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Thoughts from Across the Water on Hearsay and Confrontation

By **Richard D. Friedman**

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Summary: *This article draws on the history of the hearsay rule, and on recent decisions of the European Court of Human Rights, to argue that the right to confrontation should be recognised as a basic principle of the law of evidence, and that aspects of the Law Commission's proposals for reform of the hearsay rule, and of the Home Office's proposals for restrictions on the right of cross-examination, are therefore unsatisfactory.*

To an American scholar, it is reassuring to know that the English are as displeased with their law of hearsay as we are with ours. On both sides of the Atlantic, the law excludes highly probative evidence and causes unnecessary inconvenience and expense, and it is extraordinarily complex and often irrational.¹ As the Law Commission has properly recognised—and as the drafters of our evidentiary rules have not—it is desperately in need of reform.

At the same time, lurking within the rule against hearsay, and often shrouded by its many excesses and oddities, is a principle of magnificent importance, a principle first enunciated long before the development of the common law system but one that achieved full development within that system. This is the principle that *a person may not offer testimony against a criminal defendant unless it is given under oath, face to face with the accused and subject to cross-examination*. It is this principle—and not concerns about the reliability of hearsay evidence or the supposed inability of the jury to deal with the weaknesses of evidence—that should drive the law concerning secondary evidence.

This underlying principle is articulated—though sufficiently cryptically that our Supreme Court has not recognised it²—in the Confrontation Clause of the Sixth Amendment to the United States Constitution, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” I shall therefore refer to the principle as the *confrontation*

¹ For the English side, see, e.g. Law Commission Report No. 245, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997). Reasons for the “blight” are lucidly explored by Colin Tapper in “Hearsay in Criminal Cases: An Overview of Law Commission Report No 245” [1997] Crim.L.R. 771. For the American side, see, e.g. the papers from the Minnesota Hearsay Reform Conference, (1992) 76 Minn.L.Rev. 363.

² The Supreme Court has treated the Confrontation Clause, so far as it relates to out-of-court statements, very nearly as if it were a constitutionalisation of the provisions on hearsay in the Federal Rules of Evidence. See, e.g. *White v. Illinois*, (1992) 502 U.S. 346. I have commented at length on this tendency in “Confrontation: The Search for First Principles” (1998) 86 Georgetown L.J. 1011 (hereinafter “First Principles”).

principle. I use the term with some hesitation, however; although I believe the principle should be implemented in full, it can be implemented in parts, and the right to be brought face to face with the adverse witnesses is not necessarily the most important part. One could say, for example—and recent decisions under the European Convention on Human Rights indicate³—that in limited situations the defendant may have the right to examine a witness through counsel but not the right to have the witness testify in his presence.

That we in the United States should cling more tenaciously than do the English to an institution that we inherited from England is not altogether surprising; the same is true of the civil jury, and I have no doubt that we will still be dividing the number of ounces by 16 and the number of inches by 12 long after England has sensibly gone fully metric. What is very ironic, however, is that the confrontation principle, which for centuries English writers proclaimed as one of the chief aspects of the superiority of the English adjudicative system over its Continental counterparts, should now be pressed on the United Kingdom from the Continent. I submit that developments under the European Convention, while not going quite as far as might be wished, suggest a framework that could help us climb out of the morass—careful protection of the confrontation right with respect to testimonial statements, including such statements made out of court, without depending on the rubric of hearsay law.

In this article, I will first argue that, so far as concern about the probative value of the evidence is concerned, hearsay doctrine is misguided: if live testimony of the declarant would advance the truth-determination process, then in most cases so too would the declarant's hearsay statement. Thus, I contend, discourse about hearsay has been conducted largely along unhelpful lines. I then sketch out the confrontation principle and its history, showing how its application to out-of-court statements is one of the fundamental pillars of our system of adjudication. Finally, I show how the principle accounts for some basic aspects of hearsay law that might otherwise appear anomalous; how it points to other aspects of hearsay law that are genuinely anomalous and ought to be eliminated; and how it suggests that in some respects proposals in the Law Commission's Report No. 245, *Hearsay and Related Topics*, as well as in the Home Office's report on the treatment of vulnerable or intimidated witnesses, would be moves in the wrong direction.

If the approach suggested here were adopted, the result would be a doctrine of considerably narrower scope than the current law of hearsay, but one not undermined by a baffling and incongruous set of exceptions. The doctrine would not eliminate all difficult questions of application—there will always be close cases—but it would be based on a broad principle that can be rather easily understood and that would command broad respect.

Hearsay as beneficial to truth-determination

The Law Commission Report, like most modern discourse about hearsay, is pervaded by concern about truth-determination. Thus, the Report stresses the factors that, at least since the time of Wigmore, have often been regarded as the principal criteria for determining the admissibility of hearsay—reliability and, to a lesser extent, necessity.

³ See the discussion of *Doorson* and *Van Mechelen* below in n.38.

I will argue here that, to the extent that determination of truth is the goal, hearsay should generally be admissible if the live testimony of the declarant to the same proposition would be. The argument comes in several pieces. First, courts and rule makers cannot satisfactorily sort out categories defining reliable evidence. Secondly, evidence that is not particularly reliable will nevertheless assist the truth-determination process so long as it is more probative than prejudicial. Thirdly, if live testimony of the declarant as to a given proposition would be more probative than prejudicial, then ordinarily so too will be the hearsay declaration, the supposed disabilities of the jury notwithstanding. Fourthly, necessity as such adds little to the criterion; there is need for good evidence and no need for bad evidence. The most persuasive way of viewing the necessity criterion is perhaps as the inverse of a “best evidence” criterion—when better evidence than the hearsay, the live testimony of the declarant, is available, the need for the hearsay diminishes. But, so long as the proponent is not in a substantially better position than is the opponent to produce the declarant as a live witness, this rationale does not create a strong rationale for excluding hearsay.

This discussion suggests that, to the extent the concern is the determination of truth, courts and rule makers should generally be receptive to hearsay, even more than the Law Commission Report suggests. And a corollary is that, to the extent hearsay should be excluded, the ground must usually be some reason other than that exclusion will assist the determination of truth.

Categorisation difficulties

How reliable a statement is depends on all the circumstances of the case. Accordingly, attempts to sort out prescribed categories of reliable evidence are doomed to failure. Consider the exception for spontaneous exclamations in response to a startling event. The Commission has confidence that this exception can be limited narrowly to cases in which there is a negligible chance of concoction or distortion.⁴ But even if so—not so easy a matter, I think—this possibility of insincere statement is only one possible source of inaccuracy. The possibility of misperception may be considerably more significant in this context, and past a point the stress of excitement tends to undermine rather than enhance perceptive ability.⁵

Inevitably, rule makers feel pressed to allow trial courts discretionary power to admit hearsay that does not fit within any previously defined exception. That is the course that the Federal Rules of Evidence have taken,⁶ and now the Law Commission expressly recommends following their lead.⁷ The Commission expresses the intent that this be “a very *limited* discretion”⁸—a rather ironic development, given that the Senate Committee that shaped the Federal Rules’

⁴ paras 8.115–8.120. *cf.* David Ormerod, “Redundant Res Gestae?” [1998] Crim.L.R. 301, which reflects, in my view, an appropriate disdain for the *res gestae* exceptions and an unwarranted confidence in the other exceptions, including the “safety valve” exception, that the Law Commission would create or preserve.

⁵ See, *e.g.* Andrew Ashworth and Rosemary Pattenden, “Reliability, Hearsay Evidence and the English Criminal Trial” (1986) 102 L.Q.R. 292 at 330.

⁶ See Fed. R. Evid. 807, a recent creation substantially identical to the prior Rules 803(24) and 804(b)(5).

⁷ paras 6.48–6.53.

⁸ para. 6.49 (emphasis in original).

residual exception strongly expressed a similar intention,⁹ and that the courts have run roughshod over it.¹⁰ The analysis presented here will, I hope, support the view that, to the extent the concern is truth determination, a “safety valve” exception of this sort is inadequately receptive to hearsay, and to the extent that a fundamental right is at stake such an exception tends to undermine it.

Unreliable evidence as an aid to determination of truth

Evidence need not be particularly reliable to aid the search for truth. Suppose that testifying to proposition X would be in a witness’s self-interest and that the witness in fact testifies to X. Suppose further we make an assessment that the witness would be essentially certain to testify to X if it is true but that if X were false the probability would still be 50 per cent that the witness would testify to it. In these circumstances, the evidence is hardly reliable, and yet—assuming for the moment that the jury does not overvalue it—it clearly helps in truth-determination, much like evidence that the defendant has the same common blood type as a stain left by the perpetrator at the crime scene. Indeed, a rational factfinder would conclude that the testimony doubles the prior odds of X.¹¹

One piece of unreliable evidence presumably will be unpersuasive to the jury and insufficient to support a verdict. But sufficiency is determined on the basis of the entirety of the evidence; an accumulation of unreliable evidence may be very persuasive. In determining admissibility of a single item of evidence, if the aim is to advance the search for truth, the basic question is not an aggregate but a marginal one, whether the aggregate of evidence is better with or without that item included—or, put another way, whether that item is more probative than prejudicial.

It is helpful to bear in mind in this context that the paradigm of acceptable evidence, live testimony of a witness subject to cross-examination, need not be particularly reliable to assist in truth-determination. And yet courts do not generally purport to determine the reliability of testimony as a prerequisite for admitting it. Indeed, whenever there is a conflict of testimony, it is clear that the testimony of at least one of the witnesses—and perhaps that of both—is not only unreliable but false. But both are ordinarily admitted without question.

The jury’s consideration of hearsay

It has become commonplace to assume that the jury’s presumed inability to account sufficiently for the defects of hearsay is a primary reason for the exclusionary rule—and, correspondingly, that the general absence of the jury from

⁹ Sen. Rep. No. 93–1277, 93d Cong., 2d Sess. (1974), at 20, reprinted in Am.Jur.2d, *New Topic Service: Federal Rules of Evidence* (1975): “It is intended that the residual exceptions will be used very rarely, and only in exceptional circumstances.”

¹⁰ See, e.g. Myrna Raeder, “The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured” (1994) 25 Loy. L.A.L. Rev. 925 at 933.

¹¹ This is a simple application of Bayes’ Theorem, which provides that the posterior odds of a proposition equal the prior odds times the likelihood ratio. The prior odds are assessed without considering the evidence in question, and the posterior odds take that evidence into account. The numerator of the likelihood ratio is the probability that the evidence in question would arise if the proposition were true, and the denominator is the probability that the evidence would arise if that proposition were false.

English civil litigation accounts for the abolition of the rule in civil cases.¹² For several reasons, I believe the explanation is unconvincing.

First, this defective-jury explanation for the hearsay rule seems to have become prominent only in the nineteenth century,¹³ well after the rule had begun to emerge, and long after the confrontation principle on which I will focus had become established.

Secondly, empirical evidence supporting the defective-jury explanation is altogether lacking. Such empirical evidence as there is suggests that jurors do not fail to discount hearsay evidence to take its weaknesses into account.¹⁴ Indeed, there is some suggestion that in some circumstances jurors may tend to discount hearsay too much rather than too little.¹⁵

Thirdly, it must always be borne in mind that hearsay can be highly probative evidence. To conclude that truth-determination will be advanced rather than hindered by exclusion of an item of hearsay requires more than merely that the jurors will overvalue the hearsay. It requires that they will overvalue it by so much that they are led further away from the truth than if they had never heard it—that in some sense they will give the evidence more than twice the weight it should have. That is a very high degree of overvaluation. Assuming that live testimony of the declarant as to a given proposition would be more probative than prejudicial,¹⁶ then usually the declarant's hearsay statement asserting that proposition will be as well.

Necessity and the "best evidence" rationale

The Law Commission also points to necessity as a crucial criterion in determining the admissibility of hearsay.¹⁷ But how much does this factor add to the analysis? There is need for good evidence and no need for bad evidence. If a material proposition is in dispute and an item of evidence bearing on that proposition is more probative than prejudicial, there is need for the evidence; if it is more prejudicial than probative, there is no need for it, and the fact that the declarant is unavailable should not render it admissible.

Perhaps that analysis is too glib, though not by very much. I think the necessity criterion fails because it operates from the premise that most hearsay is not of net assistance to truth determination. The analysis above suggests that the premise

¹² See, e.g. Tapper, *supra*, at 777.

¹³ See Edmund M. Morgan, *Foreword to American Law Institute, Model Code of Evidence* (1942), at 36, and "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 *Harv. L. Rev.* 177, 182–83. A famous, and perhaps seminal, expression of the jury-defect view was that of Mansfield, C.J., in *Re Berkeley*, 4 *Camp.* 401, 415, 171 *E.R.* 128, 135 (H.L. 1811). He said that the different attitudes towards hearsay in Scotland and in England "seem to me to have a reasonable foundation in the different manner in which justice is administered in the two countries." In Scotland, as in most of the Continent, judges were the finders of fact, and they could "trust themselves entirely" to give hearsay such little weight as it seemed to them to deserve. "But in England, where the jury are the sole judges of the fact, hearsay is properly excluded, because no man can tell what effect it might have upon their minds."

¹⁴ See, e.g. Margaret Bull Kovera, Roger C. Park and Steven D. Penrod, "Jurors' Perceptions of Eyewitnesses and Hearsay Evidence" (1992) 76 *Minn. L. Rev.* 703.

¹⁵ See Peter Miene, Roger C. Park and Eugene Borgida, "Juror Decision Making and the Evaluation of Hearsay Evidence" (1992) 76 *Minn. L. Rev.* 683.

¹⁶ This may be in doubt, for example, if the proposition has dubious relevance to the case but potential inflammatory impact.

¹⁷ e.g. para. 6.1.

should be reversed. And then the inverse of a necessity argument comes more sharply into view. The point is not that in some cases hearsay should be admitted because the unavailability of the declarant renders the hearsay necessary. Rather, it is that in some cases, even though the hearsay would be net beneficial to the truth-determination process, the availability of the declarant means that exclusion may advance the truth-determination process by inducing proponents to produce better evidence—the testimony of the declarant, taken subject to oath and cross-examination.¹⁸

Although the Law Commission expressly disclaimed reliance on a “best evidence” rationale,¹⁹ I submit that this is the best justification for taking a sharply more receptive attitude towards hearsay when the declarant is unavailable.²⁰ But, even where the declarant is readily available, this rationale does not justify a broad exclusion of hearsay. Assuming the evidence is more probative than prejudicial, and that the proponent is not (and was not) substantially better able than the opponent to produce the declarant, there is a ready response to the opponent who argues that the live testimony of the declarant would be better evidence than the hearsay: “Produce her yourself.” The evidence that the proponent has chosen to lead is, by hypothesis, more beneficial than detrimental to truth-determination; if the opponent hopes to do better by the presentation of other evidence, including the live testimony of the declarant, then it is her choice to do so. Granted, doing so does not put the opponent in as favourable a position as he would have if the proponent presented the declarant as a witness and the opponent then cross-examined. But if this is a problem (I am unsure whether it is), the best solution is an adjustment of procedure rather than outright exclusion of probative evidence.²¹

Summary

If truth-determination is all that is at stake, the elimination of hearsay in civil cases and the proposals of the Law Commission for criminal cases are steps in the right direction, though perhaps complete abrogation went somewhat too far in that direction and the Law Commission does not go quite far enough.²² If the live testimony of the declarant would assist truth determination, then usually so too will the hearsay statement. The “best evidence” rationale might support exclusion of hearsay in some circumstances, but at least for the most part only if the proponent

¹⁸ In some cases, the hearsay may appear to be better evidence than testimony, because the hearsay reflects a fresher memory. But the testimony can, if appropriate, be supplemented by the hearsay; testimony under oath and cross-examination supplemented by the prior statement is bound to be better evidence than the prior statement alone.

¹⁹ paras 6.17–6.32.

²⁰ Thus, the Law Commission recommends a broad hearsay exception for statements made by declarants unavailable at trial. Arguably, though, a predicate for the exception should be that the proponent did not have adequate opportunity to take the witness’s deposition before trial. Note that failure of the proponent to take such an opportunity may, in some circumstances, preclude a finding of unavailability under Federal Rule of Evidence 804(a)(5).

²¹ I have proposed a procedural solution: If the opponent secures the presence of the declarant, willing and able to testify, by a prescribed time, then the proponent is obligated to present her live testimony of forgo the use of the hearsay. See “Improving the Procedure for Resolving Hearsay Issues” (1991) 13 *Cardozo L. Rev.* 883. I express further thoughts on the matter in “Truth and Its Rivals in the Law of Hearsay and Confrontation” (1998) 49 *Hastings L.J.* (forthcoming).

²² cf. J. R. Spencer, “Hearsay Reform: A Bridge not Far Enough?” [1996] *Crim.L.R.* 29.

is or was substantially better able than the opponent to produce the declarant as a witness subject to oath and cross-examination.

The Confrontation Principle

Now shift gears. Let us consider the requirements that a legal system should impose on witnesses offering testimony against an accused, not merely to assist in truth determination but as a matter of procedural right.²³ Ideally, testimony should be given:

- (1) under oath, or some other procedure designed to ensure that the witness is at risk for false statement;
- (2) subject to cross-examination by the accused or counsel;
- (3) in the presence of the accused; and
- (4) in the presence of the trier of fact.

For nearly half a millennium, at least since Thomas Smith described a criminal trial as an “altercation” between accusing witness and defendant, these conditions have described the norm under which common law trials have been held.²⁴ These conditions are hardly unique to the common law system. The oath has been required by many systems at least since Roman times. And the Book of Acts, 25:16, quotes the Roman governor Festus as declaring:

“It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him.”

Not all legal systems, however, impose all these conditions as a matter of course. Indeed, Continental systems traditionally took testimony out of the presence of the parties, in a closed proceeding. And for hundreds of years, English commentators declared the superiority of the English system on this score.²⁵

English adherence to these principles was by no means uncluttered, however. For one thing, the fourth condition—that testimony be taken before the trier of fact—has always been regarded as a rule of preference; if the witness is unavailable at trial, a pretrial deposition will suffice. Indeed, notwithstanding the English hostility towards Continental methods of taking testimony, by the middle of the seventeenth century a sophisticated body of doctrine had developed governing when

²³ I will not consider here the complex issue of the extent to which similar conditions should apply to other testimony—other than to say that, without the power of the state to gather and preserve evidence on the side of the proponent and the liberties of a criminal defendant on the side of the opponent, there are good reasons for being more lax.

The historical discussion here is gleaned from research on the history of hearsay that I am currently doing with Dr Michael Macnair—who has no share of blame for any inaccuracies here.

²⁴ Thomas Smith, *De Republica Anglorum*, Bk. 2, ch. 15, (c. 1565; Mary Dewar, ed., 1982), at 114. Another condition, at least in the modern era, is that to the extent possible the witness should give her affirmative testimony in her own words, rather than merely affirming or denying a proposition put to her. See Walker Jameson Blakey, “Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence” (1975) 64 Ky L.J. 3.42–3.43.

²⁵ e.g. *Case of the Union of the Realms*, (1604) Moore (K.B.) 790, 798, 72 E.R. 908, 913 (Popham, L.C.J.); Sollon Emlyn, Preface to *State Trials* (1730); Matthew Hale, *History of the Common Law* (c. 1670; C. M. Gray, ed., 1971), at 163–164.

depositions taken in equity—a system following Continental models—could be used at trial because of the unavailability of the witness.²⁶ Further, examinations taken by a magistrate under oath could be used at trial if the witness was then unavailable—but this practice was barred, absent cross-examination, in 1696 for misdemeanour cases,²⁷ and by the mid-nineteenth century in felony cases.²⁸ Finally, defendants in politicised cases in England did not always have an opportunity to confront adverse witnesses. From the early sixteenth century, treason defendants frequently demanded that the witnesses be brought “face to face” with them to give or affirm their testimony.²⁹ Sometimes the demands were granted, sometimes not. But Parliament repeatedly supported the demands, with the “face to face” formula,³⁰ and by the middle of the seventeenth century, the principle was well established.³¹ Thence, the principle passed to America,³² eventually being enshrined in the Confrontation Clause of the Bill of Rights.

Though the history is not as neat as one might wish, I believe it suggests that the first three conditions set forth above are, and for the most part have long been recognised to be, indispensable: testimony given without satisfying them is not acceptable. Thus, if a witness refuses to give satisfactory recognition of an obligation of truth-telling, or to testify in the presence of the accused, or to submit to cross-examination, the testimony should be rejected. Perhaps more moderate rules should be adopted for child witnesses or those suffering a substantial mental disability³³; I prefer not to express an opinion on this issue here.³⁴ Apart from these troublesome cases, I believe that only one qualification to this principle should be recognised: if

²⁶ e.g. *Fortescue v. Coake*, Godb. 193, 78 E.R. 117 (Com. Pleas, 1612); *Anon.*, Godb. 326, 78 E.R. 192 (K.B. 1623); *Rushworth v. Countess de Pembroke & Currier*, (1668) Hardres 472, 145 E.R. 553. Note Gilbert's comment on *Rushworth* in his *Treatise on Evidence* (1760 ed.), at 45: “A Deposition can't be given in Evidence against any Person that was not Party to the Suit, and the Reason is, because he had not Liberty to cross-examine the Witnesses, and 'tis against natural Justice that a Man should be concluded in a Cause to which he never was a Party.”

This law developed more rapidly and systematically in civil cases, in part because of the presence of counsel there and in part because of the use, discussed in the text, in criminal cases of examinations taken before magistrates.

²⁷ *R. v. Paine*, (1696) 1 Salk. 281, 91 E.R. 246.

²⁸ *R. v. Forbes*, (1814) Holt 599, 171 E.R. 354; Stat. 11 & 12 Vict. c. 42. s.17 (1848).

²⁹ Note, for example, the trial of the Duke of Buckingham in 1521, recounted by Shakespeare in *King Henry VIII*, II:1, on the basis of contemporary sources; *R. v. Rice ap Griffith* (1531), in 1 J. H. Baker, ed., *The Reports of Sir John Spelman*, 93 *Publications of the Selden Society* (1976), *Corone*, pl. 12, p.47, at 48; *Seymour's Case*, (1549) 1 How.St.Tr. 483, 492; *Duke of Somerset's Trial*, (1551) 1 How.St.Tr. 515, 517, 520; *Raleigh's Trial*, (1603) 2 How.St.Tr. at 15, 18, 19, 23.

³⁰ See, e.g. Stats. 5 & 6 Edw. 6, ch. 11, s.9; 1 & 2 Phil. & M., ch. 10, s.11; 1 Eliz. 1, ch. 5, s.10; 13 Eliz. 1, ch. 1, s.9.

³¹ See, e.g. *Trial of John Lilburne*, (1649) 4 How.St.Tr. at 1329.

³² e.g., *Massachusetts Const.*, pt. I, art. XII (1780), Richard L. Perry, *Sources of Our Liberties* (1955), at 376 (right of accused “to meet the witnesses against him face to face”).

³³ See, e.g. *Maryland v. Craig*, (1990) 497 U.S. 836.

³⁴ Factors distinguishing these cases from that of the ordinary adult witness include: (1) the higher possibility of trauma of the child or disabled witness; (2) the higher probability that the child or disabled witness will be psychologically unable to testify under ordinary procedures, especially in the presence of the defendant; (3) the virtual worthlessness, in many cases, of the opportunity for cross-examining such witnesses; and (4) the lack of understanding and independence on the part of such a witness, making compulsion on any morally tolerable terms impractical.

the witness's unavailability or inability to give testimony under satisfactory conditions is attributable to the wrongdoing of the accused, then the accused should be deemed to have forfeited his objection to testimony not given under those conditions.³⁵ I do not believe that this qualification should be extended to the situation in which the witness is afraid to testify but the fear cannot be attributed to wrongdoing of the accused; in light of the problems of proof that this extension avoids, however, the temptation to adopt it, as England has done,³⁶ is easily enough understood.

Note that in this analysis I have not referred to hearsay. And it is notable that the recent European cases, without suggesting anything remotely resembling the common law of hearsay—and with little or no attention to matters of reliability—nevertheless recognise a fundamental right of the accused under Articles 6(1) and 6(3)(d) of the European Convention on Human Rights to examine an adverse witness.³⁷ With only very limited exceptions, the accused must be able to exercise his opportunity face to face with the witness.³⁸

And yet the right would be virtually nullified if the prosecutor could argue successfully, "Very well. The person who observed the crime has not given

³⁵ This old principle has been recognised in a new rule, Fed. R. Evid. 804(b)(6). I discuss it in "Confrontation and the Definition of Chutzpa" (1997) 31 Israel L. Rev. 506.

³⁶ See Criminal Justice Act 1988, s.23(3).

³⁷ See, e.g. *Van Mechelen v. Netherlands* (1998) 25 E.H.R.R. 647, 673, para. 51:

[A]ll the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3(d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage.

See also, e.g. *Saïdi v. France* (1994) 17 E.H.R.R. 251, 270, para. 44 (September 20, 1993) ("The lack of any confrontation deprived him in certain respects of a fair trial."); *Kostovski v. Netherlands* (1989) 12 E.H.R.R. 434, 448–49, para. 41.

³⁸ In *Doorson v. Netherlands* (1996) 22 E.H.R.R. 330, the court held, over two dissents, that the Convention was not violated when witnesses in a drug case were permitted to testify anonymously, out of the defendant's presence. The Court based this decision on the ground that the witnesses might have feared the defendants; like s.23(3) of the English Criminal Justice Act 1988, the Court did not require that wrongdoing by the defendant be the cause of the fear. The Court emphasised, however, that it would have been preferable had the witnesses testified in the presence of the defendant, and that the procedure used by the Dutch courts in this case should not be used routinely. *ibid.* at 359. It also appears to have been crucial to the decision that counsel was able to question the witnesses at the appellate stage, *ibid.* at 359, and that the finding of guilt was not based "solely or to a decisive extent" on the evidence of these witnesses, *ibid.* at 360. Moreover, *Doorson* was, it appears, severely limited in *Van Mechelen v. Netherlands* (1998) 25 E.H.R.R. 647. There, the defendants and counsel were in a separate room during the examination of key witnesses, though they were able to listen to the examination and ask questions through a sound link. The Court held that "such extreme limitations on the right of the accused to have the evidence against them given in their presence" had not been justified, para. 60, and it distinguished *Doorson* on several grounds, including that the witnesses in *Van Mechelen* were police officers rather than civilians and that their evidence had been of decisive importance.

Perhaps a more disturbing aspect of *Doorson* is the portion of the majority decision declining to hold a violation on the basis of the use of a statement made to the police by a witness who then absconded, and whom the defendant never had a chance to examine. Presumably, though, this decision was based on the fear consideration; it also seems to have been supported by the fact that the witness's statement was, at least in part, cumulative of other evidence: 22 E.H.R.R. at 361.

testimony under adequate conditions. But here is a witness who will testify in court, under all the usual conditions, as to what that person said." To protect the testimonial system, then, it becomes necessary to have a narrow rule not excluding hearsay in general but barring secondhand evidence of *testimonial statements* that were not taken under conditions required for proper testimony.³⁹

The question, of course, then becomes how to define testimonial statements for this purpose—a problem especially tricky given that the definition to serve its purpose must extend to some statements not made under the usual conditions for testimony. The essence, I believe, is this: a statement should be considered testimonial if the effect of admitting evidence of the statement would be that persons in circumstances similar to the declarant could knowingly create evidence for trial.⁴⁰ Put another way, the statement is testimonial if treating it as admissible gives witnesses a method of testifying, whether in or out of court, formally or informally. Roughly speaking, the statement is testimonial if the declarant anticipates that it will be used in the prosecution of crime.⁴¹

I do not pretend that determination of whether a statement is testimonial is always a simple matter. Usually it is reasonably straightforward, though. Some rules of thumb can help. For example, a statement made knowingly to the authorities describing criminal activity is almost always testimonial. A statement made in the course of going about one's ordinary business—whether legitimate or not—is not usually testimonial.

That there are sometimes difficult cases—as of course there are under the current system and as there would be under the Law Commission's system—should not blind us to the great advantages of the system I am proposing. I will now discuss these.

Benefits of this approach

I have argued that: (1) most hearsay should be presumptively admissible; but that (2) testimonial statements, however made, should not be treated as appropriate evidence unless they were made under satisfactory conditions; (3) the right to cross-

³⁹ If the witness makes the statement under unsatisfactory conditions, but then repeats it under satisfactory ones, I do not believe there is a problem. But if, when the witness testifies subject to adverse examination, she fails to reaffirm the substance of the prior substance in any material respect, I believe that the accused's opportunity to examine the witness is seriously undermined, in a way that neither the United States Supreme Court, the Strasbourg Court, nor the Law Commission has fully recognised. Compare my article, "Prior Statements of a Witness: A Nettlestone Corner of the Hearsay Thicket" 1995 S. Ct. Rev. 277, with *California v. Green*, (1970) 399 U.S. 149 and para. 5.21 of the Law Commission Report (discussing *X v. FRG* Appl. 8414/78, (1980) 17 D & R 231).

⁴⁰ The Law Commission notes that the meaning of the word "witness" according to the Strasbourg Court goes beyond its usual meaning to an English lawyer, para. 5.6, but asserts that so far it extends only to "people who have fed information, consciously and voluntarily, into the criminal justice system." Para. 5.7. I think this is essentially the right approach—except that I would delete reference to voluntariness, given that many witnesses testify under some form of pressure.

⁴¹ This approach is similar in some respects to the views espoused by the Government in *White v. Illinois*, (1992) 502 U.S. 346, by Justice Thomas in his separate opinion in that case, and by Prof. Akhil Amar in *The Constitution and Criminal Procedure* (1997) and in "Foreword: Sixth Amendment First Principles" (1995) 84 Geo. L.J. 641, 688–697. I discuss these views at greater length in "First Principles", *supra*.

examine under oath or some equivalent should be regarded as indispensable, and probably so too should the right to have the examination taken in the defendant's presence; and (4) at least putting aside the cases of child and mentally disabled witnesses, these requirements should be subject only to the qualification that the accused forfeits any objection to a testimonial statement if his own wrongdoing accounts for the inability to take the testimony under satisfactory conditions.

This system reflects what I think has always been the most important principle behind the hearsay rule, the principle that continues to restrain common law jurisdictions from doing away with the rule altogether in criminal cases, and the one that is behind the European cases—the principle that if someone testifies against a criminal defendant, the defendant has a right to have the testimony taken under oath, face to face and subject to cross-examination. Any yet, like the European cases, it reflects this principle without depending on the utterly unsatisfactory law of hearsay.

Indeed, this approach helps explain some features of the current system that appear anomalous and provides a reasoned basis for eliminating others. Consider first the underlying rationale for limitations on hearsay. If all that were at stake were truth-determination, there would be good grounds, as Professor Tapper argues,⁴² for integration of the law of hearsay in civil and criminal cases. But the analysis here, like the European cases, suggests that a basic right of the accused is at stake with respect to some prosecution hearsay, and this factor amply justifies a sharp differentiation in treatment. A similar consideration accounts for the persistence of limitations on hearsay in criminal cases not tried by a jury⁴³; the European cases suggest that exclusion is not dependent on the nature of the trier of fact.

Basing a limited exclusion of hearsay on the defendant's right to confront accusing witnesses also sheds light on another anomaly discussed by Professor Tapper, the existence of a "massive exception" favouring the prosecution, for admissions and confessions, and no comparable exception favouring the defence.⁴⁴ The system advocated here is far more receptive than current law to hearsay presented by the defendant. At the same time, it easily explains the core of admissions doctrine: if the statement is the defendant's own, there is no adverse witness to confront. Moreover, the theory also explains receptivity to statements made in furtherance of a conspiracy, a doctrine that the Law Commission made no attempt to justify except as "a pragmatic one", without which it "might be hard to prove a conspiracy".⁴⁵ The explanation is that if a statement was made in furtherance of a conspiracy it was not testimonial, but merely an act in the course of the conspiracy's business.

Consider also the definition of hearsay, a matter addressed at considerable length by the Law Commission.⁴⁶ Particularly pressing, in light of *R. v. Kearley*,⁴⁷ is the problem raised by *Wright v. Doe d Tatham*,⁴⁸ of conduct offered to prove an uncommunicated belief that assertedly motivated the actor. Under the current structure of the law—a basic structure that the Law Commission would not alter—it

⁴² [1997] Crim.L.R. at 774.

⁴³ *ibid.* at 777.

⁴⁴ *ibid.*

⁴⁵ para. 8.131.

⁴⁶ paras 7.01–7.41.

⁴⁷ [1992] 2 A.C. 228, HL.

⁴⁸ 4 Bing. (N.C.) 489, 132 E.R. 877 (H.L. 1838).

is critical whether or not such conduct is categorised as hearsay. But neither alternative is attractive. Evidence of this sort can have great probative value; hence the impetus to admit it. On the other hand, it seems quite odd to hold that conduct is *more* probative of a given proposition if it does not assert that proposition, a factor that may make the conduct far more ambiguous than most hearsay. Under the system presented here, little or nothing would turn on whether the conduct is categorised as hearsay, for there would be no presumptive exclusion of hearsay. And ordinarily the conduct is not testimonial in nature; not only did it not communicate the proposition at issue, but in virtually all cases it occurred before litigation appeared to the actor to be in prospect. Thus, there usually would be no reason to exclude the evidence.

Indeed, more broadly, this system would eliminate the fruitless attempt to sort out reliable evidence from unreliable. The Law Commission's attempt to solve this problem with a residual exception is likely to create the same result as its American model: in some cases inadequacy in admitting probative evidence, in others violation of the accused's right to confront adverse witnesses, and throughout unpredictability in the exercise of discretion.

Similarly, the Law Commission's creation of a broad exception for statements by declarants unavailable at trial⁴⁹ is disquieting. To the extent that this exception would apply to non-testimonial statements, it is unnecessary under the system I am proposing. With respect to testimonial statements—which by definition must have been made in anticipation of litigation—most cases will fall into either of two categories. In some cases, the witness's unavailability is caused by the defendant's wrongdoing, and there the forfeiture principle applies. In others, the prosecution could have taken the witness's testimony under adequate conditions while she was still available, thus preserving it for trial, and the prosecution should be held to account for failure to do so.⁵⁰ The Law Commission's proposal provides for the case in which the proponent of the evidence procures the unavailability of the witness,⁵¹ but it gives the prosecution no incentive to preserve testimony subject to oath and cross-examination. Furthermore, if the prosecutor's hands are clean the proposal allows the Crown to use as a matter of course unsworn police station statements of witnesses who have since become unavailable. And it appears that, so long as a rape counsellor maintains independence from the prosecution, he could take an unsworn videotaped statement from a complainant and advise her that, if she happened to be unavailable at the time of trial, the video would be placed in the hands of the prosecution and could be admissible evidence.

The theory advocated here also suggests that the Lord Chief Justice was correct in criticising a recent Home Office proposal to bar unrepresented defendants from personally cross-examining the complainant in cases of rape and serious sexual assault, and to create a general discretionary prohibition in the case of other crimes

⁴⁹ paras 8.03–8.47; draft bill, ss.3, 5.

⁵⁰ See, e.g. *Forbes, supra*. In the narrow case in which: (1) a witness made a testimonial statement favourable to the prosecution but not under proper conditions; (2) the defendant has not acted improperly; and (3) the prosecution did not have a reasonable opportunity to preserve the witness's testimony before trial under suitable conditions, I believe that the prosecution, the proponent of the evidence, rather than the defendant, the beneficiary of the confrontation right, should bear the risk that: (4) the witness will be unavailable to testify at trial.

⁵¹ para. 8.30; draft bill, s.9.

and witnesses.⁵² One may well doubt the motives of a defendant who chooses to examine an accusing witness personally, rather than to rely on the skill of a trained advocate. But personal examination—truly face-to-face—is, after all, the most direct as well as traditional method of confrontation. The witness's legitimate interests should be guarded not by denying a longstanding right of the defendant but by preparing the witness, supporting her, protecting her against violence, intimidation, and abusive examination, and if need be providing representation for her. The process may still be extremely difficult for her—as it often is even when examination is conducted by counsel. A necessary consequence not only of the confrontation right but of the very notion of a trial is that giving testimony, especially against a criminal defendant, is indeed a trying experience, testing, rigorous, and adversarial. Gratuitous trauma should be prevented, of course. But we cannot eliminate trauma from the process without gutting the system.

At least these proposals by the Home Office do not appear to violate the demands of the European cases. The same cannot be said for the approach of the Law Commission. Indeed, the Law Commission appears to acknowledge some difficulty in reconciling its approach with those demands.⁵³ Rather than trying to limit the effectiveness of those cases, the Law Commission, in my butt-innish trans-Atlantic view, should have embraced them. They represent an international victory for a right long championed by the common law, though too often hidden in the bog of hearsay law. And, given the prospective incorporation of the European Convention, those cases indicate one more crucial advantage of the system I propose: it is legally valid!

⁵² Home Office, Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, *Speaking up for Justice* (June 1998). The comments of the Lord Chief Justice are reported in *The Times*, July 29, 1998, p.1.

⁵³ paras 5.13–5.20.