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1995

### Confrontation and the Utility of Rules

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#### Recommended Citation

Friedman, Richard D. "Confrontation and the Utility of Rules." J. Jackson et al., co-authors. *Miss. C. L. Rev.* 16, no. 1 (1995): 87-115.

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## DISCUSSION: CONFRONTATION AND THE UTILITY OF RULES

*Richard D. Friedman*

June 15

### IS BARKING UP THE WRONG TREE ASSERTIVE CONDUCT?

There is a good reason why evidence scholars continue to be fascinated and perplexed, and some courts continue at least to be perplexed, by the types of evidence that tend to be lumped together misleadingly under the headings nonassertive conduct or implied assertions. Evidence of this sort highlights a paradox of the prevailing law of hearsay. I believe that this paradox cannot be resolved without fundamentally transforming the structure of that law. Thus, while I agree — within the current framework — with many of the insights so ably stated in this Symposium, I think evidence scholars must devote their efforts to construction of a better structure.

The keystone of the current framework is that evidence deemed to be hearsay is presumptively inadmissible unless it fits within an exemption to the exclusionary rule. This creates great pressure to classify evidence as nonhearsay even though the evidence raises significant dangers of the sort that make hearsay an inferior form of evidence. In summary, I believe we should remove the keystone: In most contexts, most hearsay should be admissible — which means that the consequences of broadening the definition of hearsay are not too horrible to contemplate. But we cannot abide by a presumptive rule of admissibility of hearsay unless at the same time — without relying on the jumble of hearsay exemptions — we define the bounds of a strong right of confrontation belonging to criminal defendants. By speaking of confrontation, I do not mean to be limiting my proposal to the United States; rather, I believe that the Confrontation Clause of the Sixth Amendment (not the Supreme Court's jurisprudence under it!) happens to express a right that is fundamental, perhaps universal, and critical to finding a good way out of the hearsay mess.

Which is better evidence of proposition *A* — (1) that a person asserted *A* to be true, or (2) that the person acted in some other way from which we might be able to infer that she believed *A* to be true? In some cases, at least, evidence (1), the assertion, must be preferable: If the person did not have an apparent motive to lie, her assertion of *A* is strong evidence that she believed *A* to be true, often without disturbing ambiguity, while evidence (2) is far more likely to leave us with a very difficult problem of trying to determine just why the person engaged in the conduct in question.

But here is the paradox: It is evidence (2) that escapes the hearsay bar, and so is presumptively more likely to be admitted. The reason articulated by the Advisory Committee to the Federal Rules is that evidence of this sort does not raise a serious insincerity problem.<sup>1</sup> Most often, though not inevitably, that is

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1. FED. R. EVID. 801 advisory committee's note.

true. If on its face the conduct in question does not assert *A*, it usually appears most unlikely that the person engaged in the conduct in an attempt to convey falsely the truth of *A*. But to focus on insincerity is to operate with far too narrow a lens. Insincerity is just one possible explanation of how the person might have come to act as she did notwithstanding the falsity of *A*. Even if we can eliminate that possibility, there is often an immensely broad field of plausible alternative explanations. By contrast, if the conduct clearly asserted *A*, that field of possibilities is cut drastically down; that reduced field is often expressed in terms of failures of perception, memory, sincerity, and narration, though other partitions of the field, more or less detailed, are possible.

Within the current framework, I think there is a more candid reason why nonassertive conduct is classified by modern American courts and rulemakers as nonhearsay. If it were not, as Roger Park points out, the category of hearsay would be too large.<sup>2</sup> That is a rather disturbing explanation, however. If we treat nonassertive conduct as nonhearsay for this reason, we are essentially sweeping hearsay dangers under the rug, acknowledging that they are present but refusing to deal with them because of the complexity that it would cause. But what practical alternative is there — to treat all conduct as hearsay when it is offered to prove that the actor believed in the truth of a proposition and therefore that the proposition is true, but then to find exemptions for the vast bulk of this evidence? Perhaps the English courts will take that approach, to prevent *Regina v. Kearley*<sup>3</sup> from having disastrous consequences. This approach is not particularly appetizing, either. It puts great reliance on the hearsay exemptions, tending to make them broader, more amorphous, and more manipulable. And for these reasons, to the extent that the law of hearsay is meant to provide some protection for criminal defendants, it fails miserably.

It is important to place the need for such protection at the center of our focus. Even in this era of the liberalization of hearsay law, there is a broad-based sense that criminal defendants have a right to the exclusion of some hearsay. Though most common law jurisdictions outside the United States have substantially weakened the rule against hearsay in civil cases, they have moved much more cautiously in the criminal context — and the European Court of Human Rights has begun to recognize a rather strong right of confrontation.<sup>4</sup>

Thus, I think the solution to the basic hearsay problem depends first on an articulation of the criminal defendant's confrontation right that does not apply to all hearsay — but that also does not depend on the mishmash of the exemptions. In my view, the key to the confrontation right is that if a person acts as a witness against the accused, the accused has an absolute right to cross-examine her. Who, besides a person who actually testifies in court for the prosecution, should be deemed to be a witness against the accused? The line might be drawn in various ways, but basically I believe it should cover anybody who makes a statement

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2. Roger C. Park, *The Definition of Hearsay: To Each Its Own*, 16 Miss. C. L. Rev. 125 (1995).

3. See 2 App. Cas. 228 (H.L. Eng. 1992).

4. See, e.g., *Saidi v. France*, 17 Eur. H.R. Rep. 251 (1994).

knowing that it would likely be used in the investigation or prosecution of a crime. Such a statement should not be admitted against the accused unless the accused has had an adequate opportunity (not a self-defining term, but I do not have the space here to try to define it) to cross-examine the declarant — or unless the accused has forfeited the right, as by intimidating or killing the declarant.

Note, however, that although in this view the confrontation right is a very intensive one, it is not so extensive; that is, it does not apply in general to the run of hearsay. And if the confrontation right is defined in the way I suggest, or in any other way that does not depend too closely on the definition of hearsay, it leaves room to take a generally receptive attitude towards hearsay that does *not* violate the right.

I believe that the merits of such an attitude become clearer if we recognize that it is misguided to attempt to sort hearsay that should be admitted from hearsay that should be excluded on the basis of reliability. Precious little hearsay is reliable in the sense that the judicial system can take comfort in saying to the opponent, in effect, “We are so confident of the accuracy of this statement, based either on a general description of it or on the particular circumstances surrounding the making of it, that we think it is of no particular significance that you have not had the opportunity to cross-examine the declarant.” Can we really say that about the general run of excited utterances, dying declarations — or even records kept in the course of business?

On the other hand, if we ask whether a given piece of hearsay evidence is more probative than prejudicial, the answer is almost always affirmative if live testimony of the declarant would meet this standard. We really have no basis for concluding that juries or other factfinders will in effect give hearsay more than double its appropriate weight — which would be necessary if the prejudicial overvaluation were to outweigh the acknowledged probative value of the evidence.

Even though the evidence is more probative than prejudicial, it may be that better evidence would be the live testimony of the declarant, perhaps supplemented by the hearsay. I do not believe, however, that this should cause the exclusion of the hearsay so long as the proponent is not in a substantially better position than the opponent to produce the declarant. (For clarity, I emphasize that in this part of the discussion, I am assuming that the hearsay does *not* threaten to violate the confrontation right of an accused.) By hypothesis, the proponent has produced evidence that satisfies him — perhaps because it would be impossible, impractical, or just plain too expensive to produce the live declarant — and that the evidence is on balance helpful to the truth-determining process. If the opponent really thinks it is worthwhile for the declarant to be produced, he should accomplish that result; by hypothesis, he is not substantially less able than the proponent to do so. I believe that some procedural changes, outlined in my article in the 1991 Cardozo symposium,<sup>5</sup> would improve the opponent’s opportu-

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5. Richard D. Friedman, *Improving the Procedure For Resolving Hearsay Issues*, 13 CARDOZO L. REV. 883 (1991).

nity to examine the declarant if he did produce her, but I suspect that most often opponents would be satisfied to deal with the hearsay rather than the vivid testimony of a live witness.

If the proponent is, or at some point was, substantially better able than the opponent to perform at least part of the task of producing the declarant, then the analysis must change somewhat. The court might demand that, as a precondition to admissibility of the hearsay, the proponent produce the declarant or put the opponent in as good a position to do so. Thus, if only the proponent knows, or could reasonably have been in a position to know, the identity or location of the declarant, the court might insist that the proponent pass this information over to the opponent.

How do these principles apply in a case like *Kearley*? The first thing to recognize is that the conduct at issue in *Kearley* — and indeed in virtually all cases involving conduct introduced to prove the truth of a belief apparently reflected implicitly by the conduct — does not invoke the confrontation right as I have conceived that right. The actors in *Kearley* were not making statements with testimonial intent; rather, so far as appears, they were going about their ordinary business of attempting to buy drugs.<sup>6</sup>

This does not mean that no hearsay issue is involved. As Richard Kuhns and David Seidelson point out, there may be substantial hearsay-type dangers involved in this conduct; that is, there may be plausible explanations (at least in some *Kearley*-like settings) as to how the actors might have acted as they did notwithstanding the falsity of the proposition for which the evidence is offered, and an evaluation of these explanations might be materially assisted if the actors testified live in court.<sup>7</sup> Under the structure I am proposing, these dangers need not be shoved aside by categorizing the evidence as nonhearsay — but neither do they render the evidence presumptively inadmissible. On the contrary, the evidence — which clearly is more probative than prejudicial — would presumably be admissible, unless the prosecution is deemed to be in a substantially better position than the defense to produce the declarants.

That is a tricky question, but it has received rather slight attention either in the speeches of the Law Lords in *Kearley* or by the essayists in this Symposium. Could the prosecution have tracked down the source of the phone calls to *Kearley*'s residence? If so, could the defense have done so just as easily? Presumably the police could have detained the persons who actually came to the residence — but would doing so have posed an unreasonable risk to an ongoing investigation? I do not know the answers to these questions, but they are, I believe, the questions that should determine admissibility in a case like this — not the rather sterile question of whether the actors' conduct should be deemed to be an assertion that *Kearley* was a drug dealer.

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6. *Kearley*, 2 App. Cas. at 236.

7. Richard B. Kuhns, *Implied Assertions and the Hearsay Rule*, 16 Miss. C. L. Rev. 139 (1995); David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Continuing Quandary for Federal Courts*, 16 Miss. C. L. Rev. 33 (1995).

But while I am at it, I might as well throw in an opinion on that. The purported logic of restricting the definition of hearsay in the Federal Rules to assertions was that there is no serious sincerity problem unless the actor intended to assert the truth of the proposition in question.<sup>8</sup> It seems to me that this means the actor must have been trying to *convey* the truth of the proposition to her audience: if she was not trying to do so, she could not have been making an insincere assertion of the proposition, because if the insincerity existed it would presumably be aimed at fooling others. Thus, if the conduct merely takes the proposition as a premise, reflecting the actor's belief that the proposition is true and her assumption that her listener also accepts the proposition as true — "I want to buy drugs from Kearley (you and I both knowing, so I don't have to tell you, that he is a drug dealer)" — it seems to me that it should not be deemed hearsay within the Federal Rules' approach. But if part of the aim is to communicate the truth of the proposition to the other party — "I want to buy drugs from Kearley (who, you might not have known, so I'm telling you, is a drug dealer)" — then I think it is hearsay under the Rules' approach.

I do not pretend that this is an easy distinction to draw in fact. On the contrary, it strikes me as a very hard one, raising questions such as a particularly interesting one posed by Kuhns: How conscious an intent to assert must the actor have had?<sup>9</sup> I only suggest that this is the type of inquiry that conscientious application of the Federal Rules' approach demands. And if we want to get away from having to ask such questions and making admissibility turn on the answers, we must take a far different approach.

*Ronald J. Allen*

June 15

Colleagues,

I am about to leave the country for ten days, and thus will not be able to participate in the discussion for the next few weeks — I am traveling without children and computer. I have a procedural point and a few substantive comments.

1. The procedural point: The essays and comments have been quite interesting. They have, however, been sent with publication in mind. That has many positive features, but it also has one negative one — it reduces spontaneity. We are having a traditional symposium-like exchange of views. This is valuable. Based on my experience on a few discussion lists, valuable also is electronic conversation. I would urge everyone at this point to participate somewhat more spontaneously and let the editors figure out after the fact what to publish and what to excise.

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8. FED. R. EVID. 801 advisory committee's note.

9. Kuhns, *supra* note 7, at 147-48.

2. The substantive point: I basically agree with Rich Friedman that the traditional analysis of hearsay has been mined for all it is worth.<sup>1</sup> I think I am less sympathetic to his solution. The problem, it seems to me, is that the hearsay rule is a highly articulated relevancy rule, and it is about the only one left. With the possible exception of the best evidence rule in some states, all the complicated relevancy rules have gone the way of the dinosaur. In my view for good reason — their costs exceed their benefits. I think the hearsay rule in general should be encouraged to die as well, and for the same reason — it is an enormously costly rule whose benefits to everyone, but law professors and practitioners who have mastered its intricacies, are unclear. For a hearsay ruling to make a difference, for example, the factfinder must misappraise the evidence and that misappraisal must make a difference to the outcome of the case. I do not deny that this can occur, but I doubt it occurs very often, and the value of the rule lies in its total costs compared to its total benefits. *Regina v. Kearley*<sup>2</sup> is a perfect example of yet another cost to the rule. A guilty person's conviction is reversed because of a silly rule.<sup>3</sup>

I suggest that the next phase of hearsay development should not go in the direction of composing yet another complicated relevancy rule but instead toward pure discretion in the judge coupled with cost shifting rules. Judges can handle the probative value/fairness questions as well as anybody else (such as law professors engaging in armchair speculation), and in my view they should be given the power to do so. However, there is a concern about costs in a different sense — cases where one party may wear another down through protracted litigation. The solution to this will not lie in yet another regulatory regime but in exploration of cost bearing. Let me throw out as a target proposal that parties be required to bear the true costs of their evidentiary proffers, which would include the costs of the lawyers on the other side. This would involve some regulation, but it would be directed to attempting to ensure that parties bear the true costs of their activities. Something along these lines deserves exploration as a solution to this aspect of the problem of unfairness.

Friedman is really not as much concerned with hearsay as with fairness to criminal defendants.<sup>4</sup> I share the concern, but I doubt a substitute rule for the hearsay rule will generate anything other than what we presently see — a highly articulated relevancy rule that eventually collapses of its own weight. The difficulties are legion. Suppose a clearly disinterested witness testifies before the grand jury but dies a natural death before trial? Or consider the kinds of hearsay often involved in criminal cases — jail house gossip might be a good example. Typically people involved in jail house gossip do not “know” their statements will be used in criminal trials or investigations. Indeed, they believe fervently just the opposite. Does that mean then that all the junk comes in? The problem

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1. See Richard D. Friedman, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 87 (1995).

2. 2 App. Cas. 228 (H.L. Eng. 1992).

3. See *id.*

4. Friedman, *supra* note 1, at 87.



is that this possible rule does not seem to capture the special sense of “unfairness” that seems to operate in criminal cases. Can any rule? I doubt it. There are limits to analysis, and there are limits to the value of analysis. I think that quite possibly our systems of litigation are functionally beginning to perceive and reflect that point, and it is one I think the professoriate should address.

Consistent with my own admonition for spontaneity, I send this unproofread. Have fun over the next few weeks. I will check in when I return.

*Alex Stein*

June 16

A couple of comments on Ron Allen’s antinomianism in evidence law:<sup>1</sup>

(1) An attempt at roofing evidentiary rules — such as hearsay, opinion, and character — under the relevancy principle has already been made in the past (by J.F. Stephen)<sup>2</sup> and failed. Its purported simplification of the law would produce nothing but a “mercury effect”: the complexity would simply be shifted from the admissibility rules — which Ron suggests to abolish — to the relevancy principle, which would become heavily entangled. Dangers involved in admitting hearsay, non-expert opinion and character into evidence would not disappear. They would not disappear even as conceptual categories. They will continue to be categorized as dangers characteristic of hearsay, opinion, and character evidence.

Ron’s proposal therefore reduces to a sheer replacement of rules by an *ad hoc* judicial balancing (a GRAND Federal Rule of Evidence 403), accompanied with increased litigation costs. Will these costs be well-spent? Is it good to have judges with such a broad discretion? These are tough questions, and I do not think there is some immutable conception of rationality that would resolve them once and for all. Epistemic rationality alone would certainly not suffice for that purpose, as the questions raised by Ron’s proposal are also — and, indeed, primarily — moral and political.

(2) Ron believes Kearley was guilty. I doubt that. Kearley might have been identified as a drug-dealer by an underworld rumor; and he might have been framed by the police as well. That is why firm evidentiary standards should be required for convicting people, and the hearsay rule is one of them.

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1. See Ronald J. Allen, *Rules, Logic, and Judgment*, 16 MISS. C. L. REV. 61 (1995).

2. For a description of this attempt, known as a “splendid mistake,” see WILLIAM L. TWINING, *RETHINKING EVIDENCE* 56-57, 188 (1990).

*Richard D. Friedman*

June 17

Well, I will try to follow Ron's admonition and be spontaneous and not proof-read. I find myself between Alex and Ron. On the one hand, I think we have to acknowledge that hearsay doctrine as it now stands is a disaster, and something drastic ought to be done with it. On the other hand, I think we also should acknowledge that there is something, however it may be articulated, constituting a right of confrontation. To this we should pay attention *at least* because it is required by the United States Constitution — but also because, outside the United States as well, it obviously reflects a deeply and broadly felt view of proper adjudication.<sup>1</sup> And I do not think that the right is a reliability-based one at all; if it is conceived to be a protection against unreliable evidence it will, indeed, break down, because no sensible rules of reliability can be articulated in advance, and if the matter is determined on a case-by-case basis there will not be any protection at all. I am not sure I see the right so much as a matter of fairness as of the idea that if somebody gives what amounts to testimony against an accused it ought to be subject to adverse examination by the accused. Now, obviously, a standard like this raises difficult factual issues in some cases, and there would also be some tricky legal questions around the edges in deciding what is testimonial. But for now, this is the best I can do in figuring out what confrontation is supposed to mean, and I think it squares pretty well with intuition. I would love to see other suggestions (not that they have not been made). But the key, I think, is to recognize that there *is* a confrontation right that ought to be protected, that hearsay doctrine does not do it, and that once we protect that right, articulated however seems appropriate, we can relax to a far greater extent about hearsay, allowing a presumptive rule of admissibility — which also means being able to recognize and address hearsay-like problems even in a case like *Regina v. Kearley*<sup>2</sup> where the out-of-court conduct at issue does not fit within a narrow hearsay mold.

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1. See, e.g., *Saidi v. France*, 17 Eur. H.R. Rep. 251 (1994).

2. 2 App. Cas. 228 (H.L. Eng. 1992).

Alex Stein

June 17

Regards to all again,

Rich's point certainly reflects the conventional wisdom, nurtured by Wigmore's distinction between the intrinsic reliability-related evidentiary rules and rules of evidence which promote policies/values extraneous to factfinding.<sup>1</sup> Consonantly with the contemporary trend towards free evaluation of evidence, he argues that there is no room for reliability-related rules because no such rules can be set in advance and (presumably) because reliability of evidence can and should be determined *ad hoc*.<sup>2</sup> He therefore would not get rid of the confrontation right as easily as Ron would;<sup>3</sup> at the same time, he would relax the hearsay rule in a way I would not.

But I think that "intrinsic-extrinsic" categorization of the rules is a false dichotomy: the hearsay rule (along with some other rules of admissibility) is — as I see it — partly "intrinsic" and partly "extrinsic." In my view, its primary function is to control allocation of the risk of error. Take *Regina v. Kearley*<sup>4</sup> as an example. In this case, if the contested evidence were admitted, it would have exposed Kearley — in case he was innocent — to the risk of wrongful conviction. Would this be justifiable? I do not think so. I do not think anybody could decide that Kearley's guilt was established beyond a reasonable doubt while he could not substantiate the doubt through cross-examination of the drug-seekers. As I wrote in my comment on Professor Seidelson's paper, in criminal adjudication the hearsay rule should be tightened up rather than scaled down.<sup>5</sup> Functionally adequate substitutes to cross-examination should let the hearsay in; but — contrary to Federal Rule of Evidence 403, sought to be elevated by Ron to the rank of mega-principle<sup>6</sup> — if in doubt, exclude! (In civil trials — where the two types of error are, in principle, equally inequitable/inefficient — the hearsay rule can safely be abolished.)

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1. See Richard D. Friedman, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 87, 89 (1995).

2. *Id.*

3. See Ronald J. Allen, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 91 (1995) (responding to Richard D. Friedman).

4. 2 App. Cas. 228 (H.L. Eng. 1992).

5. See Alex Stein, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 55 (1995) (responding to David E. Seidelson).

6. Allen, *supra* note 3, at 91, 92.

*Roger C. Park*

June 18

Obviously, there is something special about hearsay generated in the process of criminal investigation and prosecution. So, I sympathize with Rich Friedman's tentative conclusion that the accused in a criminal case should have an "absolute right to cross-examine . . . anybody who makes a statement knowing that it would likely be used in the investigation or prosecution of a crime."<sup>1</sup>

I can think of situations where I might be more generous to the prosecution than Friedman. Ron Allen's example of the disinterested witness who testifies before the grand jury but dies a natural death before trial is a tempting one.<sup>2</sup> I would also be inclined to admit routine police records, such as documentation accompanying fingerprinting or records of the serial numbers of seized weapons, particularly if the declarants were unavailable. Nonetheless, I think a near-absolutist approach is justified.

I believe there are at least two distinct reasons for special concern about statements made by persons who know their statements will be used in investigation or prosecution:

1) Hearsay generated in the process of investigation or prosecution may be unreliable in ways that are difficult to fathom or explore.

2) Wide-open admissibility of such hearsay could have an invidious effect on future conduct of police and prosecutors in the course of finding, generating, or presenting evidence against the accused.

Suppose that the government could routinely tell the trier, "We can't produce the agent who saw defendant's crimes because the agent is still undercover in an ongoing investigation, but here is her affidavit showing the defendant to be guilty." A system that used that sort of evidence routinely would be different from ours in ways that would be a threat to the innocent as well as the guilty. I would also worry about a system that did not admit such evidence as a matter of course, but allowed it to be received at the discretion of the trial judge. So, I would have trepidations about Ron Allen's idea, though I suspect that he would come up with safeguards as he elaborated it, and his reference to "cost shifting rules" suggests that he might already have in mind some way of requiring that available declarants be produced.<sup>3</sup>

Rich Friedman's message could be read to suggest that concerns about accuracy/reliability cannot be the justification for the rule he proposes.<sup>4</sup> I believe that

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1. Richard D. Friedman, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 87, 88-89 (1995).

2. Ronald J. Allen, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 91, 92 (1995) (responding to Richard D. Friedman).

3. See *id.* at 92.

4. See Friedman, *supra* note 1, at 87.

an exclusionary stance toward statements generated in the process of investigation/prosecution *can* be justified as a way of enhancing the accuracy of factfinding, but one has to take a broad *ex ante* view and consider the impact of admission on the whole process of investigation and prosecution. It is not enough merely to ask whether hearsay offered in a particular prosecution looks reliable as a way of reaching accurate results in that prosecution.

Finally, a minor quibble: Rich Friedman makes the following ancillary comment about accuracy concerns: "We really have no basis for concluding that juries or other factfinders will in effect give hearsay more than double its appropriate weight — which would be necessary if the prejudicial overvaluation were to outweigh the acknowledged probative value of the evidence."<sup>5</sup> While I agree that jurors can generally handle hearsay, I am uncomfortable with saying that prejudicial overvaluation does not occur unless the jury gives the evidence "more than double its appropriate weight."<sup>6</sup> This argument/metaphor has been knocking around for awhile, and I have never really understood it. Hypothesize a criminal case in which all the evidence is hearsay. Suppose also that a perfect trier of fact would conclude that the evidence establishes only a sixty percent probability of guilt and therefore, applying the reasonable doubt standard, would acquit the defendant. Because of prejudicial overvaluation, the actual trier concludes that the reasonable doubt standard has been satisfied (let us even say the trier concludes that the probability of guilt is 100%). Injustice has occurred because of prejudicial overvaluation. Exclusion of the evidence would have prevented the injustice. But has the trier given the evidence "more than double its appropriate weight?" What number has to be more than doubled? A probability estimate? Something else?

*Richard D. Friedman*

June 19

Interesting comments from all over.

(1) On probative vs. prejudicial: Roger is absolutely right that it is difficult to get a grasp on just what we mean by saying that evidence is more than double-valued by the jury, and that under at least one definition there might be some circumstances in which double-valuing is impossible.<sup>1</sup> But I think that this only strengthens my point that hearsay should not generally, or even very frequently,

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5. Friedman, *supra* note 1, at 89.

6. Friedman, *supra* note 1, at 89.

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1. Roger C. Park, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 96, 97 (1995) (responding to Richard D. Friedman).

be excluded on the basis that it is more prejudicial than probative. It seems to me that the burden is on those who would exclude the evidence on this basis to try to say more precisely what they mean. And my essential point remains the same: Even assuming that the jury will overvalue the evidence, this does not mean that the evidence is more prejudicial than probative. Overvaluation means good valuation (what the wise judicial system would assess, presumably), plus the bad, extra valuation that the jury would add, and the bad must be greater in some sense than the good to make the evidence excludable on this basis.

Even though I have tried to shrug off the burden, I will say that one possible conceptual solution is simply to use the likelihood ratio — the probability that the hearsay evidence would arise given guilt to the probability that it would arise given innocence. The prior odds of guilt multiplied by the likelihood ratio equals the posterior odds of guilt. Thus, one might say that evidence is more prejudicial than probative if the likelihood ratio that the jury would assign is more than twice the likelihood ratio that the wise judicial system would assign. I am not sure I would endorse that approach, but it has some appeal and it does not present the problem Roger raises.

(2) I am glad to have support, though lukewarm or at least qualified, from Roger, on my approach to confrontation.<sup>2</sup> He raises a couple of cases in which my approach would apply and he thinks the evidence should be admissible without confrontation problems.<sup>3</sup> One is that of the disinterested witness who dies after giving grand jury testimony.<sup>4</sup> But why should the defendant be the one bearing the risk of the witness dying, if the defendant really did not have an opportunity to cross-examine her? I think the prosecution is in a position to protect itself, and ought to be held accountable for failure to do so. There is no constitutional reason why the defendant and counsel can not be allowed into the grand jury room. If the state does not want to do that, it can arrange for a deposition of the witness. I might even allow the state to inform the defendant (constructive notice being allowed if the defendant is wrongfully on the lam and unreachable by the authorities) that it has taken a statement from the witness, that it intends to use the statement if the witness is unable to appear, and that the defendant may, if he wishes, arrange to take the witness's deposition. If the defendant does not try to take the witness's deposition, then arguably the risk of the witness's inability to appear passes to him.

Similarly, with respect to those preparing documents in connection with fingerprints, and other such after-the-fact but supposedly routine police statements, the defendant ought to have the opportunity to examine. Even if the defendant is not footing the bill, counsel will make a judgment as to whether it seems worthwhile to try to shake the declarant's statement.

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2. *Id.* at 96.

3. *Id.* at 96-97.

4. *Id.* at 96.

(3) Ron challenges my approach from the other end, arguing that jailhouse gossip is unreliable junk.<sup>5</sup> Unreliable, yes, as are lots of statements made during the course of and in furtherance of a conspiracy — but more prejudicial than probative? Not as a rule. This stuff can be enormously probative, giving a glimpse that might otherwise be unattainable, and I am not sure how we can have confidence that it is significantly prejudicial at all, much less more prejudicial than probative. Even looked at globally, it seems to me that the truth-determining process is improved if the evidence is created. I do not think that this is the type of evidence to which confrontation need apply, though I can certainly understand a contrary view. But then I think the trick is to define the confrontation right in such a way as to cover this type of evidence, but without relying on the conclusory, amorphous blunderbuss (sorry for mixed metaphors) of calling it unreliable. Also, notice that even if the confrontation right does not apply, that does not mean that the defendant will not have a chance to examine the declarant. If she is willing and able to testify, he can call her if he really wants, and if the prosecution, but not the defense, is reasonably able to procure her testimony (in some circumstances, it might not be terribly burdensome on the prosecution to give her use immunity), he might have an argument that it ought to be required to do so or forgo use of the hearsay.

*Margaret A. Berger*

June 19

Alex Stein's comment that Kearley may have been framed rather than guilty points out an unstated rationale for the hearsay rule that we pretend does not exist: that while we talk about the dangers posed by the uncross-examined declarant, we fear the perjurious witness.<sup>1</sup> Theoretically speaking, such an admission is shameful for a law professor to make. Only befuddled students think that hearsay has anything to do with testimony that satisfies all the conditions for testimonial proof. But before we throw out the hearsay rule, and place our hopes on an interpretation of the Confrontation Clause that no American court seems willing to accept, perhaps we should re-examine the historical context in which the hearsay rule arose. Explanations and rationalizations came after the fact.

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5. Ronald J. Allen, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 *MISS. C. L. REV.* 91, 92 (1995) (responding to Richard D. Friedman).

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1. See Alex Stein, *Electronic Discussion in The Reach and Reason of The Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 *MISS. C. L. REV.* 93 (1995) (responding to Ronald J. Allen).

The seventeenth century that saw the development of the law against hearsay also gave rise to the Statute of Frauds. Perhaps the two doctrines are informed by far more similar concerns than we post-Wigmoreans have chosen to acknowledge. The fear of perjury was rampant in seventeenth century England and the hearsay rule does, of course, limit what the in-court witness can say. Wigmore's hymn to cross-examination — as “the greatest legal engine ever invented for the discovery of truth”<sup>2</sup> — has perhaps led us to forget that the surest antidote to lying is not to let the prevaricator testify.<sup>3</sup>

Of course, I am not suggesting that we return to the common-law incompetency rules, or that we abolish all the hearsay exceptions. And, I am considerably less disturbed about dismantling the hearsay rule in civil cases, in large measure because discovery provides the ammunition and time to ward off fabricated testimony. In criminal cases, however, it may be wise, as we enter the age of virtual reality, to remember that some people do lie. Although the hearsay rule purports to be about the declarant, its impact on the witness should not be forgotten. Before we cut back on the hearsay rule on the ground that jurors are capable of evaluating the declarant's statements, we should take a closer look at how well they do with in-court testimony.

*Nancy J. King*

June 22

Hello all. Your papers and comments have been enlightening and provoking, and I am very pleased to have the opportunity to jump into this Forum.

To begin with, I must say that while I am intrigued by all of the various proposals for evaluating implied assertions as hearsay, I favor those that have the promise of simplicity. It is scary to think of trial judges and trial attorneys sorting out some of the challenging arguments advanced in this Forum every time they encounter verbal evidence of non-witness declarants. I hope that whatever hearsay reform we propose strives to simplify. The costs of lengthening trial procedures even further — to civil litigants who cannot get their cases heard, to victims, to defendants awaiting trial, to jurors, and to taxpayers — are so very high. I would be less apprehensive about a complex or indeterminate rule for distinguishing admissible implied assertions from inadmissible implied assertions if I could be sure that the rule would be applied before trial, via motions in limine, in most cases. Unfortunately, criminal discovery provides little opportunity to litigate these issues before trial, so pretrial resolution is not very likely in criminal cases.

I would like to turn to an interesting problem that some of you highlighted many messages ago. That is the problem of implied assertions and the

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2. See 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1367 (1974).

3. *Id.*



Confrontation Clause. To recap, all seem to agree that attempts to admit the implied assertions of absent declarants against a criminal defendant can trigger Confrontation Clause concerns. I am interested in finding out how the participants in this Forum think a Confrontation Clause analysis of implied assertions ought to proceed.

One way to begin this discussion is to ask: Even if evidence of implied assertions like those in *Regina v. Kearley*<sup>1</sup> are not “hearsay” under the Federal Rules, would their admission nevertheless violate the Confrontation Clause? Unless we are willing to let Congress control the scope of the Sixth Amendment (not even the Court would go that far, I hope), the Confrontation Clause presents a puzzle separate from the meaning of the Rules. The confrontation analysis depends upon both the theory one uses for determining when implied assertions are hearsay under the Rules and the theory one uses to define the scope of the Confrontation Clause.

Consider first the proposal that most implied assertions qualify as non-hearsay because they are sufficiently reliable and avoid the worst of the hearsay dangers. Variations on this argument have been explored at length in this Forum: 1) the declarant lacked an intent to assert that which was implied, removing the risk of deceit, 2) the evidence does pose some risk of deceit, but the performative function of the words cancels out this risk, or 3) an adequate foundation establishing the reliability of the implied assertion can be laid before admission, establishing reliability. (If I have distorted or overlooked someone’s theory, please forgive me.) If the Confrontation Clause promotes *reliability* alone, barring the admission of unreliable accusations but welcoming reliable ones, then it should not bar the admission of those implied assertions reliable enough to leap the hearsay barrier. This is the easy way out for our courts: the way pointed by the Court’s decision to focus on the Clause’s requirement for sufficient indicia of reliability. In short, one advantage of adopting some sort of reliability threshold or analysis for admitting implied assertions in criminal cases is that it may provide a happy solution to the confrontation problem, given a reliability-based version of the confrontation guarantee.

If the basis for the admission of an implied assertion is a formal reading of the “plain meaning” of the word “assertion” in Rule 801, then the confrontation analysis gets more complicated. As a preliminary matter, the “firmly rooted exception” technique for discerning which evidence may be admitted consistent with the Clause would suggest that implied assertions be excluded. The practice of admitting this type of evidence against criminal defendants is not firmly rooted at all, at least if we look back to England.<sup>2</sup> And even if the relevant soil for growing firmly rooted exceptions is American only, the volume of disagreement reflected by the cases cited in this Symposium show that the admissibility of this evidence is not well rooted here either. Reliability might substitute for firm roots.<sup>3</sup> But when implied assertions are admitted simply because they are

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1. 2 App. Cas. 228 (H.L. Eng. 1992).

2. *See id.*

3. *See Idaho v. Wright*, 497 U.S. 805 (1990).

phrased as questions or commands and not as statements, they carry no special indicia of reliability, as a class.<sup>4</sup> Establishing a sensible reliability-based test for admitting certain types of implied assertions would go a long way toward simplifying the confrontation analysis.

But let us shift to a different conception of the Confrontation Clause. Assume, as many of you have (Professor Richard Friedman and Professor Margaret Berger, among others) that the Clause is more than a gatekeeper for accuracy. Assume that it serves symbolic, social, or procedural functions as well. If so, then the reliability that allows an implied assertion to leap the hearsay barrier cannot carry it across the constitutional barrier, too. Even though the statements in *Kearley*, for example, may be non-hearsay under the Rules, they are also accusations of criminality by absent declarants, callers whom Chippie had no chance to confront.<sup>5</sup> A more expansive view of the Clause may exclude even these arguably reliable statements.

Consider three theories for testing when the admission of evidence violates the Confrontation Clause. Professor Margaret Berger, in her article *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*,<sup>6</sup> suggests that statements elicited by the government require special vigilance.<sup>7</sup> She stresses that the Clause was part of a package designed to limit evidence gathering techniques for government in order to remove the incentive to manufacture evidence in secret.<sup>8</sup> Under this theory there would be no constitutional bar to the admission of the implied assertions in *Kearley* so long as they were not elicited or caused by a government agent and the agent was only a passive recipient of the statement.<sup>9</sup>

Professor Eileen Scallen has proposed that the Confrontation Clause requires that the prosecution produce the declarant or prove unavailability before admission, in order to honor the Clause's social dimension.<sup>10</sup> That is, the Clause recognizes that face-to-face contact between accuser and accused has benefits wholly apart from more accurate verdicts. Under this theory, the Clause may bar the admission of implied assertions as long as the *accused* would understand them to be assertions.

Professors Charles Nesson and Yochai Benkler have written recently in the *Virginia Law Review* in their essay, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*,<sup>11</sup> that the Clause mandates a two-step test: hearsay evidence may be admitted if it has

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4. See *Kearley*, 2 App. Cas. at 228.

5. See *id.*

6. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 563 (1992).

7. *Id.*

8. *Id.* at 561.

9. *Regina v. Kearley*, 2 App. Cas. 228, 253 (H.L. Eng. 1992).

10. Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 649 (1992).

11. Charles Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroborating Under the Confrontation Clause*, 81 VA. L. REV. 149, 173 (1995).

an adequate and independent foundation of reliability *and* it is corroborated by other evidence.<sup>12</sup> Their approach (which resembles Professor Eleanor Swift's original foundational approach to hearsay) raises many questions for implied assertions: Would evidence like that in *Kearley* need to be corroborated by other evidence? Would the multiplicity of implied assertions of the same fact provide sufficient corroboration?

What are some of the other ways we might consider this problem? I lean toward a "reliability plus" reading of the Clause, but I am not fully persuaded by any of the three above alternative readings of the "plus" part. I also believe that *Kearley*-type evidence should be examined under the Clause as long as its proponent is asking the jury to rely on it for the truth of the declarant's belief.

One other note on this topic. Professor Friedman commented that even if the Confrontation Clause does not bar the admission of this type of evidence, defendants are not harmed that much — the prosecution ought to be required to produce the declarant or forgo the use of the implied assertion.<sup>13</sup> But where would this separate, non-constitutional confrontation rule come from?

In the spirit of informality, I will stop here and hope that fuller answers to these questions develop in the weeks ahead.

I look forward to any reactions.

Margaret A. Berger

June 22

I am certainly in agreement with Professor King that any revision of hearsay definitions must have simplicity of application as a paramount goal.<sup>1</sup> I also agree that we should think more about the Confrontation Clause.<sup>2</sup> I do not find it at all certain, however, on the facts of *Regina v. Kearley*<sup>3</sup> that the agent *only* answered the phone (or came to the door).<sup>4</sup> When I read *Kearley*, I was reminded of *Idaho v. Wright*,<sup>5</sup> the Confrontation Clause case in which the Supreme Court refused to admit the two year old declarant's statements to a physician in a child sex abuse case.<sup>6</sup> In that case, as in *Kearley*, the witness' testimony never quite stated exactly what the declarant said; it provided only the import of the declar-

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12. *Id.*

13. Richard D. Friedman, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 *MISS. C. L. REV.* 87 (1995) (responding to Roger C. Park).

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1. See Nancy J. King, *Electronic Discussion in The Reach and Reason of The Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 *MISS. C. L. REV.* 100 (1995).

2. *Id.*

3. 2 App. Cas. 228 (H.L. Eng. 1992).

4. See *id.*

5. 497 U. S. 805 (1990).

6. *Id.* at 818.

ant's utterances.<sup>7</sup> In *Wright*, it is a little clearer that the child was responding to the witness' questions, but I cannot conclude on the available information that the witnesses in *Kearley* might not similarly have probed, especially with the people who came to the door and who may have feared that they were now in compromising positions. If nothing else, questioning by the agents may have produced statements in a form that the dictionary definition of assertion would then label as non-hearsay.

*John Jackson*

June 26

My first comment in this Symposium was composed on 22 June.<sup>1</sup> Since then I have been able to read comments by Professors Stein and Berger which take on board the point I was making about fabricated evidence.<sup>2</sup> The questions at issue seem to be how best to prevent police fabricated evidence and whether the hearsay rule has any role to play here.

I would suggest as an alternative approach that very clear codes of practice are drawn up to govern police conduct in *Regina v. Kearley*<sup>3</sup>-type situations and indeed, in any situation where the police believe that they may have to rely on statements made to them by witnesses who will not or may not be available at trial. Such a code would then be backed up by an exclusionary discretion not unlike the present section 78 of the Police and Criminal Evidence Act in England and Wales (Northern Ireland has a similar provision), whereby the court may refuse to allow evidence, on which the prosecution proposes to rely, to be given, if it appears to the court that, having regard to all the circumstances (including the circumstances in which the evidence was obtained), the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court should not admit it.<sup>4</sup>

This section caused a lot of uncertainty at first, but the courts have recently been developing much clearer guidelines on its use. Its advantage is that it enables the court to weigh up a number of factors that would be difficult to have

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7. *Id.* at 810-11.

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1. See John Jackson, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 185 (1995).

2. Alex Stein, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 93 (1995) (responding to Ronald J. Allen); see also Margaret A. Berger, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 99 (1995) (responding to Alex Stein).

3. See 2 App. Cas. 228 (H.L. Eng. 1992).

4. Police and Criminal Evidence Act, 1984, § 78 (Eng.).

properly considered by means of exclusionary rules; for example, the strength and availability of other evidence against the accused, the reasons for non-compliance with the code (in *Kearley*, why were the calls not taped, and why were the witnesses who arrived at the premises not called as witnesses?), the seriousness of the offense, and the ability of the defense to controvert the evidence. Section 78 has to date mainly been used to control the admission of confession evidence and evidence obtained in the course of police undercover activity, but there is no reason why its use could not be extended to situations where the prosecution proposes to rely on statements made to law enforcement officers by witnesses who are not to be called as witnesses. Indeed, Alex Stein has pointed out there is already an example of the courts using section 78 for this sort of situation.<sup>5</sup> The example arose in a decision at first instance where the trial judge indicated that, if it had been necessary, the court would have exercised its discretion under section 78 to exclude deposition statements implicating the accused, taken from two women who were not called as witnesses because they were unwilling to give evidence at trial.<sup>6</sup>

*Ronald J. Allen*

June 28

Colleagues,

I have just returned and found waiting for me a rich and interesting set of comments about hearsay. I really have nothing important to say other than hello, but in order to justify this transmission I will make one substantive comment. A lot of concern has been expressed over admitting evidence that might lead to a wrongful conviction. I share this concern, but wrongful acquittals are harmful, too, and thus we should also be concerned about excluding (or for that matter admitting) evidence that leads to wrongful acquittals. That, under a particular version of a rule, someone might be wrongfully convicted is interesting and important, but is only the first step in an analysis leading to a determination of its admissibility. That the person might be acquitted wrongly based on the exclusion must also be considered, and then a judgment made about the relative risks.

I will actually make two substantive points. It is precisely the "relative risks" that matter, in my view. Thus, I reject Alex Stein's suggestion a few weeks ago

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5. Alex Stein, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 *MISS. C. L. REV.* 193 (1995) (citing *Regina v. O'Loughlin*, 3 All E.R. 431 (Central Criminal Court 1988)) (responding to John Jackson).

6. *Id.*

that my views are “antinomian” in any way that distinguishes them from his.<sup>1</sup> His would not be “antinomian” in the sense that he means the phrase only if he could tell us how much of a risk of an erroneous conviction it is acceptable to take. But of course he cannot. Thus under his system, judgment highly analogous to the judgment I call for must be exercised, or alternatively, all criminal defendants must be acquitted, since there is always a risk of error.<sup>2</sup>

*Alex Stein*

July 19

This is my response to Ron’s argument against regulation of factfinding:<sup>1</sup>

Ron agrees with me that risk of error should, in principle, be regulated; he maintains however that it is not susceptible to regulation by rules such as hearsay.<sup>2</sup> According to him, evidentiary rules (excluding standards and burdens of proof) cannot deliver the desirable ratio of erroneous convictions and acquittals.<sup>3</sup> This assumes that risk of error can be allocated only quantitatively, and I disagree with this assumption. I believe there are risks that defendants are entitled to be immunized from *eo ipso*. The immunity I am advocating escapes the net of an ordinary utilitarian calculus. Risk of erroneous conviction involved in reliance on uncross-examined out-of-court statements (both explicit and implicit) is one of those risks. This immunity rests upon political morality, non-utilitarian, individualistic and liberal in its character. Its underlying theory is explicated in my larger article.<sup>4</sup>

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1. Alex Stein, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 93 (1995) (responding to Ronald J. Allen).

2. *See id.*

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1. *See* Ronald J. Allen, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 91 (1995) (responding to Richard D. Friedman).

2. *Id.* at 92.

3. *Id.*

4. Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J.L. & JURIS. (forthcoming 1996).

Ronald J. Allen

July 28

Colleagues, re Alex's latest,<sup>1</sup>

Why is the key issue "what rights defendants should have?" Do you think civilization or civilized criminal justice emerged so that defendants could have rights, or do you think instead that we have the concepts of "defendants' rights" and "criminal justice" as instrumental to something else? Stein's last sentence picks up the constant strain in his theory.<sup>2</sup> When faced with skeptics like me about the errors caused by hearsay as compared to other evidence, Stein denies being concerned about errors (in which case he has to explain his curious ordering of social interests that places defendants' rights, rather than, say, the right to safety and security, at the top of the list), but then he explains the difference between civil cases and criminal cases on the basis of the different implications errors of each type may have.<sup>3</sup> Unless he wishes to be heard as saying, as in fact his own argument must entail to be consistent, that no errors are allowable in criminal cases, he must explain why errors resulting from hearsay are any different from, or worse than, errors from any other sources. This, in my view, cannot be done.

While I am glad that Alex has sent his posting, I regret it has come so late in the process, for there are deep and important issues there. There has been much talk about defendants' rights and the concern about convicting an innocent person, but remarkably little about the concern of acquitting a guilty person. The academic field of criminal procedure has over the last twenty years become essentially irrelevant to the practice of the field because of its fascination with the rights of the accused to the exclusion of all other issues. There is a flavor of this in our discussion of *Regina v. Kearley*,<sup>4</sup> and in my view it is to be resisted. The plight of a possibly innocent person on trial is surely appealing, but so too is that of the innocent individual trying to lead a quiet and productive life brought unwillingly into contact with anti-social individuals. The two are intimately connected.

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1. See Alex Stein, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 193 (1995) (responding to John Jackson).

2. *Id.*

3. *Id.*

4. 2 App. Cas. 228 (H.L. Eng. 1992).

*Alex Stein*

July 28

Colleagues,

Re: Ron's latest comments:<sup>1</sup>

I think that law in general and adjudication in particular should be concerned about rights. What I have in mind is rights-as-trumps, which endorses Dworkin's jurisprudence<sup>2</sup> and, if you like, Kantian morality. In both civil and criminal cases, risk of error needs to be allocated and people should have rights in this area as well. In civil cases, my controlling principle is equality. Therefore, I am quite prepared to shift from admissibility to weight. In criminal cases, defendants should have a right not to be convicted if known to be possibly innocent (otherwise they would be singled out as risk-absorbers, which would violate the state's duty to treat them, like all citizens, with equal concern and respect). The equality principle is thus controlling once again, with different implications for criminal cases. This means that defendants should be immunized from ALL risks of error that can be empirically substantiated (as opposed to abstract risks which are present in every case). Hearsay dangers are part of the list.

I am aware of the crime-control and other utilitarian reasons running against my view. Alan Wertheimer's article makes a very profound neo-Benthamite argument in that direction.<sup>3</sup> But I do not think we would have adopted them collectively, if we stood behind Rawls's "veil of ignorance"<sup>4</sup> or followed a similarly unbiased decisional procedure.

This brings me back to the point previously made: one's approach to hearsay is dependent on one's politics, which means — at the very least — that the hearsay doctrine cannot be criticized as "epistemically irrational."

*Eleanor Swift*

July 31

Most of the definitions of hearsay discussed in this Forum use a reliability-based inquiry to sort the so-called "implied assertions" that should be excluded as hearsay from those that should be admitted as nonhearsay. The discussion has highlighted several functional criteria upon which to pick a preferred definition.

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1. See Ronald J. Allen, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 107 (1995) (responding to Alex Stein).

2. See RONALD DWORGIN, *TAKING RIGHTS SERIOUSLY* chs. 3 & 4 (1977), and RONALD DWORGIN, *LAW'S EMPIRE* chs. 6 & 7 (1986). For implications of Dworkin's jurisprudence on the law of evidence and procedure, see RONALD DWORGIN, *A MATTER OF PRINCIPLE* 72-103 (1986).

3. Alan Wertheimer, *Punishing the Innocent — Unintentionally*, 20 INQUIRY 45 (1977).

4. JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1972).



By “reliability-based,” I mean that the definition requires judges to undertake judicial judgments of reliability, based upon the specific facts of the case. (Roger Park calls these situationally specific judgments about hearsay policy.)<sup>1</sup> Different definitions use different doctrinal tests to focus this judgment, ranging from kinds of “intent” to weighing “performative” versus “assertive” aspects of speech. As I have said before, one criterion for picking between these definitions ought to be the competence and ease with which judges can apply these doctrinal tests.

Another criterion would be to consider at which stage in rule administration it is most appropriate for judges to make such fact-intensive judgments. Should the borderland between hearsay and non-hearsay be patrolled at the “definitional” stage, or at the “exceptions” stage of a traditional hearsay rule? The broadest definitions, such as the strong version of the declarant-oriented test or Craig Callen’s concept of “general intent,”<sup>2</sup> would define more borderland speech as hearsay, but would then admit it through the judge’s fact-specific judgment of reliability at the exceptions stage of administering the rule. As Richard Kuhns has noted, these fact-specific judgments are difficult and there is likely to be inconsistency in the results.<sup>3</sup> Is it preferable to locate inconsistent outcomes in the definition, or in the exceptions? There are many interesting issues to sort out in answering these questions.

Or, is it preferable to locate the judge’s reliability judgment entirely within the discretionary standard of probative value — as Ron Allen<sup>4</sup> and others suggest?

Finally, some discussion has focused on the relationship between a hearsay definition and the Confrontation Clause. There is some agreement that hearsay raises additional concerns (or raises them more keenly) in criminal prosecutions. Since judicial recognition of these confrontation concerns is decidedly on the wane, perhaps legislative reform of the hearsay rule (including the definition) ought to address them explicitly.

*Eleanor Swift*

July 31

Much of the discussion in this Forum has focused on competing doctrinal tests for sorting the so-called “implied assertions” that should be admitted as non-hearsay from those that can be excluded as hearsay. Many of these tests require

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1. Roger C. Park, *The Definition of Hearsay: To Each Its Own*, 16 MISS. C. L. REV. 125, 127 (1995).

2. Craig R. Callen, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 190, 191 (1995) (responding to Eleanor Swift).

3. Richard B. Kuhns, *Implied Assertions and the Hearsay Rule*, 16 MISS. C. L. REV. 139, 147 (1995).

4. See Ronald J. Allen, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 91, 92 (1995) (responding to Richard D. Friedman).

judges to identify when a declarant “has it right” (to use Chris Mueller’s phrase)<sup>1</sup> — that is, when the “implied” or “nonassertive” quality of the declarant’s speech adds sufficient reliability to the declarant’s belief in the proposition to be proved to justify admission. These tests are based, at least in part, on a reliability theory of the hearsay rule.

The alternative “foundation fact approach” to hearsay, discussed in my essay, purports to be a theory which is not based on judicial judgments of reliability.<sup>2</sup> Rather, it requires judges to make judgments about the kinds of foundation witnesses that will provide facts about the declarant to help the jury do its job; the job of using its own generalizations to evaluate hearsay.

Ordinarily, the foundation fact approach requires the proponent of hearsay to provide the jury (and the opponent) with foundation witnesses knowledgeable about the hearsay declarant’s exercise of his/her testimonial qualities. (Alex Stein describes this as a “functionally equivalent substitute [for cross-examination].”)<sup>3</sup> The definitional issue for judges is whether the jury needs such foundation witnesses. In my essay, I acknowledged that whenever a declarant’s beliefs are relevant to the proposition to be proved, the jury may always need foundation facts about the declarant, from foundation witnesses, to evaluate those beliefs.<sup>4</sup> If this is so, then the definition of hearsay under the foundation fact approach would be very broad, equivalent to the strongest version of the declarant-oriented test discussed by Roger Park.<sup>5</sup>

I also recognized that the *Regina v. Kearley*<sup>6</sup> case presents an important challenge to this approach. This is because it seems counter-intuitive to doubt the reliability of the numerous callers at Kearley’s residence. These declarants seem to “have it right” that Kearley has done something to substantiate their belief that drugs can be obtained from him. Thus, if ever there was a case in which the jury might not need foundation witnesses to testify about the individual declarants, *Kearley* might be it. Furthermore, if the foundation fact approach excludes this evidence, then the approach could seem counter-productive.

Therefore, I have pushed harder at the question whether the statements by the multiple callers at Kearley’s residence can be admitted as non-hearsay. Non-hearsay means, under the foundation fact approach, that the jury will use non-testimonial generalizations from its own background knowledge and experience to evaluate the significance of the declarant’s statements. If non-testimonial generalizations are used, then foundation witnesses knowledgeable about the declarant’s exercise of his/her testimonial qualities in making a statement are not needed. We are confident, for example, that the jury uses non-testimonial generaliza-

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1. Christopher B. Mueller, *Incoming Drug Calls and Performative Words: They’re Not Just Talking About It, Baron Parke!*, 16 MISS. C. L. REV. 117 (1995).

2. See Eleanor Swift, *Relevance and Hearsay in Regina v. Kearley*, 16 MISS. C. L. REV. 75 (1995).

3. Alex Stein, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 55, 60 (1995) (responding to David E. Seidelson).

4. Swift, *supra* note 2, at 78-80.

5. See Roger C. Park, *The Definition of Hearsay: To Each Its Own*, 16 MISS. C. L. REV. 125 (1995).

6. 2 App. Cas. 228 (H.L. Eng. 1992).

tions to evaluate the significance of statements for their effect on a listener, and of statements of legally operative effect. These kinds of statements are admitted as non-hearsay, without foundation witnesses.

I suggested in my essay that jurors confronted with the evidence in *Kearley* would, in common experience, say to themselves: "When fifteen callers make such identical statements, it cannot be coincidental; that is, it simply cannot happen without an explanation. And, the most reasonable explanation is, something happened to make all these people appear and make their statements. What is it that most likely happened? Kearley himself did something to make these callers believe that they could buy drugs from him; he probably sold them drugs before."<sup>7</sup> In this series of inferences, the jury does not need to know anything about the testimonial qualities of the individual callers; it is not using testimonial generalizations to evaluate the significance of their statements.

It may be that, in common experience, we think we would evaluate the callers in *Kearley* in this way. But should judicial judgments of "common experience" be added to the test for non-hearsay? I am uncertain. More work needs to be done to see whether such a test can provide a principled, administrable and limitable criterion for judges to determine when a jury will not use testimonial generalizations, and thus when a declarant's statement is non-hearsay. For example, will the anti-coincidence explanation propounded above prove to be a coherent principle for a definitional test? Is it the only additional truly non-testimonial generalization that will emerge? Or, will a test focused on corroboration better satisfy the three requirements of a principled, administrable and limitable definition? What kinds of corroboration, apart from the identical implied assertions in *Kearley* and the unique facts in the famous case of *Bridges v. State*,<sup>8</sup> can generate such a powerful anti-coincidence explanation? Would fifteen identical assertions of Kearley's guilt, made at a police station, satisfy the corroboration test? And, how would judges administer the slippery concept of "common experience" to tell them when juries can dispense with testimonial generalizations? Would someone be required to prove "common experience" empirically? Or, would judges rely on their own best guess about common practices of inference-drawing? Finally, would an inquiry into the theory of inferential reasoning reveal that corroboration necessitates a change in the content of underlying generalizations?

One thing is sure, this "common experience" test will not prove to be limitable if a declarant's statement is admitted as non-hearsay every time it is corroborated, allowing the judge to rule as follows: "The declarant's statement must be 'right,' it cannot be a coincidence, and thus, in common experience, the jury will evaluate it with an anti-coincidence non-testimonial generalization. The statement is non-hearsay." Such judicial reasoning would obviously be reliability-based and must be rejected as inconsistent with the foundation fact approach.

But even if the callers' statements in *Kearley* must be defined as hearsay under this approach, they might still be admissible if proper foundation witnesses are

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7. Swift, *supra* note 2, at 75.

8. 19 N.W.2d 529 (Wis. 1945).

presented. In *Kearley*, the appropriate foundation is what I have called the "adjusted" foundation for unavailable declarants. This would require the police to interrogate each caller further to elicit facts about prior dealings with Kearley, thus providing foundation facts about the caller's opportunity for perception and memory. The police would then have to testify about the making of the statement by each caller, and would have to "identify" the caller with regard to the main facts influencing the sincerity of the caller's statement, such as behavior, demeanor, and relationship to Kearley or to the case at hand. Gleaning such information would require the police to conduct a deeper investigation into the fortuitous callers at Kearley's residence. But suspicions about police and prosecutorial conduct, voiced during the discussion in this Forum, have led others to demand more from these representatives of the state as well.

*Richard D. Friedman*

August 7

Following up on Ron's point: We really do not have any good reason to believe that juries systematically *overvalue* hearsay by so much that it is better for the truth-determining process to exclude the evidence than admit it.<sup>1</sup> Indeed, empirical research by Roger and others reported in the Minnesota symposium raises the suggestion that juries might systematically *overdiscount* hearsay.<sup>2</sup> Hearsay is often highly probative, and we often make it more difficult for the factfinder to evaluate the facts by excluding it.

Of course, there are sometimes reasons to exclude hearsay to encourage the proponent to produce better evidence, including foundational evidence. But I do not believe this type of argument provides a sound justification for a general presumptive exclusion of hearsay. And fancy psycholinguistic theories, however intriguing, strike me as post-hoc rationalizations, not sturdy enough to support such a broad and important rule of exclusion.

Basically, it seems to me that we have to decide when to treat the absence of cross-examination (and also, to some extent, the oath and demeanor) as important only for its contribution to the truth-determining process and when to treat it as having independent importance. My own view, put roughly, is that when an observer makes a statement with testimonial intent and that statement is introduced as evidence in trial, especially by the prosecution in a criminal case, cross-examination *is* important in its own right, and in other cases not. *Regina v. Kearley*<sup>3</sup> represents one of those other cases. But it is possible that the prosecu-

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1. Ronald J. Allen, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 *MISS. C. L. REV.* 91, 92 (1995) (responding to Richard D. Friedman).

2. Peter Miene et al., *Juror Decision Making and The Evaluation of Hearsay Evidence*, 76 *MINN. L. REV.* 683 (1992).

3. 2 App. Cas. 228 (H.L. Eng. 1992).

tion could reasonably have produced evidence that would have been better for the truth-determining process (live testimony of the visitors?) and that the defense could not have; to the extent, if any, that this is so, exclusion *might* be warranted.

*Craig R. Callen*

August 9

In his last post, Rich said:

Of course, there are sometimes reasons to exclude hearsay to encourage the proponent to produce better evidence, including foundational evidence. But I do not believe this type of argument provides a sound justification for a general presumptive exclusion of hearsay. And fancy psycholinguistic theories, however intriguing, strike me as post-hoc rationalizations, not sturdy enough to support such a broad and important rule of exclusion.

Basically, it seems to me that we have to decide when to treat the absence of cross examination (and also, to some extent, the oath and demeanor) as important only for its contribution to the truth-determining process and when to treat it as having independent importance.<sup>1</sup>

Rich says that we should look at whether cross-examination would make a contribution to truth-finding.<sup>2</sup> But, if we wish to produce more information for factfinders through cross-examination, is cross our critical concern, or is it the lack of information about the declarant and the out-of-court statement? Cross can fail to produce any significant information, and, as Morgan pointed out, may not be a particularly good test of sincerity. Or the party opposing the evidence may be reluctant to cross-examine at all, based on the fear that the witness may further damage the opponent's case.

It does seem that talking about the degree to which cross-examination is necessary for truth-finding confuses the tool with the task, which is accumulation of useful data for the factfinder. That recognition, in turn, leads us back to theories of the hearsay rule that focus on the factfinders' need for information about the declarant, her statement, or her intent.

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1. Richard D. Friedman, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 *MISS. C. L. REV.* 112 (1995) (responding to Ronald J. Allen).

2. *Id.*

*Richard D. Friedman*

August 9

Craig suggests that I am asking whether cross-examination makes a contribution to truth-finding.<sup>1</sup> But what I said in my last message was that we have to ask in what circumstances the *only* significant importance of cross is in its contribution to truth-finding. I think it is crucial, irrespective of whether it actually helps determine the truth, when a prosecutor offers against a criminal defendant a testimonial statement made by a witness, which would typically occur when the statement is made from the witness stand at that very trial, or at another proceeding, or in a deposition or affidavit, or, in my view, in less formal settings when the declarant anticipates such evidentiary use of the statement. In most or all other circumstances, I think we should protect cross only to the extent it is necessary for truth-finding, and if, as Craig indicates, it is not all that necessary for truth-finding, then it should not get much protection. This does not conflict with my preferred approach, which is rather tolerant of hearsay when the confrontation right is not at stake.

*Eileen A. Scallen*

August 9

I will take one last bite. Although I tried to resist responding to Ron's message, Rich's last word is too tempting to let go.

I think Rich has again illustrated the existence of a societal dimension to confrontation (provided by cross-examination).<sup>1</sup> He puts the issue bluntly — what if we give up trying to defend the “truth finding” function of a trial (even assuming we believe in the existence of a unified “truth”)?<sup>2</sup> In short, what if we assume that trials cannot produce “truth”; is there any value to confrontation? Does it matter whether it is a civil or criminal trial? I think there is such independent value to confrontation, perhaps even some in civil trials, as I argued in my earlier response. However, one cannot seriously dispute that the framers of the Constitution thought that criminal defendants were entitled to special kinds of rights — embodied in the Sixth Amendment. The framers were apparently will-

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1. Craig R. Callen, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 113 (1995) (responding to Richard D. Friedman).

1. See Richard D. Friedman, Electronic Discussion in *The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 114 (1995) (responding to Craig R. Callen).

2. *Id.*

ing to tilt the balance toward defendants in criminal cases in a way that makes Ron Allen unhappy.<sup>3</sup> If this were not the case, the framers should have been content with the Due Process Clauses of the Fifth and Fourteenth Amendments.

My, how unfashionable it has become to believe that defendants' rights are as real as victims' injuries. I wait for the day when the problem is not framed as an either/or dilemma (i.e., not "either we protect the accused or the public") but rather as: How can we more adequately protect both the interests of the accused and the public, to which the accused belongs?

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3. See Ronald J. Allen, *Electronic Discussion in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 *MISS. C. L. REV.* 107 (1995) (responding to Alex Stein).