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# THE BRITISH EXPERIENCE WITH HEARSAY REFORM: A CAUTIONARY TALE

*Mark S. Brodin\**

The “hearsay rule” is too complex, as well as being archaic. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of [Federal] Rule [of Evidence] 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.<sup>1</sup>

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The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit. . . . “It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury, which so long has been the hallmark of ‘even handed justice.’”<sup>2</sup>

## INTRODUCTION

Among the proposals being considered by the Advisory Committee on the Federal Rules of Evidence (“the Committee”) is the scrapping of the categorical exception regime for hearsay, leaving questions of reliability and admissibility ad hoc to district court judges along the lines of Federal Rules of Evidence (FRE) 403 and 807. Over the past decades, the British have moved toward this approach, and it is the purpose of this Article to

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\* Professor and Lee Distinguished Scholar, Boston College Law School. I wish to gratefully acknowledge the very able research assistance of Kaitlin Vigars, Gabriel Ariori, and Seth Seidman, as well as the invaluable guidance of two distinguished barristers, Peter Susman and Geoffrey Bennett.

1. *United States v. Boyce*, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J., concurring), *cert. denied*, 134 S. Ct. 2321 (2014).

2. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring) (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)).

identify the lessons that can be learned from that experience, especially with regard to criminal prosecutions and the right of confrontation.

### I. CALLS FOR HEARSAY REFORM

Few are content with the state of the hearsay rule and its more than thirty (what one commentator dubbed “stone age”<sup>3</sup>) exceptions. It has long been viewed as an antique, arbitrary, and often irrational effort to capture the concepts of reliability and probative value in fixed categories and thus destined to produce unsatisfactory results.

Dean Edmund Morgan demonstrated through a series of hypotheticals how the exceptions could exclude probative, and yet admit dubious, evidence.<sup>4</sup> For James Bradley Thayer,

A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible. . . . [H]earsay [would be] admissible, as secondary evidence, whenever the circumstances of the case alone were enough to entitle it to credit.<sup>5</sup>

And as Judge Richard Posner has complained, the premises behind exceptions like excited utterance are at odds with social science’s learning about human behavior.<sup>6</sup>

But the common law structure has been a cornerstone of Anglo-American law since the end of the seventeenth century. Recall Justice Robert Jackson’s warning regarding the character evidence rules:

[M]uch of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.<sup>7</sup>

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3. IV CHARLES FREDERIC CHAMBERLAYNE & HOWARD CLIFFORD JOYCE, A TREATISE ON THE MODERN LAW OF EVIDENCE: RELEVANCE § 2733, at 3751 (1913).

4. See MODEL CODE OF EVIDENCE 36–50 (AM. LAW INST. 1942); Edmund M. Morgan, *The Future of the Law of Evidence*, 29 TEX. L. REV. 587, 587 (1951).

5. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 523 (1898).

6. *Boyce*, 742 F.3d at 801–02.

7. *Michelson v. United States*, 335 U.S. 469, 486 (1948). C. P. Harvey, QC, wrote similarly of the law of evidence:

I suppose there never was a more slapdash, disjointed and inconsequent body of rules than that which we call the Law of Evidence. Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builders’ debris.

Peter Murphy, *Hearsay: The Road to Reform*, 1 INT’L J. EVIDENCE & PROOF 107, 108 (1997) (quoting C.P. Harvey, QC, THE ADVOCATE’S DEVIL 79 (1958)).

The dilemma is that hearsay is necessarily *second-best evidence*, not open to the usual testing of oath, cross-examination, and demeanor before the fact finder.<sup>8</sup> As Professor Richard Friedman recently put it, “[W]itnesses in our system are expected to testify face-to-face with the adverse party, under oath and subject to cross-examination.”<sup>9</sup> Some hearsay, however, is both reliable and necessary to a proper resolution of the matter before the court. The question becomes, therefore: How do we regulate admission with an eye toward maximizing the accuracy of fact-finding? And on this point, is our distrust of jurors’ ability to discern the defects of hearsay put before them misplaced?<sup>10</sup>

Talk of reform is not at all new. Jeremy Bentham urged a “best evidence” approach,<sup>11</sup> like our FRE 807 admitting hearsay that is “more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.”<sup>12</sup> Judge Jack Weinstein’s classic *Probative Force of Hearsay* made a compelling case for a Rule 403 approach: “Hearsay . . . would be admissible [when] a reasonable man might be appreciably more satisfied about the truth or falsity of a material proposition with the evidence than without it.”<sup>13</sup> Admission would depend on probative force weighed against the risk of prejudice, waste of court time, and availability of more satisfactory evidence. Safeguards would include advance notice of the intention to use hearsay, a preference for rulings made pretrial, cautionary jury instructions on the deficits of hearsay evidence, and support for a judge’s prerogative to direct a verdict. In 1975, the Committee ultimately rejected this approach

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8. *R. v. Riat* [2012] EWCA (Crim) 1509 (Eng.). Some have argued that we place unjustified reliance on these methods for discovering the truth. *See, e.g.,* Matthew Caton, *Abolish the Hearsay Rule: The Truth of the Matter Asserted at Last*, 26 ME. B.J. 126, 128–29 (2011). Several empirical studies in particular raise doubt about the usefulness of demeanor in assessing credibility. *See* Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1993); Pamela C. Regan & Sheri J. Baker, *The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases*, 13 J. FAM. VIOLENCE 187 (1998); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991).

9. Richard Friedman, *Jack Weinstein and the Missing Pieces of the Hearsay Puzzle*, 64 DEPAUL L. REV. 449, 450 (2015).

10. “[M]any juries sit for several days or weeks examining evidence which is rigorously tested, and if, amongst that evidence, it receives the written statement of a witness who is ill, or dead, or frightened to appear, it is often perfectly able to understand its limitations.” *R. v. Horncastle* [2009] EWCA (Crim) 964 (Eng.). “[W]e trust juries to apply” a direction that a previous consistent statement is admissible to rebut an allegation of recent fabrication, but not as evidence of the truth of the fact stated; or that a recent complaint in a sexual case is admissible to confirm the evidence of the complainant, but is not evidence of the facts complained of, so “it seems illogical to assume that they would be overwhelmed by being told to be cautious about a statement made by someone who has not given evidence before them in court.” Murphy, *supra* note 7, at 119. Mock jury studies suggest that jurors do not afford undue weight to hearsay and in fact tend to discount it. *See id.* at 119–20; Caton, *supra* note 8, at 128.

11. 1 JEREMY BENTHAM, RATIONALE OF EVIDENCE 60–61, 449–53 (1827).

12. FED. R. EVID. 807(a)(3).

13. Jack Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338 (1961).

for investing too much discretion in the trial judge, but both Eleanor Swift<sup>14</sup> and Richard Friedman<sup>15</sup> have revisited Judge Weinstein's approach.<sup>16</sup>

Some of the finest minds in our field have thus lined up as skeptics regarding the common law approach to hearsay evidence. We cannot, however, underestimate the complexity of reform. The class-based exceptions, whatever their faults, give us some degree of *predictability*, *certainty*, and *consistency*, all lost in a regime of open-ended judicial discretion. And there is the thorny problem of the criminal defendant, for ever since Sir Walter Raleigh (“[L]et my accuser come face to face and be deposed.”<sup>17</sup>), the hearsay rule has been intimately connected to the right to confront one's accuser. Although ironically there is no explicit right of confrontation in English law,<sup>18</sup> as there is in our Sixth Amendment,<sup>19</sup> the sense of unfairness expressed by Raleigh is deeply embedded on both sides of the Atlantic.<sup>20</sup>

What would the world look like if we abandoned the categorical approach in favor of ad hoc screening by the trial judge?<sup>21</sup> Just as Stephan Landsman once cleverly used the Clarence Thomas confirmation hearings to envision a world without evidence constraints,<sup>22</sup> the British experience offers a glimpse of what a discretionary regime looks like.

## II. HEARSAY REFORM IN THE UNITED KINGDOM

The Civil Evidence Act of 1995 (“the Act”) provides that “[i]n civil proceedings evidence shall *not* be excluded on the ground that it is

14. See generally Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495 (1989). She worried that the trial judge would generally not have enough information on the declarant to make a meaningful ad hoc decision about reliability. *Id.* at 504–07.

15. Friedman, *supra* note 9, at 450.

16. For other reform efforts, see Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437 (2000).

17. The transcript of his trial for high treason in 1603 may be found in 2 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS (1816); 1 D. JARDINE, CRIMINAL TRIALS 400, 427 (1832).

18. I.H. DENNIS, THE LAW OF EVIDENCE 696 (4th ed. 2010).

19. The right was reengineered in *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

20. Shakespeare's Richard II exclaims: “[F]ace to face/ And frowning brow to brow, ourselves will hear/ The accuser and the accused freely speak.” WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1. The Massachusetts constitution, the first in America, guarantees “face to face” confrontation. MASS. CONST. pt. 1, art. XII. The right to confront one's accusers dates in fact to Roman times. See *Coy v. Iowa*, 487 U.S. 1012, 1015–16 (1988); Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994); Blumenthal, *supra* note 8, at 1175.

21. For a chart of jurisdictions that have abolished or modified the hearsay prohibition, see Caton, *supra* note 8, at 130. “The clear trend” is toward relaxation of the general rule against hearsay. See Peter Duff, *Hearsay Issues: A Scottish Perspective*, 2005 CRIM. L. REV. 525, 525. Scotland abolished the hearsay prohibition in civil trials in 1988 and has modified its regime in criminal cases. See *id.*

22. See Stephen Landsman, *Who Needs Evidence Rules, Anyway?*, 25 LOY. L.A. L. REV. 635, 635–38 (1992).

hearsay.”<sup>23</sup> There is now routine admission of hearsay in British civil trials, with the judge as fact finder,<sup>24</sup> determining *the weight* to accord the evidence.<sup>25</sup> The latter consideration is informed by a number of statutory factors, including the practical ability of the proponent to produce the declarant for testimony, the temporal connection of the statement to the event, and whether the declarant had any apparent motive to misrepresent.<sup>26</sup>

The Act provides procedural safeguards, most notably the requirement for advance notice by the proponent to give the opposing party an opportunity to prepare a response, and the right of the opponent to call the declarant as a witness and cross-examine him as if his hearsay statement were part of his evidence-in-chief.<sup>27</sup> If the hearsay statement comes in, the opponent may challenge the declarant’s credibility as if he were on the stand (as with FRE 806).<sup>28</sup>

More pertinent to the American context of jury trials is the Criminal Justice Act of 2003<sup>29</sup> (CJA). A product of the perception that criminals were escaping conviction because of legal “technicalities,”<sup>30</sup> the CJA’s design is “to send ‘a clear message that, subject to the necessary safeguards, relevant evidence should be admitted where that is in the interests of justice.’”<sup>31</sup> The goals are to simplify procedure and discard rigid rules in favor of judicial discretion.

Oddly enough, however, many of the common law exceptions are “preserved”<sup>32</sup> in what has been called a “rag-bag list.”<sup>33</sup> Beyond those, the trial judge has discretion to admit hearsay “in the interests of justice,”<sup>34</sup> informed by statutory factors including the statement’s probative value, reliability, and the availability of more direct evidence on the matter.<sup>35</sup> The

23. Civil Evidence Act 1995, c. 38, § 1 (Eng.) (emphasis added). The Act was the culmination of a gradual reform process that began in 1938. See DENNIS, *supra* note 18, at 711–12; see also Solomon E. Salako, *The Hearsay Rule and the Civil Evidence Act 1995: Where Are We Now?*, 19 CIV. JUST. Q. 371 (2000).

24. The British have nearly abandoned civil jury trials. See DENNIS, *supra* note 18, at 711.

25. *Id.*

26. Civil Evidence Act 1995, c. 38, § 4.

27. *Id.* § 3; DENNIS, *supra* note 18, at 713.

28. Civil Evidence Act 1995, c. 38, § 5.

29. See DENNIS, *supra* note 18, at 717–21. See generally Diane Birch & Michael Hirst, *Interpreting the New Concept of Hearsay*, 69 CAMBRIDGE L.J. 72 (2010).

30. Frances Gibb, *Judges Warn That Europe Could Alter UK Trial System*, TIMES (Feb. 22, 2011), <http://www.thetimes.co.uk/tto/law/article2921605.ece> [perma.cc/PR8N-8E9A].

31. Di Birch, *Criminal Justice Act 2003: (4) Hearsay—Same Old Story, Same Old Song?*, 2004 CRIM. L. REV. 556, 556 (quoting Michael Wills, Under-Secretary of State for the Home Department, House of Commons Standing Committee B); see also *Hearsay: Legal Guidance*, CPS, [https://www.cps.gov.uk/legal/h\\_to\\_k/hearsay/](https://www.cps.gov.uk/legal/h_to_k/hearsay/) (last visited Feb. 26, 2016) [perma.cc/NCU6-PXE8].

32. These exceptions include public information, reputation as to character, reputation or family tradition, *res gestae*, confessions, admissions by agents, and expert evidence. Criminal Justice Act 2003, § 118 (Eng.); see DENNIS, *supra* note 18, at 743–44.

33. Tom Worthen, *The Hearsay Provisions of the Criminal Justice Act of 2003: So Far, Not So Good?*, 6 CRIM. L. REV. 431, 435 (2008).

34. Criminal Justice Act 2003, § 114(1)(d); see DENNIS, *supra* note 18, at 745–47.

35. Criminal Justice Act 2003, § 114(2).

judge is also given the authority *to exclude* unreliable hearsay, or hearsay that would result in a waste of court time.<sup>36</sup>

The CJA thus suffers the fate of a compromise that will satisfy few: it does *not go far enough* for proponents of pure judicial discretion,<sup>37</sup> but it goes *too far* for those who look nostalgically on the certainty and predictability of the categorical exception regime.<sup>38</sup>

Like the Federal Rules of Evidence, the CJA separates available and unavailable declarants. The prior statement of an *unavailable* declarant is admissible as long as the witness is identified—so that his credibility may be assessed—and the evidence would be admissible if given in person at trial.<sup>39</sup>

“Unavailability” is given an extremely broad definition. Beyond the familiar categories of deceased, physically or mentally unfit, beyond the reach of a summons, and not capable of being located,<sup>40</sup> is added a declarant fearful of testifying.<sup>41</sup> “[F]ear” is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.<sup>42</sup> The aim is to protect reluctant or intimidated witnesses by dispensing with their live appearance if they made a prior statement regarding the crime and the court determines “that the statement ought to be admitted in the interests of justice.”<sup>43</sup>

Although leave of the court is required for admission of a fearful declarant’s statement,<sup>44</sup> the courts have given this provision a generous reading. In one notable case, a woman kidnapped from her home made statements to police after her release, but later retracted them and refused to testify because of fear of the perpetrators.<sup>45</sup> Her fear was based on *police* warnings to her that the men might use guns against her, referring to a

36. *Id.* § 126.

37. It is “hearsay thinking *within the box*, rather than outside it” and “unduly timid” in the eyes of the original consultant to the reform project (who quit). Birch, *supra* note 31, at 557 (emphasis added). One member of Parliament referred to the reforms as one of “mood music” rather than substance. *Id.* at 559.

38. The CJA nearly got tripped up on opposition in the legal profession to the “interests of justice” provisions. See DENNIS, *supra* note 18, at 718; Birch, *supra* note 31, at 559.

39. Criminal Justice Act 2003, § 116; see also Paul Keleher, QC, Lecture: An Update on Developments in the Law of Hearsay (2009) (on file with the *Fordham Law Review*).

40. Criminal Justice Act 2003, § 116(1)(b); see also Richard Padley, *The Resurgence of Res Gestae*, CRIM. L. & JUST. WKLY. (June 5, 2015), <http://www.criminallawandjustice.co.uk/features/Resurgence-Res-Gestae> [perma.cc/QT9N-PUUN].

41. Criminal Justice Act 2003, § 2(2)(e).

42. *Id.* § 116(3).

43. *Id.* § 116(4). Judges have been admonished to “take all possible steps to enable a fearful witness to give evidence notwithstanding his apprehension.” *R. v. Riat*, 1 Cr. App. 2, 15 (2013) (Eng.).

44. Criminal Justice Act 2003, § 116(2)(e). Leave has been denied in cases where the hearsay is an uncorroborated confession to murder recorded by a cellmate or eyewitness identification. See DENNIS, *supra* note 18, at 737.

45. *R. v. Marquis* [2009] EWCA (Crim) 964 (Eng.); *Horncastle v. United Kingdom*, 60 Eur. H.R. Rep. 31 (2015); see also *Determining When Admission of Hearsay Evidence Is Fair*, TIMES (Jan. 21, 2015), <http://www.thetimes.co.uk/tto/law/reports/article4329055.ece> [perma.cc/399P-4TJQ].

notorious local example of witnesses being hunted down and killed—and *not* on anything the perpetrators or their associates did or said.<sup>46</sup> Nonetheless, her incriminatory statements were read to the jury, and the convictions were upheld by both the U.K. Supreme Court and European Court of Human Rights.<sup>47</sup> Indeed, the courts have explicitly ruled that the requisite fear *need not have been* induced by the accused.<sup>48</sup>

It is submitted that this result clearly bumps up against American sensibilities. Forfeiture of the right to confront one's accuser in our system follows only from wrongful conduct *by or on behalf of the defendant intended to secure the witness's absence*.<sup>49</sup> There is also the obvious concern with the manipulation of witnesses to render them "unavailable."<sup>50</sup>

Similarly, in *Barnaby v. DPP*,<sup>51</sup> the complainant made calls to 999 (the U.K. version of 911) describing an attack by her boyfriend.<sup>52</sup> Officers later took an account from her but she refused to sign it, explaining she was fearful because he had beaten her before when she complained about abuse.<sup>53</sup> Although she was present throughout the assault trial, neither side called her.<sup>54</sup> The prosecution was permitted to rely on her prior statements under the CJA *res gestae* exception for a statement made "by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded."<sup>55</sup>

On appeal the conviction was affirmed, with the observation that

[a]lthough the court has a cardinal responsibility to ensure that a defendant receives a fair trial, careful decisions need to be taken in situations of this kind if there is a real risk that a victim of domestic abuse may suffer further harm following her cooperation with the prosecuting authorities.<sup>56</sup>

The decision is now routinely relied upon by prosecutors in domestic violence cases.<sup>57</sup>

In *R. v. Horncastle*,<sup>58</sup> the assault victim gave a written statement identifying his attackers, but died of unrelated illness before trial. The statement was read to the jury under the CJA's unavailable witness exception, and the conviction, based almost entirely on hearsay, was affirmed by both the British and European Courts.

46. *See R. v. Horncastle*, [2009] EWCA (Crim) 964 (Eng.).

47. *See infra* note 58.

48. *Horncastle*, [2009] EWCA (Crim) 964; *Horncastle*, 60 Eur. H.R. Rep. 31.

49. FED. R. EVID. 804(b)(6); *Giles v. California*, 554 U.S. 353, 361–62 (2008).

50. DENNIS, *supra* note 18, at 719.

51. [2015] EWHC (Admin) 232 (Eng.).

52. *Id.* at 140.

53. *Id.*

54. *Id.*

55. Criminal Justice Act 2003, § 118 (1)(4)(a) (Eng.).

56. *Barnaby*, [2015] EWHC (Admin), ¶ 34.

57. *See Padley*, *supra* note 40.

58. [2009] UKSC 14 (Eng.); *Horncastle v. United Kingdom*, 60 Eur. H.R. Rep. 31 (2015). *See generally* David Ormerod, Guidance, 2013 CRIM. L. REV. 1, 60–67.



And in *Tahery v. United Kingdom*<sup>59</sup> and *R. v. Al-Khawaja*,<sup>60</sup> defendants were similarly convicted on written hearsay statements read to the jury. In the former case, a stabbing, the main witness was excused because he was too frightened to give live testimony.<sup>61</sup> In the latter, a doctor was convicted of indecent assault on a female patient under hypnosis.<sup>62</sup> For reasons unrelated to the assault, she killed herself before trial.<sup>63</sup>

Where, however, the complainant in a rape case died before trial, the admission of her statements to police was ruled improper because, as “a heroin addict” who made a “false allegation of a sexual assault,” there was serious concern about reliability.<sup>64</sup>

The European Court of Human Rights, in reviewing these and similar cases under its Article 6(3)(d) (guaranteeing the right to examine prosecution witnesses),<sup>65</sup> has ruled that there is no absolute right to confrontation; the standard is whether the hearsay evidence deprived the accused of a fair trial.<sup>66</sup> English law similarly provides no absolute right to face-to-face confrontation, allowing “vulnerable” witnesses to testify behind screens or on video link.<sup>67</sup>

Expanding the welcome for hearsay, the CJA admits business records—even when prepared explicitly for the criminal proceeding—as long as the recorder is unavailable or cannot reasonably be expected to have any recollection of the matter.<sup>68</sup> A videotaped statement of a witness made when the events were fresh in his memory may be admitted provided he attests to the truth of the statements while on the stand.<sup>69</sup> Private diary entries evade the hearsay prohibition entirely because “hearsay” is limited

59. 54 Eur. H.R. Rep. 23 (2012).

60. [2005] EWCA (Crim) 2697 (Eng.); see also *Al-Khawaja v. United Kingdom*, 54 Eur. H.R. Rep. 23 (2011); *Fairness of Admitting Hearsay Evidence*, TIMES (Dec. 22, 2011), <http://www.thetimes.co.uk/tto/law/reports/article3261912.ece> [perma.cc/4V54-XHK3].

61. *Tahery*, 54 Eur. H.R. Rep. 23 [808].

62. *Al-Khawaja*, [2005] EWCA (Crim) 2697 [185–86].

63. *Id.*

64. *R. v. Ibrahim*, [2012] EWCA (Crim) 837 [¶ 102] (Eng.).

65. The Human Rights Act of 1998 incorporated into English law the European Convention on Human Rights and its guarantee of the right to a fair trial. The European Court of Human Rights (ECHR), sitting in Strasbourg, reviews cases to determine whether a violation of the Convention has occurred. The English courts are not automatically bound to comply with an ECHR finding. See generally DENNIS, *supra* note 18, at 40–49; John Jackson & Sarah Summers, *Confrontation with Strasbourg: UK and Swiss Approaches to Criminal Evidence*, 2 CRIM. L. REV. 114 (2013); Conor Mulcahy, *Unfair Consequences: How the Reforms to the Rule Against Hearsay in the Criminal Justice Act of 2003 Violate a Defendant's Rights to a Fair Trial Under the European Convention on Human Rights*, 28 B.C. INT'L & COMP. L. REV. 405, 409–10 (2005). See also *R. v. Riat* [2012] EWCA (Crim) 1509 (Eng.).

66. DENNIS, *supra* note 18, at 773–74; THE CROWN PROSECUTION SERVICE, *supra* note 31.

67. DENNIS, *supra* note 18, at 696.

68. Criminal Justice Act 2003, § 117 (Eng.); see also DENNIS, *supra* note 18, at 738–42.

69. Criminal Justice Act 2003, § 137. In *Riat*, the court affirmed the sexual offense conviction based on video-recorded interviews of the thirteen-year-old victim, who died before trial. [2012] EWCA (Crim) 1509.

to statements intended to convey information to another.<sup>70</sup> A witness's prior inconsistent statement is admissible for all purposes.<sup>71</sup>

The trial judge is also invested with "general residual power"<sup>72</sup> to admit any other hearsay "in the interests of justice,"<sup>73</sup> akin to, but broader than, our FRE 807.<sup>74</sup> The legislative history and early court decisions warned that this license was to be cautiously applied,<sup>75</sup> yet we saw similar language regarding our catchall exception and that has not restrained some courts.<sup>76</sup> In one notable case, a kidnap victim's accusatory statements to her mother, father, friend, and police officer were all admitted under this provision.<sup>77</sup>

Not surprisingly, there has been much variation in interpretations of this discretionary power,<sup>78</sup> as is the case with the discretion to exclude hearsay that would be otherwise admissible but would result in an undue waste of time.<sup>79</sup> The inconsistency and unpredictability present a substantial challenge to counsel in preparation of their cases.<sup>80</sup>

The CJA does contain an "escape clause" for defendants: the judge is required to direct a verdict for a defendant when a conviction would be based on hearsay evidence that is "so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be *unsafe*."<sup>81</sup> Empirical data on the use of this provision does not appear to exist, but anecdotally it seems to be rarely invoked.<sup>82</sup>

70. Birch & Hirst, *supra* note 29, at 92; *see also* Criminal Justice Act 2003, § 115.

71. Criminal Justice Act 2003, § 119. For a range of additional exceptions for prior consistent statements, complaints, and statements in documents used to refresh recollection, *see* DENNIS, *supra* note 18, at 742–43.

72. *See Riat*, [2012] EWCA (Crim) 1509.

73. Criminal Justice Act 2003, § 114(1). The judicial discretion is to be informed by several statutory factors, including the probative value of the statement, what other evidence has been, or can be, given on the matter, how important the matter is in the context of the case as a whole, the circumstances in which the statement was made, and how reliable the maker of the statement appears to be. Criminal Justice Act 2003, § 114(2); *see also* R. v. Khelawon, [2006] 2 S.C.R. 787 (Eng.).

74. Judges, particularly in the magistrates' courts, were not uniformly in favor of the discretion granted to them. Birch, *supra* note 31, at 556–57, 558 n.17.

75. The provision "must not become a route by which all or any hearsay evidence is routinely admitted without proper scrutiny." *Riat*, [2012] EWCA (Crim) 1509; *see also* R. v. Z., [2009] EWCA (Crim) 20 (Eng.); DENNIS, *supra* note 18, at 766; Worthern, *supra* note 33, at 437.

76. FED. R. EVID. 803(24) advisory committee's note ("[We] do not contemplate an unfettered exercise of judicial discretion."). Note that as of 1997, FRE 803(24) is encompassed in FRE 807.

77. DENNIS, *supra* note 18, at 767.

78. Worthern, *supra* note 33, at 438–39.

79. Criminal Justice Act 2003, § 126 (Eng.); *see* Worthern, *supra* note 33, at 440–41.

80. For this reason, the Scottish Law Commission and its Criminal Procedure Act of 1995 reject any plenary discretionary power. Duff, *supra* note 21, at 542.

81. Criminal Justice Act 2003, § 125(1)(b) (emphasis added). For a case reversing the conviction on this ground, *see* R. v. Ibrahim, [2012] EWCA (Crim) 837 (Eng.).

82. Ormerod, *supra* note 58, at 67; Email from Peter Susman to author (Oct. 12, 2015, 11:59 AM EST) (on file with the *Fordham Law Review*).

There are additional protections for the accused, including advance notice of the intent to offer hearsay<sup>83</sup> and the right to challenge a declarant's credibility as if he had appeared.<sup>84</sup> Judges are required to caution the jury as to the disadvantages to the defendant if hearsay has been admitted.<sup>85</sup>

### III. LESSONS FROM THE BRITISH EXPERIENCE AND THE CONSEQUENCES FOR CRIMINAL DEFENDANTS

The CJA has achieved its goal of inviting more hearsay into criminal trials (usually in the prosecution's case). Conviction rates have gone up since its adoption from 75 to 83 percent,<sup>86</sup> including a slight rise in rape convictions,<sup>87</sup> but it is of course not possible to attribute that increase to any one factor, such as ready admissibility of out-of-court statements.

Simplification however has not been achieved, as the reform combines traditional exceptions with open-ended discretion.<sup>88</sup> Two observers complained in 2010:

For years, the [English] courts had struggled but failed to provide a clear, watertight definition of what was or was not hearsay at common law. Six years on, however, it seems that the new concept of hearsay [under the CJA] is no more satisfactory, and no better understood, than the old. . . . [O]ne set of complexities has merely been exchanged for another, and the new complexities include some that the courts have yet to master.<sup>89</sup>

Far more troublesome is their report that the CJA significantly increases “the chances of a trial being influenced by second-hand evidence of which

83. See Criminal Justice Act 2003, § 114(1)(d) (interests of justice); *id.* § 116 (witness unavailable); *id.* § 121 (multiple hearsay).

84. See *id.* § 124. For hearsay offered by the prosecution, the “judge is entitled to expect that very full enquiries have been made as to the witness’ [sic] credibility and all relevant material [including a check for convictions] disclosed.” *R. v. Riat*, [2012] EWCA (Crim) 1509 (Eng.).

85. See, e.g., *Ibrahim*, [2012] EWCA (Crim) at 837; see also DENNIS, *supra* note 18, at 775. One Queen’s Counsel reports that objections to hearsay evidence are comparatively rare, in part because it is often to the practical advantage of the defense to be able to tell the jury: “[t]he witness was not able to attend for cross-examination . . . [so] their evidence has not been tested in cross-examination. Who knows what other information might have been given, helpful to the [defense]?” followed by the judge’s admonition to the same effect when summing up. Email from Peter Susman to author (Sept. 28, 2015, 11:59 AM EST) (on file with the *Fordham Law Review*). For other proposed warnings to the jury, see Matthew Caton, *Abolish the Hearsay Rule: The Truth of the Matter Asserted at Last (Part II)*, 26 ME. B.J. 207, 208 (2011).

86. ENG. AND WALES MINISTRY OF JUSTICE, CRIMINAL JUSTICE STATISTICS: QUARTERLY UPDATE TO MARCH 2014, at 12 (2014).

87. Mark Townsend, *Hearsay Rules Offer New Hope in Rape Cases*, OBSERVER (Oct. 20, 2007), <http://www.theguardian.com/uk/2007/oct/21/ukcrime.theobserver> [perma.cc/Y38D-VRGG].

88. “The current clash between a discretionary and a rule-driven approach would have been resolved in favour of a ‘happy medium’—a position balancing certainty and flexibility as well as is possible in this awkward area of the law.” Worthern, *supra* note 33, at 442.

89. Birch & Hirst, *supra* note 29, at 72.

the witness in court has no first-hand knowledge.”<sup>90</sup> There has been some consternation from defense counsel about the downgrading of the right to confrontation,<sup>91</sup> but far less than might be expected on this side of the Atlantic, where the Sixth Amendment promises a right to confront “testimonial” hearsay.<sup>92</sup> The American tradition of rigorous cross-examination of live witnesses would likely make reforms of the British variety unpalatable here.

Additionally, there is the matter of public acceptance. Has the right of confrontation become an indelible part of our legal landscape? Would the conviction of Walter Raleigh be any more palatable today than it was to the Framers in 1791?

Moreover, the reforms in the United Kingdom were accomplished in gradual steps over several decades. Would similar efforts here require our profession to wander forty years in the desert to acclimate?

#### CONCLUSION

The ideal goals of a criminal trial—truth-finding, accuracy, and avoidance of wrongful convictions—are usually best served by presentation of *first-hand live testimony*. The British experience should inform reform efforts here and give us pause about opening the door wider to second-best evidence.

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90. *Id.* at 76.

91. See, e.g., Eric Metcalfe, *Time for the UK Supreme Court to Think Again on Hearsay*, GUARDIAN (Dec. 15, 2011), <http://www.theguardian.com/law/2011/dec/15/uk-supreme-court-rethink-hearsay> [perma.cc/83TS-C72Y].

92. The Court’s *Crawford* consensus has, however, begun to splinter. See *Ohio v. Clark*, 135 S. Ct. 2173, 2179–81 (2015); *Williams v. Illinois*, 132 S. Ct. 2221, 2223 (2012); *Michigan v. Bryant*, 562 U.S. 344, 348 (2011). As Richard Friedman has observed, “[I]f we protect the confrontation principle, we can loosen up our system enormously with respect to other hearsay.” Friedman, *supra* note 9, at 472. The converse is also true.