless they have some reason to suspect the substantive justice of the trial result . . . . Note the propensity of the courts to dispose of evidence issues without discussion in a catchall paragraph, to rationalize rulings below as correct, or to conclude, without reasons, that possible errors below could not have affected the trial results.


132. The traditional requirement for a hearsay exception, that the statement be necessary, is an appropriate restriction on the trial judge's discretion even if California has abandoned the restriction at the appellate level. The danger of a catchall exception is unpredictability. Reining discretion in trial judges will diminish this danger. Moreover, need for the evidence is the most likely provocation for an ad hoc exception. See supra notes 11-14.


The issue before the court was whether to admit the children's identification of the defendant over a hearsay objection. The statement could not come in as a prior identification because the children were unavailable to testify. The children's statement was not a contemporaneous declaration because it did not explain their conduct. The court admitted the statement on redirect examination of the estranged wife to rebut the inference of bias.

Instead of this strained reasoning, the court should have utilized a catchall exception focusing on necessity and trustworthiness. The children were the only ones to see the defendant, but their important statements were consistent with the telephone calls and the known hostility between defendant and his estranged wife. Moreover, the statements were made at the moment the children saw the defendant and the children had no motive to lie. However it was dark when the children looked out, so they might not have seen the person at the door clearly. The trial judge would have to decide after careful examination of the adults who were in the house that night whether the evidence would be sufficiently trustworthy to go to the jury. If so, the evidence would be admitted in this case without erosion of the principle which permits prior identification only when the out-of-court declarant is available for cross-examination.

V. Conclusion

Without reference to section 1200(b) California courts have created two hearsay exceptions since adoption of the Evidence Code. The two new exceptions are not well designed: fresh complaints should be admissible only when the out-of-court declarant is available and invoices should come in regardless of corroboration. Had the courts fashioned the exceptions openly as authorized by section 1200(b), these problems would have been obvious and avoidable.

Rather than stretch the text of the existing hearsay exceptions, courts should admit hearsay if it is necessary and

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136. CAl. Evid. Code § 1241 (West 1966); see also United States v. Medico, 557 F.2d 309 (2d Cir. 1977).
137. Having heard the children’s statements, the witness was said to have a reasonable basis for her testimony.
trustworthy. The trustworthiness of hearsay evidence may be measured in terms of the circumstances surrounding its utterance, the presence of the hearsay dangers, or its comparability to existing exceptions. Following this approach, courts should enlarge the exceptions for contemporaneous statements and learned treatises and create a "catchall" exception giving trial judges discretion to admit reliable evidence. By using the little known section 1200(b) California courts could fulfill the Evidence Code's promise of flexibility and substantive justice.