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Cognition and Hearsay: A Response to Professor Friedman

by
CRAIG R. CALLEN*

Professor Friedman makes a provocative case for doing away with specific hearsay rules in civil cases and for admitting what he might call non-testimonial statements in criminal cases. I use the term "hearsay rules" to refer not only to the rule prohibiting the admission of hearsay that is not within an exception, but to the exceptions themselves. Space constraints force me to concentrate on the area of our greatest disagreement. There are many points in his paper on which we do agree, several of which he notes in that paper.[1]

Although Professor Friedman rightly points out that some arguments used to defend hearsay doctrine are dubious, I think that he is wrong to conclude that there can be no sound basis for the doctrine. While I do not defend the current system of hearsay rules, word-for-word, I will discuss some substantial weaknesses in his argument. I focus primarily on a cognitive problem for jurors that he overlooks, or at least minimizes. A good deal of research in cognitive science, psychology, and linguistics shows that the problem is, at the least, more difficult than he seems to appreciate. His analogy comparing human communication, mechanical readings, and animal behavior is particularly misleading. In order to explain how this cognitive problem relates to evidence rules, I must first briefly discuss a more basic issue: why the empirical reality of human decision-making strongly suggests that the practice of excluding some possibly relevant evidence[2] serves a useful function.

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1. See, *e.g.*, Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation,* 49 HASTINGS L.J. 545, 552, 557 (1998). I agree that courts and commentators should analyze the utility of hearsay evidence in deciding whether to admit it. *See* Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 63-65 (1994).

2. *See* David Crump, *On the Uses of Irrelevant Evidence,* 34 HOUS. L. REV. 1, 3 (1997) (The definition of relevant evidence in the Federal Rules is "impossibly broad if taken literally. It can be read to include everything a lawyer would ever conceivably offer....").

I. Constraints on Cognitive Capacity and Constraints on Evidence

It is not unusual to see arguments that fact-finders will tend to make better decisions if the quantum of evidence to which they have access increases. While that proposition is true in a very general, abstract sense, one aspect of the reality of human cognition shows that the generalization could be very misleading in any number of particular cases.

Human ability to consider and process a mass of data at any one time is limited.[3] Our limited mental workspace requires us to use strategies to identify critical data to help us use our limited decision-making resources efficiently. While there are all sorts of interesting examples of the use of strategies to guide the use of resources, consider whether you can multiply 327 times 429 in your head. Those who are able to do it derive their ability from the use of strategies or tricks learned from experience.[4] As for the use of strategies to identify critical data, experts in problem-solving disciplines are primarily distinguishable from laypeople in the way they select data rather than the amount of data they consider.[5] Limitations on human beings' mental workspace pose special problems when they (the human beings) must act as jurors in a typical trial and become passive decision-makers about facts without powers to call witnesses, or question them.[6] Jurors must rely on their experience in extra-judicial decision-making in an unfamiliar context. They necessarily receive less information about questions of fact than they would have in their everyday lives. Processes unfamiliar to them shape the information they do receive. The generation of evidence is party-driven, and the parties often have incentives to present evidence in a form that is not the easiest one for the jury to evaluate.[7] For example, adversaries have incentives to try to over-prove certain points, either to attempt to mislead the jury with cumulative evidence, or to impress clients with the thoroughness of their efforts.[8] They may prefer not to offer

3. *See* Herbert A. Simon & William G. Chase, *The Mind's Eye in Chess*, *in* MODELS OF THOUGHT 404, 413-15 (Herbert A. Simon ed., 1979).

4. *E.g.*, James J. Staszewski, *Skilled Memory and Expert Mental Calculation*, *in* THE NATURE OF EXPERTISE 71, 92-125 (Michelene T.H. Chi et al. eds., 1988).

5. *See* Callen, *supra* note 1, at 57.

6. I have talked elsewhere about the application of the hearsay rules in bench trials. *See* Craig R. Callen, *Inference from the Secondary Evidence of Ordinary Witnesses and Scientific Experts*, *in* PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE 37, 39-40 (J. F. Nijboer & J. M. Reintjes, eds., 1996).

7. *See* MIRJAN L. DAMAŠKA, EVIDENCE LAW ADRIFT 89, 92 (1997).

8. *See e.g.*, RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 871 (2d ed.

other evidence, such as evidence about the circumstances in which a statement was made, because they fear its effect on the jury. [9]

II. Cognition and Extrajudicial Statements

The need to limit consumption of valuable resources in litigation, and the obligations and limitations of lay jurors, oblige us to attend to the everyday strategies humans use when we design fact-finding processes, particularly those relating to spoken, written, or physical communications. Extra-judicial communication relies on one fairly well-identified strategy for understanding communications in context, which is useful in considering the difficulties passive lay fact-finders might have in evaluating hearsay. That strategy is outlined in a set of conventions, known as Grice's maxims.[10] Those maxims model a strategy for co-operation that enables the communicator to convey, and the hearer to comprehend, a great deal of information with very little effort. (There is some correspondence between individual maxims and Morgan's hearsay dangers, but the analyses do diverge.)[11]

To show how the maxims work, let me use the following example involving my friend Sean Doran, who is Irish. Suppose I said to him, "We have a chance to see some great hurlers Sunday." The first maxim is that the speaker should be neither more nor less informative than necessary. Here, I would be understood to imply to Sean that one *can* see hurlers Sunday—otherwise the reference to a chance would be a silly reference to a statistical possibility. The second is that the utterance should relate to the purpose of the parties to the communication, so that the reference to seeing hurlers should refer to something we are interested in doing. The third is that the speaker should be orderly, brief and clear. The words might, for instance, briefly convey the availability of hurlers and the possibility, but not certainty, that we will see them. The final maxim is that I should try to make my contribution true. I would usually have no reason to make the statement if seeing hurlers were impossible. As far as I am aware (and if I can say it without provoking a long discussion of *Daubert*) the theory is generally accepted in a number of disciplines, testable and confirmed by empirical research.

1992) (citing United States v. Reeves, 636 F. Supp. 1575, 1576-79 (E.D. Ky. 1986)); Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial By Heuristics*, 15 L. & SOC'Y REV. 123, 136-137 (1980).

9. *See* Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 923-24 (1992).

10. *See* H. PAUL GRICE, STUDIES IN THE WAY OF WORDS 26-27 (1989).

11. *See* Callen, *supra* note 1, at 76.

Well, then, what would my utterance "We have a chance to see some great hurlers Sunday," have meant? I might well make such a statement (i) if I wanted Sean to believe that the pitchers (or hurlers) in the Giants-Padres game Sunday are good, (ii) if my tone were ironic, and I wanted him to believe that the pitchers would be bad, (iii) if I wished to impress Sean with knowledge of National League pitchers, or (iv) if I wanted Sean to infer that there would be a contest in that famous Irish sport, hurling. There are other possibilities as well. Note that, as passive observers, you would not really have a good basis on which to decide what the statement meant on the information you have. Professor Friedman seems to say that my statement is simply a trace unlikely to have been left unless it were true.[12] That argument mistakes the process of communication, because you don't know what circumstances would make the statement true.

If you had further information, namely that Sean and I sent e-mail to each other about the baseball games on the weekend of this conference, you would probably conclude it was likely that I was talking about baseball rather than hurling, and likely that I was trying to make a point about the weekend's pitchers. If you had information about my tone of voice, you would probably know whether I was being ironic. In neither case would you know the basis for my conclusions about pitchers, which, given that I seldom pay much attention to the National League, would be very shaky.

The hearsay rules give parties incentives to supply jurors with information they need to evaluate whether they should rely on their extra-judicial strategies to evaluate out-of-court communications.[13] In addition, they provide a minimal check for whether the likely impact of the evidence warrants the effort to evaluate it. The rules exclude some[14] out-of-court statements unless the proffering parties

12. *See* Friedman, *supra* note 1, at 556.

13. While I focus here on cognitive science, linguistics and psychology, *see infra* at note 21, I should say that the argument that the hearsay rules perform a necessary evidence-forcing function can be supported any number of ways. Examples are the best evidence theory arguments of Professors Nance and Seigel, (Dale A. Nance, *The Best Evidence Principle,* 73 IOWA L. REV. 227, 263-70 (1988); Seigel, *supra* note 9), Professor Swift's foundation-facts theory (Eleanor Swift, *A Foundation Fact Approach to Hearsay,* 75 CAL. L. REV. 1339 (1987)), or the arguments about foundation facts and corroboration that Professors Nesson and Benkler make in regard to the confrontation clause (Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration under the Confrontation Clause,* 81 VA. L. REV. 149 (1995)).

14. Professor Friedman believes that the hearsay rules exclude a significant amount of evidence with substantial probative value. *See* Friedman, *supra* note 1, at 557. Given the flexibility of, for example, the residual exceptions in Rule 807, this seems extremely doubtful. *See* Myrna S. Raeder, *The Hearsay Rule at Work: Has it been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507, 514-17 (1992) (residual exceptions);

produce the evidence necessary to satisfy an exception, which is information about the context in which the statement was made, or foundation facts. Professor Friedman seems to argue that testimonial statements in criminal cases should be suspect because of the context in which they arise.[15] He argues, in another part of the paper, that insisting on foundation facts for the admission of other sorts of hearsay would be contrary to the goal of truth determination.[16] Yet, even in the case of non-testimonial hearsay, fact-finders may have no reason to know the speaker's message without information about the context.

Professor Friedman believes that we can rely on the adversary system for production of information about context.[17] Parties, however, may prefer to offer hearsay rather than offering live testimony. Sociolinguistics tells us that the use of reports of speech in ordinary conversation is a matter of creative narrative choice rather than necessity. The reporter uses the report to cast herself as a mere observer, in the process both paraphrasing and characterizing the speaker's statements, and concealing her own evaluative role.[18] Doing so encourages the listener (or by analogy, the juror) to identify with the witness, and allows the witness or party to avoid personal responsibility for her utterance and yet to add the support of authority to her message.[19]

That point highlights the thinness of Professor Friedman's analogy between human speech, on the one hand, and information obtained from extra-judicial observations of animals or thermometers, on the other. It is fair, I think, to say that few jurors are ever likely to personally identify with a thermometer, or to

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see also Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 801 (1992) ("The hearsay rule today is more a rule of admission than exclusion."). Professor Friedman also argues that the residual exception gives the fact-finder too much discretion (Friedman, *supra* note 1, at 551) which seems anomalous since the rule that he would likely use instead of the hearsay rules, Rule 403, is one under which trial judges are given "extreme" deference. *See* David P. Leonard, *Minimal Probative Value and the Failure of Good Sense*, 34 HOUS. L. REV. 89, 97 (1997). Finally, he argues that the hearsay exceptions are gratuitously complex. Friedman, *supra* note 1 at 551. It is likely, however, that judicial decisions about hearsay under 403 would be at least as complex, and possibly more so. *See, e.g.*, Christopher B. Mueller, *Post Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 397 (1992); Siegel, *supra* note 9, at 914.

15. *See* Friedman, *supra* note 1, at 561.

16. *See id.* at (note 24).

17. *See id.*

18. *See* DEBORAH TANNEN, TALKING VOICES: REPETITION, DIALOGUE AND IMAGERY IN CONVERSATIONAL DISCOURSE 104, 109, 125 (1989).

19. *See* TANNEN, *supra* note 18, at 104; *see also* Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 900 (1994).

identify strongly with a witness testifying about one. Nor, with Grice's maxims in mind, is a bloodhound likely to engage in irony.

Conclusion

Professor Friedman justifiably criticizes the psychology underlying some of the older exceptions, such as the dying declaration exception.[20] While there were flaws in that earlier psychology, it does not follow that there is no good psychological reason to be cautious about the admission of hearsay evidence. In fact, psychology and other fields give us some reason to think that hearsay presents special inferential problems that may warrant admissibility rules. Professor Friedman's paper is interesting and provocative, but his attempt to argue that hearsay is a form of trace evidence[21] misses much about human communication.

20. *See* Friedman, *supra* note 1, at 552. He also relies on some experiments purporting to show that jurors undervalue hearsay. *See id.* at 555. I do not think these studies strengthen his argument very much. First, setting a "true value" for evidence is extraordinarily difficult, and may be impossible. *See* Jonathan J. Koehler, *The Base Rate Fallacy Reconsidered:Descriptive, Normative and Methodological Challenges,* 19 BEHAV. & BRAIN SCI. 1 (1996). It may be that *both* the mock jurors in the studies and those who stipulated the (greater) "true value" overvalued the hearsay in question. In addition, the studies rely on exactly the sort of judgments about trustworthiness that he criticizes in conventional doctrine—still arguing that the mock jurors were wrong and that the experts know the true value of evidence. Finally, one of the studies reported that the mock jurors believed that hearsay is dubious evidence and should be excluded. *See* Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence,* 76 MINN. L. REV. 683, 697-98 (1992). That undermines the idea that any hearsay prohibition must rest on elitist distrust of jurors, or of old fashioned "cracker barrel" psychology. *See* Friedman, *supra* note 1, at 552.

21. Professor Friedman correctly notes that cognitive psychologists use the term "memory traces" to refer to the changes in the brain that represent memories. *See* Friedman, *supra* note 1, at 556. The use of the term "trace" might have led him to conclude that psychologists regard those changes, engrams, much as a forensic expert might think of physical traces that events or conditions may leave, such as impressions in a photograph. That conclusion would be an error. Psychologists believe that human memories are not literal recordings of events. Instead, humans integrate whatever information they derive from new experiences by new information to older knowledge or belief, in terms of the new information's meaning to them as individuals. *See, e.g.,* Robert A. Bjork, *Memory and Metamemory Considerations in the Training of Human Beings, in* METACOGNITION: KNOWING ABOUT KNOWING 185, 187 (Janet Metcalfe & Arthur P. Shimanmura eds., 1994). Retrieval of information from memory in order to make a statement may be "more reconstructive than literal" and may depend on a number of factors, including environment and personal mood. *See id.* at 187-88. So the relationship between events and physical traces is less complicated than that between events and reports of memory—particularly so in light of problems with statements such as possible irony, insincerity or ambiguity.