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LEFT HAND, THIRD’ FINGER: THE WEARING OF WEDDING (OR OTHER) RINGS AS A FORM OF ASSERTIVE CONDUCT UNDER THE HEARSAY RULE

Peter Nicolas

Recently, I took a trip to Berlin, Germany, to celebrate the end of what turned out to be an incredibly busy academic year. I had just finished teaching two very different courses: a large lecture course in Evidence and a small seminar entitled “Gay Rights and the Constitution.” Minutes before boarding the airplane, I sent my publisher the final draft of the annual supplement to my Evidence textbook. Having all of that behind me, I hoped the trip would allow me to clear my mind of complex legal issues such as the hearsay rule and the right to same-sex marriage that I had grappled with during the year in those two subject areas. Little did I realize that the trip would do just the opposite, bringing those two issues together to form an even more complex legal and cultural puzzle that would keep my mind occupied throughout the trip and for the next several months as I poured through not only legal sources, but also anthropological and sociological ones in search of a solution.

Shortly after arriving in Berlin, I discovered — or so I initially thought I had — that a rather large number of Berliners were gay and in committed relationships. What, you might well ask, was my evidence for drawing such a conclusion? To me, the evidence at first glance seemed so clear that the people I encountered were practically wearing it on their sleeves, or more precisely, their hands: most of the people I initially encountered in

1 Or fourth finger, depending on whether you consider the thumb or the index finger to be the first finger (and thus, whether you consider the thumb to be a finger or not). Compare PENNY PRODDOW & MARION FASEL, WITH THIS RING: THE ULTIMATE GUIDE TO WEDDING JEWELRY 18 (2004) (stating that the wedding ring is traditionally worn on the “third finger of the left hand”), with PEGGY POST, EMILY POST’S WEDDING ETIQUETTE: THE DEFINITIVE GUIDE TO YOUR WEDDING EXPERIENCE 33 (5th ed. 2005) (stating that the wedding ring is “traditionally worn on the fourth finger of the left hand.”); see also SUE FOX, ETIQUETTE FOR DUMMIES 275 (Wiley Publishing 2d ed. 2007) (2000) (stating that whether it is the third or fourth finger depends on whether you count the thumb as a finger or not).

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Berlin were sporting simple gold bands on the ring fingers of their right hands.

The symbolic significance of wearing wedding rings on the left versus the right hand had occupied my mind for much of the previous year, which is why the large number of Berliners wearing them on their right hands stood out to me. That year, my long-term partner (Mike) and I decided that although we could not legally marry in our state of residence (Washington State) due to its ban on same-sex marriage, nothing stopped us from exchanging wedding rings with one another. Once we made that decision, we had another decision to make: on which hand would we wear our rings?

As most people know, the tradition in the United States (and in many cultures) is for married people to wear their wedding bands on the ring finger (that is, the one closest to the pinkie) of their left hand. This is based primarily on a romantic belief (since debunked) that a vein or nerve went from this finger directly to the heart. In contrast, within the gay and lesbian community in the United States, individuals in committed relationships will often wear wedding or commitment rings on the ring finger of their right hand, for one of three reasons. First, some gay people do so as a way to protest laws that prevent gay couples from legally marrying, wearing the ring on the opposite hand to draw attention to the unequal treatment.

Second, some gay people do so as a way to signal their view that same-sex relationships are different from heterosexual relationships. Third, some gay people do so to express their commitment to one another privately (and by extension to those, including other gay people, who recognize the significance of wearing the ring on the right hand) while avoiding using the ring as a symbol to others that signals "married," which would inevitably result in questions about their spouse.

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Questions that, if answered truthfully, might cause an adverse reaction, be it the loss of their job, estrangement from a family member, or other stigmatizing behavior.\footnote{See sources cited supra note 7.} For some combination of reasons one and three, Mike and I sized our rings to fit the ring fingers of our right hands.

My prior research on ring placement notwithstanding, I soon began to harbor doubts about my conclusion regarding the sexual orientation of the Berliners I had encountered thus far. As an initial matter, if ring placement were an accurate indicator of sexual orientation, gay people would represent something approaching ninety percent of the population of Berlin, which would be inconsistent with even the most generous estimate of gay people representing ten percent of the population.\footnote{See \textsc{Edward O. Laumann et al.}, \textit{The Social Organization of Sexuality: Sexual Practices in the United States} 287-90 (1994); \textit{Realities and Fallacies of Homosexuality}, 30 SOC. SCI. \\& MODERN SOC'Y, July/Aug. 1993, at 2-3; \textit{Richard Schneider, Jr., 'The People Gay' and the 10\% Debate}, \textsc{Gay \\& Lesbian Rev. Worldwide}, Spring 2000, at 3-6.}

I began to harbor even more serious doubts when I attended the city’s sixteenth annual Lesbian and Gay Festival in the traditionally gay neighborhood around Nollendorfplatz in Schöneberg. In contrast to the Berliners I had encountered elsewhere in Berlin, a large percentage of the festival-goers in this predominantly gay neighborhood sported wedding rings on their left hands. Were I to have taken my prior research at face value, it would mean that Berlin is a city in which almost everyone is gay except for those who frequent its traditionally gay neighborhood. As intriguing as this conclusion sounded, statistics were not on its side. Moreover, other evidence tended to point in the opposite direction. More specifically, many of the festival-goers did not strike me as being straight. Perhaps it was my gaydar,\footnote{The term “gaydar” refers to the “apparent ability [of gays and lesbians] to recognize each other by cues too subtle for heterosexuals” to detect. \textit{Mary Coombs, Interrogating Identity}, 11 \textsc{Berkeley Women's L.J.} 222, 232 n.57 (1996) (book review); \textit{see also Nalini Ambady, Brett Conner, \\& Mark Hallahan, Accuracy of Judgments of Sexual Orientation From Thin Slices of Behavior}, 77 J. PERSONALITY \\& SOC. PSYCHOL. 538, 543-45 (1999) (providing analytical data regarding ability to perceive sexual orientation).} or maybe it was the fact that many of the men sporting rings on their left hands were also sporting the hands of their boyfriends in their hands. Whatever it was, it became clear to me that there was more to interpreting the meaning of ring placement on hands and fingers than my initial research had led me to conclude.

So after I returned home, I decided to critically examine my initial hypothesis that a ring on the left hand means heterosexual and married, a ring on the right hand means gay and married (or in a committed relationship), and no ring means single. I wanted first to determine whether this hypothesis was true within the United States, and then to examine whether the principles of ring placement interpretation differ across cultures.
As I began to conduct my research in earnest, I quickly discovered significant holes in my hypothesis, even when I limited my focus to the United States. While the simple hypothesis I had established was generally consistent with practice within the United States, there were important exceptions.

First, gay couples within the United States sometimes opt to wear their wedding or commitment rings on the ring finger of the left hand, thus making them indistinguishable from married heterosexuals. The reasons cited by gay couples who choose to wear the rings on their left hands are just the opposite of the reasons cited by those who wear them on their right hands, namely, to signal their view that same-sex relationships are no different from heterosexual relationships, and indeed to purposely use a symbol that, to others, would signal “married” so as to invite questions about their spouse and the resulting conversation about the right to legal recognition of same-sex relationships. Furthermore, with the legalization of same-sex marriage in Massachusetts, Iowa, Vermont, Connecticut, Maine, New Hampshire, and, briefly, California, some gay couples who previously wore their rings on their right hands as a symbolic protest against laws that prevent gay couples from marrying have on their (legally recognized) wedding days made the equally symbolic gesture of moving their rings to their left hands as a nod to the affirmative change in the law.

Moreover, some heterosexual individuals in the United States will, for at least two reasons, wear wedding rings on their right hands, making them indistinguishable from gay people in committed relationships (that is, the right-hand-wearing genre of gay people). First, while many people remove their wedding rings upon divorce, some people in the United States will move their wedding ring to the ring finger of their right hand if they have divorced their spouse (an even smaller number will keep it on their left ring finger, particularly if they did not want to get divorced). Second, some widowed heterosexual individuals will, upon the death of their

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11 See supra notes 3-8 and accompanying text.
12 See Suter & Daas, supra note 4, at 185-86 (discussing same-sex couples who follow heteronormative conventions when wearing wedding and engagement rings); Which Finger, supra note 7 (discussing the various ways same-sex couples conform to and defy heteronormative conventions).
14 See, e.g., Franey, supra note 5; Mehren, supra note 5.
16 See MARTIN, supra note 15, at 657.
spouse, move their wedding ring to the ring finger of their right hand,\(^{17}\) although some will keep it on the ring finger of the left hand for at least some time.\(^ {18}\)

In addition, a number of other practices I uncovered led me to conclude that the *absence* of a wedding ring is not necessarily a sign that a person is, in fact, single. First, not all couples choose to have double-ring ceremonies, in which they give one another a wedding ring; some choose, often because of the husband’s desire not to wear a wedding ring, to have only a single-ring ceremony in which only the wife wears a wedding ring.\(^ {19}\) Second, some people, even if married, have been known to remove their wedding rings when they wish to convey to others the message that they are “available” (in other words, if they want to cheat on their spouses without signaling to the object of their desire that they are married).\(^ {20}\) Other reasons for not wearing a wedding ring at any given point in time may include significant weight gain or loss (the ring will not fit unless it is re-sized or the weight is lost or regained), removal to avoid damaging the ring (such as when one is doing heavy-duty work with one’s hands), or simply forgetting to put it on in the morning.

Nor, as it turns out, is the *presence* of a ring on the ring finger necessarily a sign that a person is actually married or in a committed relationship. It is not unusual for single women to wear a fake wedding ring at times when they wish to discourage men from hitting on them\(^ {21}\) (less frequently, men will do so as well).\(^ {22}\) In addition, a recent trend among single people is to wear a Singleringen, a silver band covered with a bright acrylic upper layer (which has a crescent cut out of it) as a means of more directly and clearly signaling their status as single than would wearing no ring at all.\(^ {23}\) According to the designer of the Singleringen, it is designed to be worn on the ring finger of the hand on which one would

\(^{17}\) Id. at 809-10; GENEVIEVE DAVIS GINSBURG, WIDOW TO WIDOW: THOUGHTFUL, PRACTICAL IDEAS FOR REBUILDING YOUR LIFE 81 (rev. ed. 1997) (1995).

\(^{18}\) GINSBURG, supra note 17, at 79-80; MARTIN, supra note 15, at 657; TUCKERMAN & DUNNAN, supra note 15, at 402-03.

\(^{19}\) See GRUEN, supra note 15, at 115-16.


\(^{21}\) ALEX BOESE, HIPPO EATS DWARF: A FIELD GUIDE TO HOAXES AND OTHER B.S. 44 (2006); GRUEN, supra note 15, at 115; MICHAEL POWELL, BEHAVE YOURSELF!: THE ESSENTIAL GUIDE TO INTERNATIONAL ETIQUETTE 82 (2005); BETH WHITMAN, WANDERLUST AND LIPSTICK: THE ESSENTIAL GUIDE FOR WOMEN TRAVELING SOLO 189 (2007).

\(^{22}\) Jennifer Sumsion, Critical Reflections on the Experiences of a Male Early Childhood Worker, 11 GENDER & EDUC. 455, 459 (1999) (discussing a male in a traditionally female job who started wearing a wedding ring so people would not think he was gay and also to appear unattainable to female coworkers who sexually harassed him).

normally wear an engagement or wedding ring, although in North America many people wear them on their right hands.

With this additional research in hand, I now had a more nuanced theory of determining sexual orientation and relationship status based on ring placement. But it wasn’t clear that the additional information did much to resolve the puzzle that I had encountered in Berlin, for it did not make sense to conclude that ninety percent of Berliners were either (1) gay (right-hand-wearing genre) and in committed relationships; (2) widowed or divorced; (3) single and wearing a Singleringen that I mistook for a wedding ring; or (4) single and gay, but wearing a fake wedding ring on their right hands so as to signal that they are gay and in committed relationships to prevent other people from hitting on them.

Accordingly, my next step was to determine whether the more nuanced hypothesis I had developed was consistent across all cultures or religions, or whether the significance of ring placement differed depending on the nationality or religion of the individuals involved. What I discovered just about destroyed my already fragile hypothesis on interpreting ring placement.

I began by looking at cultural practices within Germany. In doing so, I quickly discovered the key to solving the Berlin puzzle: the general rule on ring placement in Germany is just the opposite of that in the United States. Thus, most people in Germany wear their wedding rings on the ring fingers of their right hands. Accordingly, while the people who were wearing wedding rings on their right hands were non-verbally expressing that they were heterosexual and married, I had, by superimposing my own cultural norms on them, misinterpreted the message that they were sending. With this information in hand, I also had a potential explanation for why many of those attending the Lesbian and Gay festival were sporting wedding rings on their left hands: perhaps they were wearing their rings on the opposite (left) hand as a protest against laws that prevent same-sex couples from legally marrying or for one of the various other reasons that many gays and lesbians in the United States wear it on the opposite (right) hand.

Yet, as I began to delve further into the practice in Germany, I learned that revising my hypothesis would not be as simple as saying “everything I said before applies, unless you are dealing with a German, in which case everything is just the opposite.” For one thing, when heterosexuals in Germany “betroth” one another (the equivalent of getting engaged in the United States), they place a plain gold band on the ring fingers of their left

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26 See CAROLYN MORDECAI, WEDDINGS: DATING & LOVE CUSTOMS OF CULTURES WORLDWIDE, INCLUDING ROYALTY 28, 178 (1999); SPANGENBERG, supra note 3, at 30, 80.
hands. Moreover, the practice of wearing a wedding ring on the right hand is not uniform throughout Germany: wedding rings are worn on the right hand in Northern Germany but on the left hand in Southern Germany.

Nor, as I soon discovered, were heterosexual Northern Germans alone in wearing their wedding rings on their right hands. In Colombia, Greece, Norway, and Russia, for example, heterosexuals likewise wear their wedding rings on their right hands. Moreover, in many other countries the ring is worn on one hand when a couple is engaged and moved to the other once they marry. In some countries, such as Norway and Greece, the ring is placed on the left hand when engaged but moved to the right hand when the couple marries, while in other countries, such as Chile or Brazil, it is placed on the right hand when engaged but moved to the left hand when the couple marries. Indeed, ring placement may even differ by gender: at a Hindu betrothal ceremony, for example, the bride-to-be wears a gold ring on the ring finger of her left hand, but the groom-to-be wears it on the ring finger of his right hand.

In addition, just as in the United States, people in countries where the wedding ring is normally worn on the right hand will instead wear it on the left hand to signal that they are divorced, widowed, or gay. Thus, for example, in Russia, people will move their wedding rings to their left hands upon divorce or the death of a spouse. Likewise in Russia, gay people will sometimes wear a ring on their left hand, although this is usually to signal that they are single rather than to signal that they are in a committed relationship.

27 See MONGER, supra note 3, at 137; MORDECAI, supra note 26, at 178; SPANGENBERG, supra note 3, at 30.
28 See GAD, supra note 3, at 42.
30 See GAD, supra note 3, at 42; PRODDOW, supra note 1, at 19.
31 See Wedding Rings — Left or Right Hand?, WEDDING RINGS.NET, Apr. 17, 2009, http://www.weddingrings.net/blog/uncategorized/wedding-rings-left-or-right-hand.html
32 See MONGER, supra note 3, at 240.
33 See id. at 248.
34 See GAD, supra note 3, at 42; PRODDOW, supra note 1, at 19.
35 See MONGER, supra note 3, at 257; MORDECAI, supra note 26, at 118-19.
36 See MORDECAI, supra note 26, at 118; TRACY NOVINGER, COMMUNICATING WITH BRAZILIANS: WHEN “YES” MEANS “NO” 188 (2003).
37 See MONGER, supra note 3, at 28.
38 See POST, supra note 1, at 81.
39 Id. at 240.
In addition, ring placement may vary depending on the religion of the individuals involved. Thus, for example, in Jewish and Eastern Orthodox wedding ceremonies, the rings are placed on the index finger of the right hand. However, individuals who practice such religions today will often move the ring after the wedding to the hand and finger that matches what the society in which they live considers the proper location for the wedding ring.

As if this isn't confusing enough, the Irish add a new twist to the science of interpreting ring placement with their Claddagh ring, which depicts a heart with a crown on top of it with the heart clasped by a pair of hands. As a matter of custom, the ring conveys a different message depending not only on the hand it is worn on but also the way in which it is oriented on the hand. If worn on the right hand with the crown turned toward the wrist and the heart turned outward, it means that the wearer is single. If worn on the right hand with the crown turned outward and the heart turned toward the wrist, it means that the wearer is in a committed relationship. And if worn on the left hand with the crown turned outward and the heart turned toward the wrist, it means that the wearer is married.

And then there are abstinence promise rings, typically given by a parent to a child to symbolize a commitment “by the child to remain sexually pure until marriage” (or, sometimes, a commitment not to use drugs, alcohol, or tobacco). Such rings, which are sometimes plain bands similar to wedding rings, are often worn on either the left or right ring fingers, thus creating the risk of communicating to others that the wearer of the ring is a married heterosexual or a gay individual in a committed relationship.

As I sorted through the various ring placement customs across various cultures, the evidence professor in me began to realize that my ring placement puzzle had all of the trappings of a classical hearsay problem.

To understand why this is so, imagine that you are litigating a case in which a particular individual’s sexual orientation or marital status is somehow relevant. For example, evidence of a plaintiff’s sexual orientation would be relevant to the defense of truth in a defamation action...
in which he sues someone for stating or writing that he is gay. The sexual orientation of the defendant in a sexual harassment suit based on sexual desire might likewise be deemed relevant. Moreover, the marital status of an individual would be relevant in a prosecution for adultery.

Imagine further that you wish to offer as evidence of the individual's sexual orientation or marital status testimony that she said on some earlier occasion “I’m gay and in a committed relationship,” or “I’m married,” or “I’m single.”

Under the Federal Rules of Evidence, hearsay is defined in pertinent part as “a statement . . . offered in evidence to prove the truth of the matter asserted.” In turn, the term “statement” is defined to include “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Hearsay is inadmissible unless, inter alia, it falls within an exception to the hearsay rule.

Under this definition, testimony regarding what an individual said on some earlier occasion about his sexual orientation or marital status would clearly be hearsay. First, as oral statements made by an individual, they easily fall within the definition of the term “statement.” Second, the statements at issue are being offered “to prove the truth of the matter asserted”: the statement “I’m married” is being offered to prove that the person is, in fact married, and the statements “I’m single” and “I’m gay and in a committed relationship” are offered to prove those propositions.

Of course, my ring placement puzzle is not quite the same, for in it I do not have evidence that individuals have made any verbal statements at all regarding their sexual orientation or marital status. All I have are individuals wearing rings on the ring fingers of their left or right hands. Accordingly, such evidence is hearsay only if wearing a ring on one’s hand is analogous to making a verbal statement about one’s sexual orientation or marital status.

As the definition of “statement” makes clear, however, the rule against hearsay is not limited to verbal assertions. Rather, it also includes

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53 FED. R. EVID. 801(c).
54 Id. at 801(a).
55 Id. at 802.
56 FED. R. EVID. 801(a) advisory committee’s note ("It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of ‘statement.’"). However, verbal declarations can in some instances be deemed to be nonassertive, in which case they would fall outside the definition of the term "statement" and hence outside the definition of "hearsay." Id. ("Similar considerations govern nonassertive verbal conduct . . . also excluded from the definition of hearsay by the language of subdivision (c)"); see also CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.8 (3d ed. 2003) [hereinafter MUELLER & KIRKPATRICK 2003].
"nonverbal conduct of a person, if it is intended by the person as an assertion." In elaborating on the differential treatment accorded to nonverbal conduct vis-à-vis that accorded to verbal conduct, the Advisory Committee's Note provides in pertinent part as follows:

Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred . . . .

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. 58

With that background in mind, we thus must ask whether, when a person wears a wedding or other commitment ring, she intends in doing so to assert something to those around her. The answer seems rather clearly in most instances to be yes: wearing a wedding or commitment ring is a way for a person to communicate nonverbally to those around them something along the lines of "I share a life with someone, so if you're interested in me, tough luck. I'm not available." 59

Can the failure to wear a wedding ring likewise be viewed as nonverbal assertive conduct? Here, the answer is less certain. To be sure, if an individual chooses to wear the so-called Singleringen, that, like wearing a wedding ring, is designed to assert something about the wearer's relationship status, namely, that the person is unattached. 60 But what about those who don't wear a wedding ring at all — can it really be said that their failure to wear a wedding ring is intended by them as an assertion of their status as single?

57 FED. R. EVID. 801(a) (emphasis added).
58 Advisory Committee's Note to FED. R. EVID. 801(a).
59 TESS AYERS & PAUL BROWN, THE ESSENTIAL GUIDE TO LESBIAN AND GAY WEDDINGS 138 (Alyson Books rev. ed. 1999); see also Shahar v. Bowers, 114 F.3d 1097, 1107 (11th Cir. 1997) ("the wearing of a wedding ring is an outward sign of having entered into marriage"); TEGG, supra note 3, at 16 (noting that in a situation in which it is hard to hear if a woman is introduced as "Miss" or "Mrs.," the wedding ring is a nonverbal means of communicating that information to a person); Suter & Daas, supra note 4, at 185-187 (noting that wearing rings is a way to nonverbally communicate to others the nature of one's relationship); Diary of a Russian Wife, http://zamuzh.blogspot.corn/2006/07/non-verbal-communication_16.html (July 16, 2006, 10:32) (describing the wearing of a wedding ring as a type of nonverbal signal).
60 See Singelringen Concept, supra note 23 ("Like a wedding band, Singelringen signals the wearer's romantic status: proud to be a single.").
To answer this question, it is perhaps easiest to step away from the concept of nonverbal communication for a moment and to first conceptualize this in terms of verbal communication. If individual A says “I am married,” that is clearly a form of verbal communication intended to assert something about individual A’s marital status and thus is a form of hearsay. And if individual A chooses to wear a wedding ring in lieu of making a verbal statement about his marital status, that is a form of nonverbal communication intended to assert something about his marital status and is likewise hearsay.

But what of individual B, a single individual, who makes no verbal statement whatsoever about her marital status? Can it really be said that individual B’s failure to say that she is married is tantamount to an assertion that she is single, and thus be deemed hearsay when offered to prove that she is single?

The question here is whether an individual’s silence can ever be deemed to be hearsay. While there was some authority at common law for the proposition that the nonverbal conduct of being silent could be deemed an implied assertion, the modern view, consistent with the above-cited Advisory Committee’s note, is that “silence, at least where there is no showing of intentional silence on a particular occasion intended as an assertion when the silence was kept, is no longer within the hearsay realm.”

Accordingly, as a general matter, individual B’s failure affirmatively to verbally state anything about her marital status would not be deemed to be hearsay. And just as her failure to verbally state “I’m married” would not be viewed as hearsay when offered as proof that she is single, her failure to wear a wedding ring, and thus her failure to nonverbally state “I’m married,” likewise should not be deemed hearsay when offered to prove that individual B is single.

But what about individual C, who for years has worn a wedding ring every day without fail, then suddenly stops wearing it? Can his “silence,” in the sense that he is no longer wearing a wedding ring, fairly be characterized as an assertion by him that he is now single?

Again, it might help to revert to the world of verbal communication for a moment. Suppose instead that, every day for the past ten years, individual D walks into work each morning and announces at the top of his lungs, “I’m married!” Then one day, he stops doing so. Might he perhaps be trying to communicate something by no longer yelling “I’m married” each morning, and can such an effort to communicate by silence ever be deemed hearsay?

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62 Wilson, 747 F. Supp. at 1157 (emphasis added).
While it is true that, as a general matter, an individual’s silence is not deemed to be implied hearsay, a person’s silence can be deemed a form of hearsay when the individual intended his silence to be an assertion. Accordingly, individual C who, like individual D, effectively yelled out “I’m married” every morning by visibly wearing a wedding ring can arguably be deemed to be asserting his new status as a single individual by taking the visible step of removing his wedding ring.

Is treating the wearing of (or, in some cases, the failure to wear) a wedding or commitment ring as hearsay consistent with the policies underlying the hearsay rule? Answering that question requires a brief review of why hearsay is, as a general matter, inadmissible.

Traditionally, there are four risks associated with hearsay evidence, and thus four reasons why hearsay evidence is excluded: (1) faulty perception (the danger of inaccurate observation); (2) faulty memory (the danger of faulty recollection); (3) faulty narration (the danger of ambiguity); and (4) insincerity (the danger of fabrication). Two of these hearsay risks, those of faulty narration and insincerity, are of particular concern where “ring evidence” is involved.

The first of these, the risk of faulty narration or narrative ambiguity, refers to the risk that the declarant (i.e., the ring wearer) might misspeak or be misunderstood. As demonstrated above, the risk that the message that a wedding ring wearer intends to convey will be misunderstood is rather high given the fact that the meaning of wearing a ring on a particular hand differs not only between cultures, but within them. Thus, for example, a person who wears a ring in a manner consistent with a particular meaning in one country, such as Colombia, sends a different message by continuing to wear the ring on the same hand when he travels or moves to another country, such as the United States, where the ring conventions are reversed. By wearing a ring on his right hand, a married heterosexual from Colombia may incorrectly signal to people in the United States that he is widowed, divorced, or in a committed same-sex relationship. Similarly, a gay person in the United States, by wearing a ring on his left hand to signify that his relationship is no different from

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63 Id.; see also Hulsey v. Bush, 839 S.W.2d 411, 413 (Tenn. Ct. App. 1992); MUELLER & KIRKPATRICK 2003, supra note 56, at § 8.10.
65 See FED. R. EVID. 801(b).
66 4 MUELLER & KIRKPATRICK, supra note 56, at § 8:3; WRIGHT & GRAHAM, supra note 64, at § 6324.
67 See Daza, supra note 29, at 78.
68 Id.
heterosexual marriage, risks signaling instead to others that he is in fact a married heterosexual. 69

The second hearsay risk implicated in the use of wedding ring evidence is the risk of insincerity, which refers to the risk that the declarant may not have been speaking truthfully when he made the statement. 70 Whether it is the married man with the wandering eye who removes his wedding ring in order to signal to others that he is single, or the single woman who sports a fake wedding ring in order to prevent men from hitting on her, it is clear that people make false statements with their rings with at least some frequency.

Accordingly, as both a doctrinal and a theoretical matter, it appears sound to treat most ring evidence as hearsay, and thus to deem it presumptively inadmissible when offered to prove the marital status or the sexual orientation of the person wearing (or in some cases, failing to wear) the ring. Does this mean that ring evidence is never admissible? For at least three reasons, the answer to that question is no.

First, as indicated above, not all ring evidence can be deemed assertive in nature. Specifically, the absence of a ring on an individual's finger, when not accompanied by special circumstances (such as a prior longstanding practice of wearing a wedding ring and then removing it as a way to communicate one's availability, showing their ring-free hand in response to a question about their marital status, or otherwise making efforts to display their ring-free hand), is non-assertive in nature and thus falls outside the scope of the definition of hearsay.

Second, a statement, even if assertive in nature, is deemed to be hearsay only if it is offered "to prove the truth of the matter asserted." 71 Thus, for example, evidence that a person is wearing a wedding ring is hearsay only if it is offered to prove the truth of the non-verbal statement that such a ring expresses, namely, to prove that the person is in fact married. If, on the other hand, a statement is significant merely because it was made, and it is offered into evidence for that reason, it is not being offered to prove the truth of the matter asserted and accordingly is not hearsay. 72

There are at least four ways in which ring evidence could be offered for some reason other than to prove the truth of the matter that is being asserted by the wearing of the ring. First, the ring evidence can be offered as a prior inconsistent statement to impeach a witness's credibility. Imagine that a witness is asked on the stand if he has ever been married, and he answers the question in the negative. In that case, evidence that he wore a wedding ring on some prior occasion, which, as discussed above, was in effect a non-verbal statement equivalent to the verbal statement "I'm

69 Id.
70 See WRIGHT & GRAHAM, supra note 64, at § 6324.
71 FED. R. EVID. 801(c) (emphasis added).
72 See Advisory Committee's Note to FED. R. EVID. 801(c).
married," could be introduced into evidence not to prove that he, in fact, was married, but rather to impeach his credibility as a witness: the jury, upon learning that the witness’s current testimony contradicts his earlier statement will question his credibility, concluding that he was either lying then or lying now. In other words, use of the ring evidence is not hearsay because its significance lies merely in the fact the prior statement was made; it is the prior statement’s inconsistency with the witness’s current testimony, and not the truth or falsity of the prior statement, which makes it relevant for purposes of impeaching his credibility.

A second way in which ring evidence could be offered for some reason other than to prove the truth of the matter asserted by wearing the ring is when it is being used as an identifying characteristic. For example, if someone testifies that the perpetrator of a hit-and-run accident drove off in a car with a bumper sticker that read, “I Love the Environment,” their testimony would not be hearsay because it was not offered to prove the truth of the matter asserted on the bumper sticker (that the perpetrator in fact loves the environment), but rather it was offered as an identifying characteristic of the car driven by the perpetrator. Similarly, if a person testifies that the perpetrator of a crime was wearing a particular type of ring on a particular finger of a particular hand, that testimony would be admissible not to prove the truth of the matter asserted by the wearing of the ring (“I’m married”), but rather as an identifying characteristic of the perpetrator of the crime.

A third way in which ring evidence could be offered for some reason other than to prove the truth of the matter asserted by wearing the ring is when it is being used as a way to show its effect on another person and thus the latter’s state of mind (such as his knowledge or the reasonableness of his taking particular actions). Thus, for example, in a civil action for alienation of affections, the defendant’s lack of knowledge that the person whose affections he alienated was married is a recognized defense. Accordingly, evidence that the person whose affections the defendant alienated was or was not wearing a wedding ring could be offered into evidence not to prove that the individual in fact was or was not married, but rather to show the reasonableness of the defendant’s belief that the individual was or was not married.


See U.S. v. Bao, 189 F.3d 860, 865-66 (9th Cir. 1999); U.S. v. Graham, 858 F.2d 985, 990 n.5 (5th Cir. 1988); Mueller & Kirkpatrick 2003, supra note 56, at § 8.17; Nicolas, supra note 50, at 852.

See U.S. v. Snow, 517 F.2d 441, 443-44 (7th Cir. 1975); Mueller & Kirkpatrick 2003, supra note 56, at § 8.19; Nicolas, supra note 50, at 852.

See U.S. v. Peco, 784 F.2d 798, 804 n.3 (7th Cir. 1986) (describing a statement regarding death threats that is not admitted to prove the truth of the matter asserted); Mueller & Kirkpatrick, supra note 56, at § 8.18.

See, e.g., Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978).
A fourth way in which ring evidence could be offered for some reason other than to prove the truth of the matter asserted by the wearing of the ring is when it is being used as circumstantial evidence of the state of mind of the person wearing (or not wearing) the ring. Thus, for example, in a divorce proceeding, evidence that the husband regularly failed to wear his wedding ring when he went to bars during business trips would be offered not to show that he was, in fact, unmarried at the time, but rather to show his unfaithful intent. In other words, the mere fact that he goes around effectively stating “I’m single” when he is in fact married is relevant.

Finally, even if ring evidence is assertive in nature and offered to prove the truth of the matter asserted, it may nonetheless be admissible if it falls within one of the exceptions to the hearsay rule. Of the multitude of exceptions to the hearsay rule set forth in the federal rules of evidence (as well as their state law analogues), a handful are potentially well-suited for ring evidence.

First, to the extent that the ring evidence involves a party to an action, and it is being offered against that party, it would be admissible as an admission of a party-opponent. Thus, for example, if the marital status of a party were somehow at issue in a case, testimony that he wore a wedding ring would overcome a hearsay objection when offered against him.

If the ring evidence is being offered against someone other than the ring wearer, a possible alternative route to admissibility is to invoke the hearsay exception for family records, which actually refers to rings! Specifically, it provides for the admissibility of “[s]tatements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, tombstones, or the like.” The theory underlying this exception to the hearsay rule is a presumption that “a person would not wear a ring with an error [regarding his family history] upon it.” Of course, what we have here is not an engraving on a ring but the ring itself and the way in which it is worn, meaning that our evidence does not quite fall within the scope of the family records hearsay exception.

78 See MUELLER & KIRKPATRICK 2003, supra note 56, at § 8.20.
79 See FED. R. EVID. 803, 804 (setting forth 29 specific exceptions to the hearsay rule); FED. R. EVID. 807 (setting forth a “catchall” exception to the hearsay rule for statements that do not fall within the specific exceptions but that have equivalent guarantees of trustworthiness); see also Fed. R. Evid. 801(d) (defining eight types of statements that, while falling with the formal definition of hearsay, are deemed “not hearsay”).
80 See FED. R. EVID. 801(d)(2)(A) (“A statement is not hearsay if . . . The statement is offered against a party and is . . . the party’s own statement, in either an individual or a representative capacity . . . .”).
81 See id.
82 See FED. R. EVID. 803(13).
83 Id. (emphasis added).
84 See 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 394, 1495 (3d prtg. 1974) (citing Vowles v. Young, 13 Ves. 140, 144 (1806)).
However, one could argue that the theory underlying this hearsay exception likewise justifies admitting evidence of the way in which a ring is worn: if it is really true that a person typically would not wear a ring upon which is engraved an erroneous statement regarding his family history, then it stands to reason that a person would likewise not wear a ring in a way that communicates an erroneous statement regarding his family history, such as by wearing a gold band on the ring finger of his left hand when he is not, in fact, married. Accordingly, assuming that ring evidence fits no other exception to the hearsay rule, one could argue for admissibility pursuant to Federal Rule 807 (or its state law analogues), which provides for the admissibility of hearsay statements that are "not specifically covered by Rules 803 or 804 but hav[e] equivalent circumstantial guarantees of trustworthiness."\textsuperscript{85}

There is one other codified exception to the hearsay rule that might more directly pave the way to admitting ring evidence. The hearsay exception for "statement[s] of personal or family history" provides for the admissibility of "[a] statement concerning the declarant’s own... marriage... or other similar fact of personal or family history...."\textsuperscript{86} Wearing a wedding ring, as has been demonstrated above, is a form of assertive conduct that makes a statement regarding one’s marital status, thus such evidence may fall within the scope of this hearsay exception. Moreover, to the extent that what is involved is not a statement regarding marriage per se but a committed relationship (as in the case of gay couples wearing rings on the ring finger of the opposite hand or someone wearing an Irish Claddagh ring on the right hand with the crown turned outward and the heart turned toward the wrist), such relationships would seem to fall within the scope of the phrase “other similar fact of personal or family history.”\textsuperscript{87}

However, there is a caveat to invoking this hearsay exception: it can be invoked only if the declarant (in other words, the person wearing the ring) is “unavailable” to testify as a witness at trial because, inter alia, he has successfully invoked a testimonial privilege, has refused to testify despite a court order, claims not to remember the subject matter of his statement, is unable to testify due to “death or then existing physical or mental illness or infirmity,” or is absent and cannot be procured “by process or other reasonable means.”\textsuperscript{88} The reason for so limiting the admissibility of such evidence is a belief that such hearsay statements are not nearly as reliable as live testimony, and thus are admissible only upon a showing that first-hand testimony by the declarant himself is not available.\textsuperscript{89} The reliability

\textsuperscript{85} See FED. R. EVID. 807 (emphasis added).
\textsuperscript{86} FED. R. EVID. 804(b)(4)(A).
\textsuperscript{87} Id.; see also Nicolas, supra note 50, at 860-62.
\textsuperscript{88} FED. R. EVID. 804(a), 804(b)(4).
\textsuperscript{89} FED. R. EVID. 804(b) advisory committee’s note.
of ring evidence, which contains an even greater risk of faulty narration than traditional spoken statements regarding personal or family history, makes such a preference for live testimony all the more clear.

So when all is said and done, ring evidence, when offered to prove the truth of what the wearer of the ring is nonverbally asserting by wearing the ring, would seem to be admissible only upon a showing that the ring wearer is unavailable to testify in person as to his marital or other relationship status (absent a successful argument for admission under Rule 807). In light of the substantial risks of faulty narration and insincerity associated with ring evidence, such a principle, whether applied in the courtroom or in everyday life, makes good sense. In other words, if you want to know with a reasonable amount of certainty whether someone is married, gay, or in a committed relationship, you should ask him directly. Only if direct testimony from him is unavailable should you resort to ring evidence in trying to make that determination, and even then, its weight should be discounted to reflect the risks of narrative ambiguity and insincerity associated with such evidence.

Although what I discovered through my travels to Germany and the research that followed is unlikely to find its way into courtrooms on a frequent basis, the results of my research nonetheless provide an important lesson for students, legal scholars, and jurists when learning about, interpreting, or defining the rule against hearsay. That lesson is that the hearsay rule, which addresses the admissibility of evidence that is created when people communicate, requires an understanding of the ways in which people communicate. And that understanding comes not from law, but rather from sister disciplines such as psychology, sociology, and anthropology. Accordingly, in order to accurately interpret and apply the rule against hearsay, particularly when a mixing of cultures is involved, one cannot rely on legal research alone, but must instead turn to social science research and ultimately rely on a little bit of cultural common sense in order to find the correct answers.