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## JACK WEINSTEIN AND THE MISSING PIECES OF THE HEARSAY PUZZLE

*Richard D. Friedman\**

### INTRODUCTION

For the first three quarters of the twentieth century, the Wigmore treatise<sup>1</sup> was the dominant force in organizing, setting out, and explaining the American law of evidence. Since then, the first two of those roles have been taken over in large part by the Federal Rules of Evidence (Rules). And the third has been performed most notably by the Weinstein treatise.<sup>2</sup> Judge Jack Weinstein was present at the creation of the Rules and before. Though he first made his name in Civil Procedure, while still a young man he joined two of the stalwarts of evidence law, Edmund Morgan and John Maguire, to become the junior—that is, the laboring—author on the oldest textbook in the field.<sup>3</sup> He was a natural selection to be a member of the Advisory Committee that drafted the Rules. The Rules were finally enacted in 1975,<sup>4</sup> and though handling a full docket on the bench and teaching a full load at Columbia Law School, he was ready: He published his monumental treatise with Margaret Berger the same year.<sup>5</sup>

In this Article, I will take another look, more than half a century later, at Judge Weinstein's most important early contribution to the law of hearsay. In an article published in 1961, *Probative Force of Hearsay*, he argued for a more discretionary approach to hearsay, functionally oriented and procedurally sensitive.<sup>6</sup> In early drafts, the

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1. JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES (1904).

2. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE (1975).

3. EDMUND M. MORGAN, JOHN M. MAGUIRE & JACK B. WEINSTEIN, CASES AND MATERIALS ON EVIDENCE (4th ed. 1957).

4. Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

5. WEINSTEIN & BERGER, *supra* note 2.

6. Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338-42 (1961).

Advisory Committee appeared willing to give the trial judge broad discretion over the admissibility of hearsay, much as Judge Weinstein had advocated. But public commentary and congressional resistance resulted in rules that took a more cautious approach: a definition of hearsay followed by a list of exemptions.<sup>7</sup> It was a long list, to be sure, and one that included a matched pair of open-ended residual exceptions. But this approach maintained the essential structure of traditional hearsay law and ensured that much of the work in applying that law would consist of determining the bounds of the enumerated exemptions.

I suggest in this Article that the principal factor that prevented the Rules from granting more judicial discretion over hearsay was implicit recognition that the admission of *some* hearsay violates fundamental norms of our adjudicative system, irrespective of whether the evidence appears reliable to a court. And, I argue, the principal norm that should render some hearsay inadmissible is the one articulated, nearly three decades after enactment of the Rules, in *Crawford v. Washington*<sup>8</sup>: Witnesses in our system are expected to testify face-to-face with the adverse party, under oath and subject to cross-examination and, if reasonably possible, at trial.<sup>9</sup> That, we now better understand, is a constitutional command with respect to prosecution witnesses, and some constraint on hearsay is necessary to enforce it. If a person gives testimony in another way—say, by talking to a police officer in the station house or in her living room—that testimony cannot be relayed to court, either by another witness testifying to what she said, or by a writing or other form of recording presented at trial.<sup>10</sup> And though this principle does not have as great constitutional force when the evidence is not offered against an accused, it still is at least, for better or worse, the expected practice of our system.<sup>11</sup> We do not expect witnesses to provide trial testimony by, say, filling out an affidavit, recording a video presentation, or asking a friend to repeat a statement in court. But, I will argue, if we protect this principle, at least in criminal cases, then we really do not need anything resembling the current law of hearsay. I will suggest possibilities as to how the principle might be applied, albeit with less rigor, with respect to evidence offered by an accused or in a civil case. In any event, if we

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7. Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, Rules 801, 803, 804, 88 Stat. 1926, 1938-43 (1975).

8. 541 U.S. 36 (2004).

9. *Id.* at 68-69; *see also* FED. R. EVID. 603.

10. *Crawford*, 541 U.S. at 68-69.

11. And it still has considerable force in such other contexts. *See* discussion *infra* note Part VI.

protect the principle adequately, we can adopt a discretionary approach—indeed, even one more open-textured than the one for which Judge Weinstein advocated. We can even do without the presumptive exclusion of hearsay, folding the hearsay concern into the trial judge’s overall discretionary power over evidence. I will also suggest that introducing a simple procedural feature will facilitate the change.

### I. THE PROBATIVE FORCE OF HEARSAY

Let’s look at the celebrated article, *Probative Force of Hearsay*,<sup>12</sup> that Professor Weinstein, as he then was, published in 1961. I will begin by noting a limitation of scope that he makes only in a footnote at the very end of the article. He does not address “[t]he extent to which hearsay is forbidden by constitutional rules on confrontation.”<sup>13</sup> Focusing on civil cases, he argues for turning the hearsay rule “from a rule of exclusion,” marked by an “excessively detailed” list of exceptions, to a discretionary rule “hedged with protections designed to balance more adequately the need for hearsay and its possible abuse.”<sup>14</sup>

His first step is to analyze three factors cutting against free admissibility of hearsay—the loss, respectively, of (1) the trier’s ability to observe the declarant’s demeanor; (2) trial convenience; and (3) the benefits of cross-examination.<sup>15</sup> He accords weight to these, so that free admissibility of hearsay is not optimal; indeed, he recognizes that hearsay dangers may be present in out-of-court conduct that reflects the actor’s belief in a material proposition but does not assert it.<sup>16</sup> But neither do these factors “require the absolute exclusionary hearsay rule,” which would be a serious impediment to the search for truth, for each may be considered by the court in determining whether to admit the evidence and by the trier of fact in determining how much probative force to accord it.<sup>17</sup> Rather, he suggests, they support only a rule of preference, for there is no reason to suppose that the trier of fact will not discount hearsay, and if the trier of fact is a jury, the court can encourage such discounting by commenting on the evidence.<sup>18</sup>

While Judge Weinstein rejects the poles of free admissibility of hearsay and absolute exclusion, he does not find much more appealing the prevailing approach, associated with Professor Wigmore, of a long

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12. Weinstein, *supra* note 6.

13. *Id.* at 355 n.159.

14. *Id.* at 355.

15. *Id.* at 334–36.

16. *Id.* at 331, 334.

17. *Id.* at 334.

18. Weinstein, *supra* note 6, at 335–36.

enumeration of class exceptions. The doctrine, he points out (though he claims no originality for the point),<sup>19</sup> does a poor job of mapping—that is, of sorting out hearsay that is worthwhile from that which is not.

Ultimately, then, he favors a system in which the trial court's discretionary control over hearsay is paramount, and in which procedural protections play a prominent role. In this system, when notice is practical, it should be required or at least encouraged, so that the court might make an advance ruling and the opponent can better secure rebuttal evidence; the trial court should exercise its power to comment on the evidence and also, in appropriate cases, to keep a case away from the jury; and appellate courts should be more aggressive about controlling trial-level findings that are based on hearsay. Judge Weinstein recognizes that most hearsay would likely be admitted under such an approach, but that is not a bad thing. Already, the rule against hearsay is “a small and lonely island” in a “sea of admitted hearsay,” and civil adjudications in which hearsay has played a prominent role do not seem to have suffered.<sup>20</sup>

Thus, there were four cornerstones to Judge Weinstein's approach to hearsay as indicated in *Probative Force of Hearsay*: First, and perhaps most fundamentally, he believed that trial judges should have greater discretion in determining the admissibility of hearsay than they previously had.<sup>21</sup> It is, I suppose, utterly unsurprising that Jack Weinstein advocated greater discretion for the trial judge—but bear in mind that he wrote this article more than five years before he took the bench and became a judge who relished the opportunity to exercise discretion. Second, he believed that on the whole, the law should be more receptive to hearsay than it previously had been.<sup>22</sup> Third, he believed that procedural considerations, including notice, should play a significant role in hearsay law.<sup>23</sup> And finally, he recognized that because of the confrontation right, some hearsay may be inadmissible against a criminal defendant even though it would be admissible in a civil case.<sup>24</sup> Though this point was not at the center of *Probative Force of Hearsay*, it was the essence of the very first comment he made

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19. *Id.* at 339, 344.

20. *Id.* at 346–47.

21. *Id.* at 338–39, 353.

22. *Id.* at 338, 353, 354.

23. *Id.* at 340–42.

24. Weinstein, *supra* note 6, at 340 n.51, 355 n.159.

when the Advisory Committee took up the Reporter's first draft of the rule against hearsay.<sup>25</sup>

## II. THE FEDERAL RULES: AMBIVALENCE ABOUT DISCRETION

The Reporter for the Advisory Committee on Evidence (Reporter), Professor Edward W. Cleary, circulated two drafts of each rule to the Advisory Committee, and then in March 1969, the Committee published for comment a Preliminary Draft of the whole set. If one were to look just at these initial drafts, one would conclude that Judge Weinstein's approach held considerable sway, at least with respect to the elements of judicial discretion and overall receptivity to hearsay. In these drafts, Rules 8-01 and 8-02, like their modern counterparts, established, respectively, the definition of hearsay—a narrower one than under the prior conception<sup>26</sup>—and its presumptive exclusion. But Rules 8-03 and 8-04 did not state lists of exceptions as such; instead, they stated general standards for overcoming the presumptive exclusion of hearsay, and then provided nonexhaustive lists of illustrations of statements that fit those standards, drawing on traditional exceptions but tending to state them expansively. Interestingly, it appears that the Advisory Committee adopted this basic approach with no opposition and with little or no angst. But as the Committee deliberated, it tightened up somewhat on the standard governing admissibility of a hearsay statement by an unavailable declarant; it is perhaps ironic, or perhaps an indication that the first draft was rather daring, that the suggestions for greater stringency were made by Judge Weinstein.<sup>27</sup>

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25. Minutes of the Advisory Comm. on Rules of Evidence 33 (Oct. 9–11, 1967), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf>. As the Committee began its deliberations over the hearsay rule, Albert Jenner, the chairman, asked “the professors” for their opinion. *Id.* Judge Weinstein—still, and always, a professor, though by then a judge—offered the first comment. *Id.* The minutes record: “Judge Weinstein felt that there should be more flexibility in the civil cases than in the criminal ones, and he thought that the reporter’s approach to the problem was admirable.” *Id.*

26. Judge Weinstein used the term hearsay in accordance with that prior conception “to encompass any action or declaration involving a hearsay danger,” which “exists when a trier of fact is asked to conclude that a proposition about a matter of fact is true because an extra-judicial declarant stated it was the case or did an act, verbal or otherwise, from which it can be inferred that he believed it to be true.” Weinstein, *supra* note 6, at 331 (footnote omitted). Though ultimately he regarded adoption of a narrower definition as “probably sound,” he cautioned that even for evidence falling outside such a definition, “the argument of hearsay danger should be made to the trier in helping him evaluate evidence which requires reliance on the credibility of an extra-judicial declarant.” *Id.* at 353–54.

27. Minutes of the Advisory Comm. on Rules of Evidence 22 (Mar. 7–9, 1968) [hereinafter Mar. 1968 Meeting Minutes], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV03-1968-min.pdf>. Applying “regardless of whether the declarant is unavailable

The Reporter was not happy about the change, and he questioned it in a later memo.<sup>28</sup> Rule 8-03, he explained, operated on the view that if the declarant is available as a witness, then admissibility of the hearsay is justifiable only if the quality of the hearsay evidence is “at least as good as would be forthcoming if [the] declarant took the stand and testified.”<sup>29</sup> But Rule 8-04 stated a “less exacting” standard, because if the declarant is unavailable, then “admittedly inferior hearsay evidence may be used” because “the choice is between that and none.”<sup>30</sup> When the Committee reconsidered the matter, it decided instead, after considerable debate, to bolster the latter Rule’s requirement of “assurances of accuracy” by adding the modifier “strong.”<sup>31</sup> Use of that word was first suggested by Judge Weinstein.<sup>32</sup>

Even while submitting that daring first draft, the Reporter included commentary raising serious reservations about according too much discretion to the trial judge.<sup>33</sup> The Committee’s Note to the Preliminary Draft of Article VIII<sup>34</sup> also had a more restrictive feel than the draft itself. Citing Judge Weinstein’s article, the Note acknowledged that “[a]bandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards, has been impressively advocated.”<sup>35</sup> But then the Committee said that it had “rejected this approach,” and indeed

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as a witness,” the Reporter’s first draft of Rule 8-03 provided that the hearsay rule would not render a statement inadmissible if “the nature of the statement and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness.” Memorandum No. 19 from Edward W. Cleary, Reporter of the Advisory Comm. on Evidence, Preliminary Note on Hearsay: The Components of Credibility, for the Dec. 1967 meeting of the Advisory Comm. on Rules of Evidence 113 [hereinafter Reporter’s Memorandum No. 19] (on file with author), available at <https://www.law.umich.edu/facultyhome/richardfriedman/Documents/19.%20Art%208%201st%20draft.pdf>. Applying only when “the declarant is unavailable as a witness,” the draft of Rule 8-04(a) articulated a somewhat different standard, taking the statement outside the hearsay exclusion if “the special circumstances under which it was made offer assurances of reasonable accuracy.” *Id.* at 260. Judge Weinstein moved to delete the word “reasonable” from Rule 8-04(a), thus bringing the two rules closer together, and the motion carried by a 5–4 vote, with two members abstaining and the others not present. Mar. 1968 Meeting Minutes, *supra*, at 22.

28. Reporter’s Memorandum No. 19, *supra* note 27, at 40.

29. *Id.* at 40–41.

30. *Id.* at 41.

31. Minutes of the Advisory Comm. on Rules of Evidence 76–78 (May 23–25, 1968), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV05-1968-min.pdf>.

32. *Id.* at 77.

33. Reporter’s Memorandum No. 19, *supra* note 27, at 15–19.

34. Comm. on the Rules of Practice & Procedure of the Judicial Conf. of the U.S., *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 324 (1969) [hereinafter *Preliminary Draft*].

35. *Id.* at 327 (citing Weinstein, *supra* note 6).

the reasons it cited amounted to a dismissal of three of the cornerstones of Judge Weinstein's approach.<sup>36</sup>

First, presumably because of that approach's notice element, the Committee believed that the approach would "enhanc[e] the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures."<sup>37</sup>

Second, the Committee expressed disapproval of an approach "requiring substantially different rules for civil and criminal cases."<sup>38</sup> Of course, the Committee recognized that the confrontation right might require exclusion of some statements when offered against a criminal defendant even though they would be admissible in other contexts.<sup>39</sup> For the most part, though not completely,<sup>40</sup> it chose not to take account of that in crafting the hearsay rules, instead leaving it to the ordinary judicial process to define the bounds of the confrontation right.

Third, and most fundamentally, the Committee believed that Judge Weinstein's approach "involv[ed] too great a measure of judicial discretion, minimizing the predictability of rulings."<sup>41</sup> This concern about discretion is perhaps surprising given the rule actually proposed by the Committee, which it described as "a general rule excluding hearsay, with two broadly phrased exceptions"—one "prescrib[ing] the conditions under which hearsay is admissible without regard to unavailability of the declarant" and the other doing the same for unavailable declarants.<sup>42</sup> One might well wonder why the Committee thought its draft rules would confine judicial discretion and yield predictability more than would the Weinstein approach. The two exceptions created by the drafts of Rules 8-03 and 8-04 were extremely open-textured, and the roles that the traditional exceptions played under them and under Judge Weinstein's conception were quite similar.<sup>43</sup>

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36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.* at 329–30.

40. Ultimately, the Committee did add one clause to the exception governing factual findings resulting from authorized investigations, limiting it to "civil cases and against the government in criminal cases," *Preliminary Draft, supra* note 34 at 347, and the House, in an amendment adopted on the floor, provided that the related exception for matters observed pursuant to duty of law did not include "in criminal cases matters observed by police officers and other law enforcement personnel." 120 CONG. REC. 2387–89 (1974).

41. *Preliminary Draft, supra* note 34, at 327.

42. *Id.* at 327–28.

43. The Advisory Committee noted: "The traditional hearsay exceptions are drawn upon to illustrate the applicability of the two exceptions." *Id.* at 328. And Judge Weinstein wrote,



Perhaps the Committee's stance against excessive judicial discretion with respect to hearsay was in part an attempt to fend off criticism that *it* proposed to give courts too much discretion. If so, the tactic did not work; the criticism appears to have been so intense that the Committee, in its March 1971 Revised Draft, substantially altered the structure of the two rules (now designated by unhyphenated numbers 803 and 804).<sup>44</sup> The Committee adopted an approach that it described as being "that of the common law."<sup>45</sup> Now, instead of stating generally worded standards and providing a nonexclusive list of illustrations drawn from the traditional exceptions, these rules each created a list of exceptions. The impact of the change was mitigated by including a residual exception in each list, providing in broad simple terms that the rule against hearsay would not require exclusion of "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."<sup>46</sup> The Committee explained that the enumerated exceptions were "designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay," but that the two residual exceptions were appropriate because "[i]t would . . . be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system."<sup>47</sup> And the Committee strove to set out a middle course with respect to the matter of judicial discretion:

[The residual exceptions] do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area . . . .<sup>48</sup>

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The circumstantial proof of credibility which gave rise to the class exception may continue to be utilized in the particular case in assessing probative force. . . . [H]earsay coming within one of the traditional exceptions may rightly be given greater weight by a trier than testimony on the witness stand.

Weinstein, *supra* note 6, at 339.

44. Compare *Preliminary Draft*, *supra* note 34 at 345-86, with Comm. on Rules of Practice and Procedure of the Judicial Conf. of the U.S., *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 419-45 (1971) [hereinafter *Revised Draft*].

45. *Revised Draft*, *supra* note 44 at 411.

46. *Id.* at 422, 439.

47. *Id.* at 437.

48. *Id.*

But Congress, it turned out, was unwilling to accept even this degree of discretion with respect to hearsay.<sup>49</sup> The House Subcommittee on Criminal Justice, to which the Rules were referred, deleted the residual exceptions “as injecting too much uncertainty into the law of evidence.”<sup>50</sup> If there was need for additional hearsay exceptions, the Subcommittee said, they should be created “by amendments to these Rules, not on a case-by-case basis.”<sup>51</sup> The full House Committee on the Judiciary,<sup>52</sup> and then the House itself, accepted this decision.

The Senate moved partway back in the direction of the Advisory Committee. The Judiciary Committee expressed agreement with the House “that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.”<sup>53</sup> But it also believed that there were certain “exceptional circumstances” in which admission of statements not fitting within the enumerated exceptions would be justified.<sup>54</sup> Accordingly, it restored a form of the residual exceptions, but with additional qualifications and the expressed intention that the exceptions “be used very rarely, and only in exceptional circumstances.”<sup>55</sup>

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49. These two rules were not materially changed between the Revised Draft and the version of the Rules that the Supreme Court promulgated in November 1972. *Compare id.* at 419–22, 438–39, with Supreme Court of the United States, *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 300–03, 320–22 (1972). Had Congress not intervened, that version would have become effective on July 1, 1973. *Id.* at 184. But Congress passed a statute providing that the Rules would not become effective unless affirmatively enacted into law. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

50. *Proposed Rules of Evidence: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 30 (1973), reprinted in *COMM. ON THE JUDICIARY, RULES OF EVIDENCE (SUPPLEMENT)* 174 (Comm. Print 1973).

51. *Id.*

52. H.R. REP. NO. 93-650, at 2, 5–6 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7076, 7078–79.

53. S. REP. NO. 93-1277, at 19–20 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7066.

54. *Id.*

55. *Id.* The Committee changed the requirement of “comparable” guarantees of trustworthiness to one of “equivalent” guarantees—perhaps a marginal tightening—and added requirements that the court determine that

- (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

H.R. REP. NO. 93-1597, at 3 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 7098, 7106.

Of these, it appears that only (ii) could genuinely constrain discretion in any marked degree. If a statement failed (i), it presumably would be inadmissible even without considering the hearsay issue, and (iii) patently invites a wide-open exercise of discretion. *See id.*

The full Senate stood by the Judiciary Committee, so the matter had to be resolved in conference. And the conference committee further tightened up on the residual exceptions, adding a requirement of pre-trial notice<sup>56</sup> and thus adopting, in that particular context, a prong of the Weinstein approach that the Advisory Committee had rejected at the outset. The conference version was enacted without further change.<sup>57</sup>

Ultimately, then, the Rules took a cautious approach to hearsay: Article VIII was more permissive than the common law, but only mildly so: it gave trial judges some discretion to admit hearsay that did not fit within the traditional exemptions, but in the hope that this discretion would be exercised rarely;<sup>58</sup> it incorporated a notice requirement, but only in the residual exceptions; and it made virtually no attempt to protect, or articulate, the confrontation right, or to take account of different considerations applicable in civil and in criminal cases. Clearly, the drafters of the Rules were torn by desires on the one hand not to make the hearsay rule overly rigid and restrictive, and on the other by a sense that in some cases, admission of hearsay would be a very bad result that trial judges acting without constraint might reach.

### III. THE CONFRONTATION PRINCIPLE

I believe that both concerns that led to the Rules' ambivalent attitude towards discretion were justified. At least without the safety valve of the residual exception,<sup>59</sup> hearsay law is overly rigid and restrictive. In some cases, it imposes considerable costs on litigants and the judicial system, requiring the production of witnesses whose live testimony has little marginal value. The awkward and complex system of enumerated exceptions cannot hope to mark out all the hearsay that ought to be admitted. And one reason for this, as indicated by Judge Weinstein in *Probative Force of Hearsay*, in 1961, is that there is no reason to suppose that triers of fact are so overwhelmed by hearsay

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56. *Id.* at 3–4, reprinted in 1974 U.S.C.C.A.N. 7098, 7106.

57. Compare *id.*, with Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, Rules 803, 804, 88 Stat. 1926, 1938–43 (1975).

58. But Judge Weinstein, for one, has not been reticent in exercising his discretion. I recall a conversation long ago—sometime in the 1980s, I am virtually certain—in which he told me, in essence, that if he thinks hearsay is good evidence he lets it in. I asked if he cited the residual exceptions. No, he said, he just lets it in, adding, “If they reverse me, they reverse me.” He has been consistent; I had a very similar conversation with him on the evening of April 23, 2014, the night before the Symposium of which this Article is a part.

59. I will now refer to the exception in the singular, because Rules 803(24) and 804(b)(5) were transferred to a new Rule 807 in 1997.

that, as a general matter, it is better for the truth-determination process that the hearsay be excluded than that it be admitted.<sup>60</sup>

On the other hand, the residual exception, among others, gave trial courts sufficient leeway to achieve some very bad results.<sup>61</sup> The drafters may have hoped that such results might be prevented in criminal cases by development of Confrontation Clause doctrine independent of hearsay law, but that did not happen in the decades immediately following the adoption of the Rules. On the contrary, the Supreme Court read the Confrontation Clause to be little more than a constitutionalization of the traditional rule against hearsay.<sup>62</sup> Adoption of the Rules by most of the states may well have reinforced this tendency; by creating something close to a national law of hearsay, it yielded a readily discernable body of doctrine that might have appeared to express longstanding and universally accepted principles that underlay the Confrontation Clause.

But a decade ago, in *Crawford v. Washington*,<sup>63</sup> the Supreme Court dramatically transformed the law governing the Confrontation Clause, and the change opened up an opportunity to thoroughly revise the law of hearsay. *Crawford* establishes confrontation doctrine that stands independent of hearsay law: The Confrontation Clause, *Crawford* makes clear, is a procedural protection governing how prosecution witnesses give testimony, requiring that they do so not only under oath but face-to-face with the accused, subject to cross-examination,

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60. “There is little reason to believe that jurors—a much more highly educated and sophisticated group than their English seventeenth and eighteenth century predecessors—are not . . . capable of assessing hearsay’s force without giving it undue weight.” Weinstein, *supra* note 6, at 353 (footnote omitted). Empirical studies bear out this conclusion. I explored the point in *The Mold That Shapes Hearsay Law*, 66 FLA. L. REV. 433, 446 (2014).

61. Examples of cases in which the courts used the residual exceptions to secure admission of statements that were clearly testimonial in nature include *United States v. Papajohn*, 212 F.3d 1112, 1118–20 (8th Cir. 2000); *United States v. McHan*, 101 F.3d 1027, 1036 (4th Cir. 1996); and *United States v. West*, 574 F.2d 1131, 1134–36 (4th Cir. 1978). In other cases, courts stretched enumerated exceptions to cover the statements in question. For example, in *Hammon v. Indiana* (the companion case to *Davis v. Washington*, 547 U.S. 813 (2006)), the trial court used the exception for statements of present sense impressions to admit an affidavit making an accusation of domestic violence, and treated an objection to it as trivial. Joint Appendix to Petition for Writ of Certiorari, *Hammon v. Indiana*, 546 U.S. 976 (2005) (No. 05-5705), 2005 WL 3617526, at \*19–20; see also Friedman, *supra* note 60, at 442–43. I represented Hammon in the Supreme Court.

62. Under *Ohio v. Roberts*, a statement characterized as hearsay presumptively violated the Confrontation Clause, but the problem could be relieved if the declarant was unavailable and the statement was deemed reliable, which could be established by showing that it fell within a “firmly rooted” hearsay exception. 448 U.S. 56, 66 (1980). Subsequently, though, the Court cut back on the unavailability requirement, see *United States v. Inadi*, 475 U.S. 387, 400 (1986), and the Court never applied it in a case in which the Federal Rules of Evidence would not have required unavailability for admission of a hearsay statement.

63. 541 U.S. 36 (2004).

and, if reasonably possible, at trial.<sup>64</sup> If an out-of-court statement is testimonial in nature and not given under the prescribed conditions, then admitting it would, in effect, allow a witness to testify against the accused in an improper manner. The resulting Confrontation Clause problem will not be relieved by demonstrating that ordinary hearsay law does not pose an obstacle to admission,<sup>65</sup> or that the statement appears to be highly reliable. But if a hearsay statement is *not* testimonial in nature, then the Confrontation Clause simply has no bearing on admissibility.<sup>66</sup>

The basic principle reflected by *Crawford*—the idea that for testimony to be acceptable, witnesses must testify face-to-face with the adverse party—is very old; it long predates the hearsay rule, which did not emerge in anything close to its modern form until around 1800, and it has clear roots in some ancient legal systems.<sup>67</sup> Now that *Crawford* has focused our attention on this principle, a simple thought experiment will be useful. Think of a situation in which admission of hearsay seems clearly unacceptable—not merely unwarranted on balance, but contrary to some basic conception of our adjudicative system. I believe it will almost certainly be a case in which admitting the statement would, in effect, allow a witness to testify without confronting the adverse party. The statement by Lord Cobham while imprisoned in the Tower of London, accusing Walter Raleigh of treason, is one such example; the statement by Sylvia Crawford, made in a formal setting in a station house to police officers investigating a knife fight that occurred earlier in the day, is another; the statement by Amy Hammon, accusing her husband of assault, made to a police officer in her living room while another officer held the husband at bay, is a third.

If a testimonial statement is offered against an accused, enunciation of a clear and hard-edged doctrine<sup>68</sup> is necessary to prevent cases of

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64. *Id.* at 68.

65. This should have been apparent from *Crawford*. See *id.* at 60–61. To the extent it was not, *Melendez-Diaz v. Massachusetts* made it quite clear. 557 U.S. 305, 324 (2009).

66. *Davis*, 547 U.S. at 823–26; see also *Whorton v. Bockting*, 549 U.S. 406, 420 (2007).

67. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1201–09 (2002).

68. The principle must be qualified, however, by recognition that the accused may forfeit the right by at least some misconduct that renders the witness unavailable. FED. R. EVID. 804(b)(6); see also *Giles v. California*, 554 U.S. 353, 367–68 (2008). I believe that the Supreme Court has given an unfortunately narrow scope to this forfeiture doctrine. See Richard D. Friedman, *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733 (2009).

this sort, and for two reasons.<sup>69</sup> First, it is in fact a clear and hard-edged principle, a fundamental procedural matter, that makes admissibility of these statements unacceptable. We do not say that an accused has no right to counsel or to trial by a jury because he is obviously guilty, or because in the particular case some other procedure would be preferable. Similarly, we should not say that an accused has no right to be confronted with an adverse witness because the witness is clearly telling the truth, or because in the particular case the determination of the truth would be advanced by allowing the witness to testify without confronting the accused. Second, in an individual case, a court-given discretion will very often tend to give primacy to the probative value of the statement in the particular case before it, and less attention to underlying systemic principles.<sup>70</sup>

#### IV. NONTTESTIMONIAL HEARSAY: THE NEED FOR DISCRETION AND FLEXIBILITY

I have defended the need for a hard-edged exclusionary rule barring the admissibility, at least against an accused, of testimonial statements when the opponent has not had an opportunity for confrontation. But if a hearsay statement is *not* testimonial in nature, then I contend that there is no need for such a rule. This is not to say that the statement ought certainly be admitted, but only that it is best to leave the matter to the discretion of the trial judge.

If the statement is not testimonial, then it appears that, so far as hearsay considerations are concerned, no matter of principle is at stake. Nor is hearsay, by nature, likely to bias the trier of fact against one party, the way that prior bad acts or criminal convictions are likely to do. The only real question is whether the benefits of admitting the statement outweigh the costs. Cost-benefit evidentiary determinations of this sort are generally committed to the discretion of the trial judge,<sup>71</sup> and there is no reason why the same should not be true when one of the factors weighing against admissibility is that the evidence is hearsay.<sup>72</sup>

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69. I will postpone, until near the end of this Article, discussion of whether a similar rule is appropriate when a testimonial statement is offered against a party other than an accused. *See infra* Part VI.

70. *Crawford* lists numerous cases of testimonial statements, the admission of which courts had approved under the looser standard that prevailed beforehand. 541 U.S. at 63–65.

71. *See* FED. R. EVID. 403.

72. I discuss this matter further *infra* note 77.

*A. Unavailable Declarant*

Consider first the case in which the declarant is unavailable and could not have reasonably been made available for a deposition. Thus, if the hearsay is inadmissible, the trier of fact will be denied any evidence of the declarant's observations. The question as to admissibility then becomes, rather simply, whether the hearsay is favorable on balance to the truth-determination process. We must assume, hypothetically, that live testimony of the declarant would be more probative than prejudicial—for if it were not, then presumably neither would be evidence of the declarant's out-of-court statement, and such evidence could be excluded on that basis without reaching the hearsay question. And, given that live testimony would be more probative than prejudicial, there is no reason to suppose that the declarant's out-of-court statement asserting the same proposition would not be as well. As Judge Weinstein pointed out long ago, jurors are not so weak-headed that they cannot take into account the deficits of hearsay, especially when those deficits are pointed out by the trial judge.<sup>73</sup> Empirical studies support the proposition that jurors do not give hearsay excess weight—and certainly that they do not do so by so much that closing their eyes and ears to the evidence is preferable to allowing them to consider it for whatever it is worth.<sup>74</sup> Usually, then, hearsay considerations should not render inadmissible a nontestimonial hearsay statement made by an unavailable declarant. And given this, it seems clear that there is no reason to have a presumptive rule of exclusion that denies the trial judge discretion to admit the hearsay.

*B. Available Declarant*

If the declarant is available, the situation is more complex. Perhaps truth determination would be facilitated by bringing the declarant in as a live witness. But is it worth the cost and difficulty in a given case? That, I believe, is a complex question that depends on the play of several factors, which I will outline below—and it is sufficiently complex that attempts to prescribe results for categories of statements are bound to be less satisfactory than according broad discretion to the trial judge.

I believe that a court has the best chance of reaching optimal decisions on admissibility in this context—nontestimonial hearsay made

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73. Weinstein, *supra* note 6, at 353.

74. See Friedman, *supra* note 60, at 446; see also Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655 (1992).

by an available declarant—if it uses a simple procedural feature and asks several basic questions. The procedural feature is this: If a proponent wishes to offer hearsay, but the opponent timely produces the declarant willing and able to testify, then the court should give the proponent the choice of putting the declarant on the stand as its own witness or forgoing use of the hearsay. The advantage of this procedure is easy to see. An opponent wishing to examine a hearsay declarant will usually not produce the declarant as his own witness under current practice; doing so entails several costs, the principal one being that it will raise juror expectations and thus backfire if the opponent does not gain some significant advantage from the examination. And for this reason, use of this procedure makes admission of the hearsay much more appealing to the court: Assuming the opponent is substantially as able as the proponent to produce the declarant, for example, the court can tell the opponent, “Your adversary is satisfied to introduce the hearsay, I believe it’s more probative than prejudicial, and I’m not satisfied that making him produce the declarant is worth the trouble and expense. But if you want to produce her—if it’s really important to you and you’re not just arguing that in an attempt to get the hearsay excluded—be my guest. If you do so on time, I’ll insist that your adversary put the declarant on the stand and ask for her live testimony, or forgo use of the prior statement. So then you’ll presumably be in the same position as if your adversary had produced her.”<sup>75</sup>

The court should ask questions such as the following:

First, how probable does it appear that the trier of fact’s ability to determine the truth would be significantly enhanced by making the declarant a live witness? If it appears very probable that the statement is true, or if it appears unlikely that the declarant would remember the event or condition described by the statement, there may be

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75. I elaborated further on this in *Improving the Procedure for Resolving Hearsay Issues*, 13 *CARDOZO L. REV.* 883, 892–97 (1991). In a subsequent article, I expressed reservations about using this procedure universally, principally on the basis that “given that the proponent is satisfied to rest on the out-of-court statement of the declarant, it is not clear that the opponent ought to have the opportunity to interrupt [the proponent’s case].” Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 *HASTINGS L.J.* 545, 559 (1998). Continuing the decades-long conversation I have been having with myself, I now would not put much weight on that concern. True, the proponent, by offering the hearsay, has shown that he would prefer presenting the hearsay rather than presenting the witness live, subject to the interruption of cross-examination. But live testimony, subject to immediate cross-examination, remains the preferred way of presenting a declarant’s statement. Often, it is not worthwhile to insist that the proponent present the witness live; if, however, the opponent has gone to the trouble of producing the declarant ready to testify, then it is not unduly burdensome to insist that the proponent attempt to support his case with live testimony. This is especially true given the large practical advantages summarized in the text.



limited value in bringing the declarant in as a live witness. Given that the statement is not testimonial, these conditions are particularly likely to be true: The statement may well have been on a matter in which the declarant had no interest and that would not have appeared particularly salient to her.

Second, how difficult, and for whom, would it be to make the declarant a live witness? The declarant's availability is a very complex issue. It is not a simple binary matter—available or unavailable. Availability is a matter of degree, of how much trouble and expense (financial or otherwise) it would take—or would have taken, if the parties had taken prompt anticipatory action—to secure the live testimony of the declarant at trial or, alternatively, at some other proceeding such as a deposition. Moreover, availability is not a one-dimensional matter. Rendering a declarant a witness in court or at another formal proceeding depends on the performance of several functions—identifying the declarant, locating her, securing her presence in court, and persuading her to testify—and it may be that one party is substantially better able to perform one or more of these functions than the other party.

Third, has the proponent given the opponent ample notice of intent to offer the hearsay statement? In this context, notice would enable the opponent to produce the declarant as a live witness, if he so chose, or otherwise secure evidence that would enable him to challenge the significance of the hearsay evidence.

These questions generate a wide variety of possible combinations of answers and of possible decisions by the court. I will not attempt to offer a comprehensive analysis here, but rather will present a few illustrations.<sup>76</sup> Suppose first that the court believes that live testimony of the hearsay declarant is unlikely to enhance the quality of fact-finding significantly, the proponent has no significant advantage over the opponent in producing the declarant as a live witness, and the proponent has given the opponent ample notice of intention to present the hearsay. This is a very strong case for admissibility of the hearsay. By hypothesis, the statement is not testimonial, it is more probative than prejudicial, the proponent is satisfied to present the hearsay rather than going to the cost and trouble of producing the declarant, and the opponent is no less able to produce her than is the proponent. If the opponent nevertheless believes that it would be worthwhile to bring the declarant in, he may do so—and if he does so in a timely manner,

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76. Long ago, I explored this approach in some detail. For that discussion, see Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723 (1992).

then, assuming the proponent still wants evidence from that declarant, the proponent must put her on the stand as part of his case. The proponent would first ask for the declarant's current recollection of the event or condition at issue, and the admissibility of the hearsay could then be determined in light of that testimony.

At the other pole, suppose that the court believes that the accuracy of the statement is questionable, it is on a subject that the declarant should remember, and cross-examination will potentially be productive. Suppose further that if the proponent had given the opponent notice of his intention to use the hearsay, the opponent could have produced the declarant in a timely manner as a live witness, but the proponent has failed to give such notice and now production of the declarant is not feasible. This appears to be a good case for excluding the hearsay—not because the jury is unable to address its deficiencies but because exclusion will give this proponent, or others in a similar position, incentive to generate better evidence, either by producing the declarant as a live witness or by giving the opponent sufficient notice to do so.

And then, of course, there is a myriad of cases in the middle. The court may have more or less confidence that there would be little or no advantage to bringing the declarant in as a live witness. The opponent may have gotten more or less notice of intention to use the hearsay—the clarity as well as the time of notice may vary, because the proponent might claim that even if he did not explicitly state his intention to present the hearsay, it was sufficiently obvious from the prior course of proceedings. And one party may have more or less of a comparative advantage in performing any of the functions that are necessary to secure the live testimony of a witness. So, for example, suppose that the proponent has given the opponent ample notice, the court is uncertain as to whether it would be worthwhile to bring the declarant in as a live witness, the declarant's identity is known, the proponent is better able than the opponent to locate her, and otherwise, they are equally able to secure her live testimony. One possible ruling would be as follows: (1) The hearsay is admissible unless the opponent indicates that if the proponent provides information as to the declarant's whereabouts, the opponent will secure her presence; (2) if the opponent does so indicate, then the hearsay is inadmissible unless the proponent gives the required information; and (3) if the proponent does so, then the hearsay is admissible unless the opponent does in fact secure the timely presence of the declarant, in which case the proponent must put her on the stand as part of his case or forgo use of the hearsay.

The problem is kaleidoscopic in nature—variations in the basic ingredients of the problem can set up an extraordinary range of different situations. Any attempt to write a codification that prescribes closely the resolution for each of these settings is not likely to yield very good results. I believe that we are better off committing the problem, as we do most evidentiary problems, to the discretion of the trial judge. Judges can take into account all the particulars of the given situation—including the procedural aspects—and craft a sensible response.

That does not mean that they will always exercise that discretion in an optimal manner—any more than it means that they always exercise optimally the extraordinary discretion that Federal Rule of Evidence 403 gives them. But it does not appear to me that there is any good reason to deprive them of discretion more in this realm than in any other covered by Rule 403. If the hearsay statement in question was not made in anticipation of litigation, then admitting it does not amount to allowing a witness to testify out of court. No fundamental principle is at stake, or at least not one subject to a bright-line rule. The basic issue is, given all the circumstances of the particular case, to what extent it is best—taking into account the goals of fairness, efficiency, and accuracy in truth determination—to impose on the proponent, rather than on the opponent, the burden of producing the declarant as a live witness. Trial judges accorded wide discretion will not always answer that question sensibly, but they have a better chance at doing so than do rulemakers who create general codifications that cannot adequately take into account the nuances of any particular case.<sup>77</sup>

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77. The Reporter, Professor Cleary, did attempt in one of his memoranda to suggest reasons why discretion might be more troublesome in the hearsay context than in others, but the arguments do not strike me as strong. He contended that “[w]hen it is proposed to confer upon the trial judge a greater discretion to admit or exclude hearsay depending upon its probative force, the effect is to move him into the area of credibility, one traditionally reserved to the trier of fact and in any event not a basis heretofore for admitting or excluding evidence generally.” Reporter’s Memorandum No. 19, *supra* note 27, at 17–18. But taking probative value into account in determining admissibility is precisely what Rule 403 prescribes. Furthermore, the reliability of a given type of hearsay is a traditional basis for exempting it from the hearsay rule; it is no different, so far as the jury is concerned, if that determination is made by the judge in the individual case rather than by rulemakers. Finally, the argument seems particularly misplaced given that the rule against hearsay is a presumptive rule of exclusion, and the question is whether the court should have discretion to *allow* a given piece of hearsay to be presented to the jury.

One can also construct from Professor Cleary’s memorandum a more appealing argument as to why discretion should be confined more in the hearsay context than in others: There is in fact a dense body of hearsay law, because certain types of situations arise recurrently, and denying lawyers and judges the guidance that is thus possible in the hearsay realm would entail substantial opportunity costs. *See id.* at 18–19. True enough, but I have two responses. First, a discre-

In short, I am suggesting that if the confrontation principle is protected by a hard-edged rule, the rest of hearsay law can and should be made much more wide open. As Judge Weinstein suggested long ago, we can discard the long-standing system of class exceptions in favor of a system that is procedurally sensitive and accords great discretion to the trial judge.

Judge Weinstein has said that the experience that best prepared him to be a trial judge was his time as a naval officer in World War II—because it taught him to make decisions, which he had to do quickly and intuitively.<sup>78</sup> Life-and-death decisions in combat are of necessity often entrusted to young officers. Once we protect the genuine matters of principle that may be at stake, we should put no less trust in the discretion of judges deciding the admissibility of hearsay.

#### V. CONDUCT IMPLICITLY REFLECTING A BELIEF

Note that if the approach suggested here is implemented, there is no strong reason to limit it to evidence that falls within the Rules' definition of hearsay, which extends only to statements that assert the proposition in question.<sup>79</sup> As Judge Weinstein emphasized, other conduct, not amounting to a declaration of the proposition but reflecting the actor's belief in it, may raise significant hearsay dangers.<sup>80</sup> Such other conduct is almost certainly not testimonial—conduct that consciously creates evidence of a proposition, which is the essence of what it takes to make conduct testimonial, almost by definition attempts to communicate that proposition, by verbal or other means. Usually, such other conduct does not raise problems of insincerity, because if the actor was not trying to communicate the proposition at issue, then she was not trying to do so insincerely. These two factors probably account for the fact that the Rules do not place such conduct within the definition of hearsay. But given that the conduct does not

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tionary system allows the judge to consider openly a wider range of factors, but it does not necessarily make results significantly less predictable. On the one hand, in a discretionary regime, judges may still use the traditional exceptions for guidance; on the other, under the traditional regime, judges often distort the exceptions. Second, if predictability comes at the price of too many bad results, it may not be worthwhile—and the discretionary residual exception has been found necessary to minimize the bad results that the Rules' codification would otherwise yield. (One data point: Michigan adopted a codification based on the Rules but without the residual exceptions; eventually, though, it felt the need to add them in. See John Norman Scott, *Michigan Catches Up to the "Catch-Alls": How Much Hearsay Will They Catch?*, 14 T.M. COOLEY L. Rev. 1, 1–2 (1997). I am not aware of any jurisdiction that has deleted such an exception.)

78. Conversation with Jack B. Weinstein (Apr. 24, 2014).

79. FED. R. EVID. 801(a), (c).

80. Weinstein, *supra* note 6, at 353–54.

assert the proposition at issue, it often raises a large ambiguity problem as to whether the conduct was motivated by belief in the proposition; when a statement asserts a given proposition, by contrast, it is usually clear enough that the declarant intended to convey to her audience that the proposition is true.

Let's consider a concrete pair of illustrations drawn from the famous case of *Wright v. Tatham*.<sup>81</sup> The question there was whether Marsden, a wealthy decedent, had the mental capacity to make a will.<sup>82</sup> One piece of evidence was a letter written long before Marsden's death by a neighbor. The writer, who had no stake in the outcome of the later-arising controversy, asked Marsden to get involved in a local community dispute.<sup>83</sup> Now, compare this to a hypothetical statement made to a friend by the same neighbor, "Marsden is not very bright, but he's within the normal range of intelligence and understanding." Which is better evidence of Marsden's mental competence? The answer to that question is not clear, but there is an enormous ambiguity in using the letter for this purpose: Did the author really write it because he believed Marsden was able to deal with the matter, or was he merely being decorous and following acceptable form, in full knowledge that Marsden's steward would take care of the matter, and indeed perhaps that Marsden himself would never even see the letter? To my mind, the unambiguous statement, made with no apparent motive to lie and not in a testimonial capacity, is better evidence on the point—and the potential value of cross-examination is greater with respect to the letter writer than with respect to the express declarant. But at least it appears that we can draw no broad conclusion that statements fitting within the Rules' definition of hearsay are less reliable proof of a proposition, or raise greater hearsay dangers on the whole, than conduct that appears to reflect the actor's implicit belief in the proposition. It certainly seems that, in a cost-free world, we would want the actor to come to court and testify concerning the proposition.

Here, then, is a great oddity of current law. Assertions of a proposition offered to prove the truth of the proposition are presumptively excluded by the rule against hearsay—but the rule has nothing at all to say about conduct that, the proponent contends, implicitly reflects the actor's belief in the proposition. A presumptive exclusion of the latter type of evidence would be too restrictive. But that does not mean the dangers raised by evidence of this kind should be ignored, or

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81. (1838) 7 Eng. Rep. 559 (H.L.); 5 Cl. & Fin. 670.

82. *Id.* at 559–60; 5 Cl. & Fin. at 672.

83. *Id.* at 560–62; 5 Cl. & Fin. at 673–79.

should only be considered by the trier of fact in considering the weight to attribute to the evidence.

The approach suggested here offers a way around the problem, because it can be applied generally to out-of-court conduct, communicative or not, offered to prove a proposition on the basis that the conduct shows that the actor believed the proposition to be true; that is, its applicability does not depend on whether the conduct actually asserted the proposition. In either case, the problem from the court's perspective looks much the same. In either case, assuming the conduct is not testimonial in nature and that it is more probative than prejudicial, the evidence is presumptively useful for truth determination. But live testimony of the actor might be preferable, and so the court has to decide an allocation of the burdens for bringing the actor to court. In either case, the court should ask similar questions—to what extent would the quality of the available evidence be improved by bringing the actor in? How difficult, and for whom, would it be to perform each of the functions necessary to make the actor a live witness? And to what extent has the opponent had notice of the proponent's intent to offer the evidence?

This means that there is no need for the court to police the conceptually difficult line between statements and other conduct. Indeed, there is no pressing need to worry about a definition of hearsay at all. When the probative value of an offered item of evidence depends on the perceptions of a person who is not scheduled to be a live witness, the court does need to consider whether the quality of evidence available to the trier of fact would be significantly enhanced by securing live testimony from that person, and if so, how to allocate the accompanying burdens. But no doctrinal lines are necessary to guide the court in performing that function.

#### VI. TESTIMONIAL STATEMENTS NOT OFFERED AGAINST AN ACCUSED

I have argued for a dichotomous approach—a hard-edged rule preventing the admission of testimonial statements against an accused if she has not had an opportunity for confrontation, and a wide-open, nondoctrinal approach with respect to nontestimonial statements. Now I will return to a question I postponed earlier—how should testimonial statements be dealt with when they are not offered against an accused?

The Confrontation Clause, of course, applies only in favor of the accused in a criminal case. But the basic confrontation principle is applicable, regardless of who offers the statement: For centuries, the

common law has generally required a witness to testify face-to-face with the party against whom her testimony is offered (or with representatives of a nonindividual party), subject to cross-examination.<sup>84</sup> Suppose, by contrast, the court routinely admits a statement that a person made out of court, not subject to cross-examination, with the intention that it would be used as evidence in litigation. In that case, we have created a system in which witnesses can testify without coming to court. Parties taking advantage of such a system might take the testimony of witnesses in writing or by video.

But the question remains: Is that so bad? In thinking about that question, I will assume that, absent a hard-edged rule against admitting the out-of-court testimony, the approach I have suggested above for nontestimonial statements would still apply. Thus, the court would retain the discretion to exclude the evidence if, under all the circumstances, doing so would improve the truth-determination process. And if the opponent produces the witness in a timely manner, then the proponent must put the witness on the stand as part of the proponent's case or forgo use of the hearsay. To facilitate that procedure in this context, I will assume further that the court will not, except in unusual circumstances, admit testimonial statements made without an opportunity for cross-examination unless the proponent has given the opponent ample notice and otherwise put the opponent in as good a position as the proponent to produce the witness.

Let's assume first that after making the testimonial statement, but before the opponent had an opportunity for cross-examination, the witness became unavailable, through no fault of either party.<sup>85</sup> The choice is then between admitting testimony given under suboptimal conditions or not allowing any testimony at all from that witness. When such testimony is offered against an accused, it is the prosecutor who must bear that risk rather than the accused, who has the constitutional confrontation right. But when another party offers the testimony, no such absolute principle seems to apply.<sup>86</sup> It is appropriate

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84. There is some constitutional force to the requirement. *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

85. I do not believe that the opportunity to take a deposition for discovery purposes should be deemed an opportunity for cross-examination. I presented arguments on this point in a petition for certiorari seeking review of *State v. Berkman*, 976 N.E.2d 68 (Ind. Ct. App. 2012). Petition for a Writ of Certiorari, *Berkman v. Indiana*, 134 S. Ct. 155 (2013) (No. 12-10691) (memorandum decision denying certiorari).

86. If, for example, a witness testifying at trial suddenly becomes ill or dies before the opponent has a chance for cross-examination, there is not clearly a per se rule, if the opponent is not a criminal defendant, that the testimony must be struck. 1 MCCORMICK ON EVIDENCE § 19, at 157-58 (Kenneth S. Broun gen. ed., 7th ed. 2013) (endorsing the principle that, while exclusion

for the court to make a discretionary judgment as to whether an impaired loaf is better than no loaf at all.

Now assume that the witness is available equally to both parties, but the proponent prefers to present the out-of-court statement. The proponent might have this preference because bringing the witness in is difficult or expensive, or because he anticipates that the witness will be a poor one. Given the assumed conditions, the opponent is in as good a position as is the proponent to produce the witness in court, and even if it is the opponent who does so and the witness takes the stand, it will be as part of the proponent's case. Accordingly, the only issue is one of burden: To what extent should one party or the other bear the burden of bringing the witness in or facing an adverse evidentiary consequence (admissibility of the hearsay, in the case of the opponent, or exclusion, in the case of the proponent)? If the proponent were a criminal prosecutor, the accused, having been notified of the prosecutor's intent to introduce a testimonial hearsay statement, could be required to make a timely demand that the prosecutor bring the witness in, but the burden of actually doing so could not be shifted to the accused.<sup>87</sup> In other contexts, though, I believe it is sometimes appropriate to require the opponent to shoulder that burden.

Bear in mind some basic elements of the situation: (1) The proponent is satisfied to present the out-of-court testimony, knowing that, to a certain extent, it will be self-impeaching because the witness has not appeared in court; (2) the testimony is more probative than prejudicial; and (3) the proponent is not substantially better able than the opponent to produce the witness for live testimony. Clearly, then, it would be more efficient to allow the proponent to present the less costly evidence with which he is satisfied, leaving it to the opponent to secure live testimony and the opportunity for cross-examination if he thinks it is worth the cost and the effort. And it is not apparent that there is any unfairness in such a ruling. We treat civil litigants essentially the same, whether they are plaintiffs or defendants, and discovery gives them ample opportunity to learn the facts necessary to make

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may be required in the case of a prosecution witness, the court should have discretion not to strike testimony of other witnesses who are not able to complete participation in cross-examination).

87. *Melendez-Diaz v. Massachusetts* declares that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." 557 U.S. 305, 324–25 (2009). It also makes clear, though, that it is permissible to create a simple "notice-and-demand" procedure. *Id.* at 326–27. Under this procedure, if the prosecution gives timely notice of its intent to offer a given type of document, the confrontation right is deemed waived unless the accused makes a timely demand that the author of the document testify as a live witness. *Id.* at 326–27. If the accused does make the demand, the prosecution must bring in the author or lose the benefit of the evidence.



a reasoned judgment as to whether to bring the witness in. As for a prosecutor, she represents the power of the state and is generally in a much more powerful position than is the accused in terms of ability to gain information, to take risks, and to pay for what she believes will help her position in litigation. In large part because of these advantages, her adversary is given a web of constitutional protections in litigation, and it is the prosecutor who bears the burden of production and a very demanding burden of persuasion on the elements of the crime. Accordingly, it does not seem unfair to say to a civil litigant or to a prosecutor, “Your adversary is satisfied to have the witness testify by a prerecorded video, knowing that the jury may discount the evidence if the witness does not appear live. The evidence is certainly worth something, it’s better than nothing, and I’m not prepared to say that the cost of bringing the witness in is clearly worthwhile. You are in as good a position as he is to bring the witness in, and if you do so, I’ll make him put her on the stand as part of his case or give up on the evidence—and assuming he does put her on, then you will have an opportunity for cross-examination, just as if he had brought her in. So the choice is up to you whether it’s worth the time and effort.”

I have argued that if we protect the confrontation principle, we can loosen up our system enormously with respect to other hearsay, to the point that we do not even have to worry about a definition of hearsay. And now I am suggesting that, though we must give full protection to the confrontation right of criminal defendants, a lesser, though still substantial, degree of protection might be appropriate when testimony not given subject to cross-examination is offered against another party. No doubt, what I am suggesting would represent a dramatic change in our trial procedure. But I believe it is at least worth thinking about, because the efficiency gains would be substantial, and it is not apparent that there would be any loss in fairness.

## VII. CONCLUSION

I suggested at the outset that there were four cornerstones to Judge Weinstein’s vision of hearsay, as presented in *Probative Force of Hearsay*. The approach I have presented here incorporates all of them. It would admit more hearsay than traditional law, and more even than under the Federal Rules. It would rely heavily on the discretion of the trial court; indeed, except in the context of testimonial statements, it would not place doctrinal limits on that discretion. It would be highly sensitive to procedural considerations, including but not limited to notice. And it would draw a sharp distinction between testimonial hearsay offered by a prosecutor and other forms of hearsay.

Such an approach, I believe, has obvious advantages over the traditional rubric of hearsay law. It protects the confrontation rights of criminal defendants, and in other settings, it allows for fair and efficient presentation of evidence that will advance the search for truth.

So why, given the huge boost that Judge Weinstein provided, did the drafters of the Rules, both on the Advisory Committee of which he was a member and in Congress, not adopt such an approach nearly half a century ago? The principal reason, I believe, was that the drafters had an intuitive sense, in the era before an independent conception of the confrontation right had been developed, that a wide-open discretionary approach would lead to some truly intolerable results. Most of those results, I believe, would allow a prosecution witness, in effect, to provide testimony without confronting the accused. But now that the *Crawford* doctrine prevents those results, that should no longer be a concern; indeed, even if the Supreme Court stepped back from *Crawford* as a matter of constitutional law, the basic doctrine should be incorporated into an ideal body of hearsay law. The ability of such a body of law to reach optimal results would be facilitated by incorporating the procedural device discussed in this Essay: A court may impose on the opponent all or part of the burden of producing a hearsay declarant as a live witness and yet insist that it be the proponent who puts the witness on the stand.

These, then, are the missing pieces of the hearsay puzzle. They were not part of the discussion when the Rules were crafted. But now they are available. We can make the law far more efficient without sacrifice of any fundamental right, or of accuracy or fairness. We should not stand pat.

