The New Wave of Hearsay Reform Scholarship

Roger C. Park
Foreword: The Hearsay Reform Conference

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Issues on the hearsay borderland have always appealed to evidence teachers, but core issues of hearsay policy have sometimes received less attention. For a time at least, evidence scholars were more interested in the riddles of implied assertions and nonverbal conduct than in the core question whether undoubted hearsay ought to be received freely. This neglect of the core cannot be explained by any test of social importance. The question whether the system of trial by live testimony should be fundamentally altered is as important as any issue confronting proceduralists. If nothing else, the amount of judicial energy expended on the hearsay rule would justify a careful examination of its value. (As a rough measure, note that twenty-five percent of the annotations devoted to the Federal Rules of Evidence in the United States Code Annotated address hearsay.) Moreover, the hearsay ban seems a glaring anomaly in a trial system that generally favors free proof, and that generally trusts factfinders to discount unreliable evidence. Nonetheless, for two or three decades following the middle of this century, there was little academic writing about fundamental hearsay issues. My guess is that scholars became disheartened

* Fredrikson & Byron Professor of Law, University of Minnesota, and organizer of the Hearsay Reform Conference, held at the University of Minnesota Law Center in September, 1991. The articles in this symposium are based on papers presented at that conference. I am pleased to salute the authors of those papers and the fifty-five evidence professors who attended. I am especially grateful to my dean, Robert A. Stein, for his encouragement and tangible aid, and to my colleagues Steven D. Penrod, Daniel A. Farber, and Robert J. Levy. In organizing and managing the conference, I received invaluable help from my secretary, Jill Braithwaite, who will soon be a member of the class of 1995 at the University of Minnesota Law School. I also owe special thanks to Richard Friedman, who suggested the idea of a conference on hearsay, and to Suzanne Park, for her hard work and astute advice.
about their chances of having an effect on hearsay law, and at any rate felt that they had nothing new to say.

The generation of hearsay reformers whose ranks included Wigmore, Morgan and McCormick did thoughtful and often brilliant work. However, the results were discouraging. On the surface, nothing much happened in response to their work. The Model Code of Evidence was an utter failure, in large part because of its radical relaxation of the rule against hearsay. The discretionary approach to admission of hearsay envisioned by the original drafters of the Federal Rules of Evidence became steadily less radical as it progressed through the rule-making and congressional process. The rules finally emerged as a typical list of class exceptions, supplemented by a residual exception seemingly hedged with restrictions.

The thoroughness of the Wigmore-Morgan generation, and the durability of its insights in the absence of doctrinal change, made it more difficult for scholars to find new perspectives. Doctrinal scholarship feeds on doctrinal change, and for a time there was not much to stimulate those who might otherwise have been interested in hearsay reform.

Times have changed, for three reasons. First, the law has started to change. There have been dramatic legislative changes in other English-speaking nations. As Professor Allen points out in his contribution to this issue, these deserve our careful attention. In the United States, change has been less obvious, but perhaps just as profound. Many observers believe that liberal judicial interpretation, particularly of the residual exceptions and the expert witness rules, have shaken the foundations of the hearsay ban. In civil cases, procedural changes not formally classified as part of evidence law—for example, increased use of summary judgment and of alternative methods of dispute resolution—may have the effect of making resort to full trial with cross-examination of eyewitnesses relatively less common, thereby weakening the impact of the hearsay ban. In criminal cases, significant doctrinal development has occurred in caselaw interpreting the hearsay-excluding aspect of the right to confrontation. Confrontation issues came alive for academic lawyers after the Supreme Court's ruling in 1965 that the Confrontation Clause applied to the states, and fundamental questions about the scope of the Clause are being actively debated in commentary and in the courts.

Second, legal scholarship has more to say about hearsay because it has acquired additional tools. For example, until recently the proposition that jurors are competent to evaluate hearsay had not really been tested by any measure other than common sense. For this reason, one would expect the new wave of hearsay scholarship to include examination of empirical issues with the methods of social science, and this symposium includes articles representing this approach. Moreover, the procedure of excluding hearsay, and requiring in its place firsthand testimony when that is available, has costs that can usefully be analyzed using the tools of microeconomics, as Professor Friedman demonstrates in his contribution. The reader will also note the influence of concepts from decision analysis and probability theory in the contribution of Professors Tillers and Schum. Finally, while the idea that one might learn by examining other systems is not new to legal scholarship, it has been underutilized in the hearsay context. In his contribution, Professor Damáska examines continental analogues to the hearsay rule, notes differences between legal environments that explain a different treatment of derivative proof, and adds a note of caution about change of the American system.

Third, scholars who write about hearsay policy in criminal cases have new things to say because they have views about the goals of hearsay exclusion that are different from those of the Wigmore-Morgan generation. That generation’s case for reform was founded, expressly or implicitly, upon the belief that free proof would enhance accuracy in fact-finding. A reductionist view of the dangers against which the hearsay rule was directed led to relatively simple solutions to the hearsay problem. If the hearsay rule, and the hearsay aspect of confrontation doctrine, are perceived as being more than merely misguided efforts to protect jurors from factfinding failures, then the case for abolition or radical reform is not so simple. The due process revolution of the Warren Court, accompanied by the increased visibility of the confrontation right after 1965, has caused the hearsay wing of confrontation doctrine to be examined by scholars coming from a new perspective. Today, a number of scholars are inclined to view the exclusion of out-of-court statements as a way of protecting individual rights from the intrusion of government, or as a way of influencing the conduct of police and prosecutors in the process of preparing and preserving evidence. Several of the articles in this issue reflect a complex understanding of the process goals served by hearsay and
confrontation doctrine, and hence a more complicated view of the path that reform might take.

In short, the three forces of new law, new tools, and new goals have revived inquiry about fundamental issues of hearsay reform. But readers should not treat this foreword as proof of the truth of what it asserts. They should turn the page and see for themselves.