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Re-Examining Hearsay Under the Federal Rules: Some Method for the Madness

Paul S. Milich*

I. INTRODUCTION

The hearsay rule has never been particularly "user friendly." Called "bizarre,"¹ a "crazy quilt,"² and an "unintelligible thicket,"³ its conceptual intricacies have long confounded scholars and appellate courts, in addition to the trial judges and litigators who often analyze difficult hearsay problems in the heat of trial.⁴

The drafting of the Federal Rules of Evidence in the early 1970s provided an excellent opportunity to review the hearsay doctrine and design a set of coherent, easily applied rules to make the doctrine more manageable at trial. The drafters achieved notable progress with rules regarding the classification and organization of admissions and with specific exceptions to the hearsay rule. The definition of hearsay, however, remains a source of confusion, complication, and conflicting arguments.

Scholars criticize the federal definition of hearsay as incoherent from a principled standpoint, ill-conceived from a policy standpoint, and unworkable from a practical standpoint.⁵ These scholars typically conclude their critiques with proposals to reformulate the federal hearsay definition.⁶ As desirable as such a reformulation

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1. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 135 (1973).

2. Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).

3. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 742 (1961).

4. See generally *id.*; McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948); Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

5. See, e.g., M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § § 801.7-801.10, at 712-19 (2d ed. 1986); Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1391-94 (1987). See generally Wellborn, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49 (1982).

6. M. GRAHAM, *supra* note 5, § 801.10, at 718-19; Wellborn, *supra* note 5, at 92-93.

may be, no change is anticipated in the foreseeable future. In the meantime, thousands of courts must operate under the current federal definition.⁷ Trial judges and lawyers grappling with difficult hearsay issues will find case law and commentary pointing in inconsistent directions.⁸

This Article attempts to clarify the federal definition of hearsay and offer some simple, reliable methods for analyzing difficult issues under the definition. The Article begins by describing the hodgepodge of approaches that courts have taken in interpreting the federal definition. Next, the Article describes the nature of the hearsay problem and why efforts to design a workable definition of hearsay have proved so difficult. Part III discusses the different interpretations given to the term "assertion" in Federal Rule 801's definition of hearsay and presents a case for one such interpretation, as well as a simple method for correctly applying that interpretation. Part IV explores the problem of distinguishing hearsay from nonhearsay and offers several tests to make that task simpler and more coherent. The Article concludes by applying the principles and methods suggested to several cases that pose difficult hearsay issues.

II. A JUDICIAL HODGEPODGE

Federal cases reveal an astonishing variety of inconsistent applications of the federal hearsay definition to the basic question, "Is it hearsay?"⁹ Consider the following hypothetical.

The defendant, Don Jones, is charged with hiring Max, a professional killer, to murder his wife for \$5,000 cash and a gold Rolex watch. Max also is charged with the crime, but will be tried separately, and refuses to testify at Don's trial. The prosecution offers the following three pieces of evidence at Don's trial: (1) The detective who arrested Max will testify that when she told Max that they had just arrested Don, Max said "Tell Don he'd better get me a good lawyer;" (2) one page from a small notebook found in Max's apartment with the entry "Don Jones — 225-1112 — \$5,000 and Rolex;" and (3) a gold Rolex watch with "D.

7. Thirty-five states have adopted the Federal Rules of Evidence or their substantial equivalent and 34 have adopted the federal definition of hearsay. 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 801(a)-(c) [02] (1984 & Supp. 1990) [hereinafter *WEINSTEIN'S*].

8. See cases cited *infra* notes 10-22; Wellborn, *supra* note 5, at 71 ("The final result, then, may be that worst of all possible worlds: arbitrary distinctions applied inconsistently after pointless, troublesome quarrels.").

9. See cases discussed in Wellborn, *supra* note 5, at 83-91.

Jones" engraved on the back, also found in Max's apartment.

A definition of hearsay should provide a coherent and consistent means of determining whether this evidence falls within the hearsay rule. Courts faced with this kind of evidence, however, often use widely different methods to determine whether these pieces of evidence are hearsay under the federal definition.

Regarding the statement, "Tell Don he'd better get me a good lawyer," some courts would exclude the comment as hearsay, reasoning that the proponent offered it to prove the implied assertion that Max believed Don was obliged to hire a lawyer for him.¹⁰ Other courts would conclude that such a statement is not hearsay because it is not offered to prove the truth of the matter asserted, and because the federal definition of hearsay does not cover implied assertions.¹¹ Finally, some courts would find that because the out-of-court expression is an order or direction, it is not an assertion, and therefore not hearsay under the federal definition.¹²

The second item of evidence is the page from the notebook with the entry "Don Jones — 225-1112 — \$5,000 and Rolex." Some courts would exclude this as hearsay because it asserts the implied proposition that Max knows a Don Jones with this phone number who has paid or promised to pay \$5,000 and a Rolex watch for some service.¹³ Other courts would admit the page as nonhearsay circumstantial evidence of association between Max and the defendant.¹⁴ Some courts would find that the page poses no hearsay problem because nothing is "asserted."¹⁵ Others might admit the name and phone number to prove that Max knew the defendant, but only if the accuracy of the phone number was independently established.¹⁶ Finally, some courts might admit the page as non-

10. See, e.g., *United States v. Reynolds*, 715 F.2d 99, 101-04 (3d Cir. 1983); *Lyle v. Koehler*, 720 F.2d 426, 433 (6th Cir. 1983); *United States v. Day*, 591 F.2d 861, 880-81 (D.C. Cir. 1978).

11. See, e.g., *Lyle*, 720 F.2d at 436-40 (Porter, J., concurring in part and dissenting in part); *United States v. Zenni*, 492 F. Supp. 464, 468 (E.D. Ky. 1980).

12. See, e.g., *United States v. Cruz*, 805 F.2d 1464, 1478 (11th Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987); *United States v. Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984); see also *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1181-82 n.6 (5th Cir. 1975).

13. See, e.g., *United States v. Garcia-Duarte*, 718 F.2d 42, 46 (2d Cir. 1983).

14. See, e.g., *United States v. Marino*, 658 F.2d 1120, 1124 (6th Cir. 1981); *United States v. Mazyak*, 650 F.2d 788, 792 (5th Cir. Unit B July 1981), *cert. denied*, 455 U.S. 922 (1982).

15. See, e.g., *United States v. Day*, 591 F.2d 861, 883 (D.C. Cir. 1978); *United States v. Snow*, 517 F.2d 441, 443 (9th Cir. 1975).

16. See, e.g., *United States v. Saint Prix*, 672 F.2d 1077, 1083 (2d Cir. 1982); *United States v. Lieberman*, 637 F.2d 95, 101 (2d Cir. 1980).

hearsay if offered to imply from Max's behavior that he believed Don had paid or promised to pay the money and the watch.¹⁷

The third piece of evidence is the inscribed Rolex watch. Some courts would find that the inscription "D. Jones" asserts that the watch at some time belonged to "D. Jones", and because the watch is offered to prove the truth of that assertion, it is hearsay.¹⁸ Other courts might find that the inscription is not an assertion,¹⁹ or that it is "neutral"²⁰ and thus not hearsay. A court might determine that the inscription is not offered for its truth, but only to identify real evidence and thus is not hearsay.²¹ Other courts would find that the inscribed watch is not hearsay but rather is circumstantial evidence or a mechanical trace that links the watch to the defendant.²²

The existence of these different approaches and answers to the fundamental question, "Is this evidence hearsay?" reflects the basic interpretive confusion with the federal definition of hearsay. Before examining the federal definition in detail, it will be helpful to review what makes hearsay difficult to define.

III. THE PROBLEM WITH HEARSAY

A. A Credibility Problem

An out-of-court statement is hearsay when offered as proof that what the declarant said was true. The inferences take the following basic form:²³

- (1) The out-of-court declarant said "X";
- (2) people do not normally say "X" unless they believe "X" is true;
- (3) therefore, the declarant probably believed "X" was true;
- (4) people are not normally mistaken in their beliefs about facts within their personal knowledge and experience;²⁴

17. See, e.g., *United States v. Singer*, 687 F.2d 1135, 1147, *different result on rehearing on other grounds*, 710 F.2d 431 (8th Cir. 1983).

18. See, e.g., *United States v. Cowley*, 720 F.2d 1037, 1044 (9th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984); *Payne v. Janasz*, 711 F.2d 1305, 1313-14 (6th Cir.), *cert. denied*, 464 U.S. 1019 (1983).

19. See, e.g., *United States v. Hensel*, 699 F.2d 18, 31 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983).

20. See, e.g., *United States v. Day*, 591 F.2d 861, 883-84 (D.C. Cir. 1978).

21. See, e.g., *United States v. Vinson*, 606 F.2d 149, 155 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

22. See, e.g., *United States v. Snow*, 517 F.2d 441, 443 (9th Cir. 1975).

23. See generally Morgan, *supra* note 4, at 177-79; Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974).

24. Neither in-court nor out-of-court statements are admissible unless based on the speaker's personal knowledge, FED. R. EVID. 602, and in compliance with FED. R. EVID. 701-05 concerning lay and expert opinions.

(5) therefore, "X" probably is true.

The two key premises in lines two and four are the source of the hearsay risk. The first assumes that the out-of-court declarant was not lying and did not misspeak. The second assumes that the declarant was not mistaken in the perception or memory of the event.

Hearsay risks exist when the evidence invites the jury to rely on the out-of-court declarant's sincerity, communication skill, perception, and memory.²⁵ Without cross-examination of the declarant, the jury has insufficient evidence to intelligently assess these factors.²⁶ In the absence of evidence to the contrary, the jury probably will conclude that the declarant was a normal person who believed what was stated and was not mistaken about that belief. If the declarant, in fact, has below average credibility for one reason or another, the inability to cross-examine the declarant may cause the jury to overvalue the declarant's credibility.²⁷ Without the rule excluding hearsay, such evidence could be offered instead of live testimony whenever counsel does not want to expose a witness's below average credibility to cross-examination.

On the other hand, not all out-of-court statements create a credibility problem. If an out-of-court statement is offered for some purpose other than proving the truth of the matter asserted, it is not hearsay. For example, testimony that a murder victim told the accused, "I am in love with your wife," could be offered to prove that the accused heard the statement and thus had a motive to kill the declarant. The probative value of this evidence does not depend on the inferences that the declarant believed what he said and that what he believed was probably true. Thus the declarant's credibility in this instance is not in issue. Whether or not the declarant truly believed he was in love with the defendant's wife is irrelevant. The fact that he said it to the accused is enough to supply motive.

B. The Scope of Hearsay Evidence

It is clear that a prosecutor cannot offer the out-of-court statement "Joe killed Bob" to prove that fact. Although this information is important, the declarant cannot be cross-examined as to

25. See, e.g., 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § § 1362-63 (1974); Morgan, *supra* note 4, at 178-179; Wellborn, *supra* note 5, at 52-53.

26. See 5 J. WIGMORE, *supra* note 25, § 1363.

27. See Swift, *supra* note 5, at 1345; Note, *The Theoretical Foundations of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1788 (1980).

whether he or she was lying or mistaken. Anytime an uncross-examined declarant is the source of information offered at trial, it should follow that the hearsay rule applies. Consider, however, the many ways in which something a person says or does out of court can be used in court to prove a fact. For example, to prove that Joe is a good shot with a rifle, the proponent might offer a witness who will testify as to any of the following out-of-court statements or actions:

(1) I heard Ted say, "Joe is a good shot with a rifle." (This is a direct expression of the fact in question.).

(2) I heard Ted say, "Joe can shoot a tick off a running jaguar at two hundred yards." (This is an indirect, implied expression of the fact in question.).

(3) I heard Ted say, "Joe's father was a marksman and taught Joe how to shoot when Joe was ten." (This is a direct expression of certain facts which, if true, support an inference to the fact in question.).

(4) I heard Ted say, "You ought to go hunting with Joe." (This is an expression, in this case a recommendation, that implies the declarant's belief in the fact in question.).

(5) I heard Ted say, "Have you ever seen anyone shoot a rifle like Joe?" (This question implies that the declarant believes the fact in question.).

(6) I saw Ted point to Joe when asked, "Who is the best shot in the county." (This is nonverbal conduct used to express the fact in question.).

(7) I saw Joe sign up for a rifle shooting competition. (This is evidence of Joe's nonverbal conduct used to support an inference to the fact in question.).

(8) I saw Joe win a rifle shooting competition. (This is direct evidence of the fact in question; good shooting is evidence of a good shot.).

The list could go on almost endlessly. The many ways in which out-of-court statements can inform the jury challenges a hearsay definition to consistently differentiate between those that pose hearsay risks and those that do not. Although most of the examples above present such risks,²⁸ those risks may be diminished in some

28. Only example number eight involves no hearsay risks at all. The rest present some variation of the hearsay inferences described above. For example, in number two, the inferences are drawn as follows:

(1) Ted said, "Joe can shoot a tick off a running jaguar at two hundred yards."

(2) People normally would not say that unless they believed that Joe was a good shot.

cases²⁹ and displaced in others.³⁰ To the extent that some offers of evidence pose less hearsay danger than others, the issue for a hearsay definition is whether and where to draw the line excluding dangerous hearsay and admitting less dangerous evidence. The issue is one not only of principle, but also of policy and practicality.

From a policy standpoint, the definition of hearsay should not be too broad or too narrow. If the definition is too broad, it will exclude probative, and perhaps even dispositive evidence from the truth-finding process that, in fact, may raise little or no hearsay risk. If the hearsay definition is too narrow, however, it sometimes will admit dangerous hearsay, making the definition and the rule seem arbitrary. From a practical standpoint, if the definition is too complicated, it will ask too much of the trial bench and bar, who likely will respond by ignoring the finer points of the definition.³¹ If the definition is simplified too much, it will fail to take account of the principled distinctions that determine whether out-of-court evidence carries serious hearsay dangers.

The federal definition of hearsay has not satisfactorily resolved these issues of policy and practicality. The lines drawn by the federal definition to delineate the scope of hearsay are obscure. The task, therefore, is to clarify the principles upon which the federal definition is based in order to promote a coherent, workable interpretation of the federal rule.

(3) Therefore, Ted believed that Joe was a good shot.

(4) People normally are not mistaken about their beliefs regarding matters within their personal knowledge and experience.

(5) Therefore, Joe probably was a good shot.

29. In example number 3, for instance, ("Joe's father was a marksman and taught Joe how to shoot when Joe was ten,") it does not appear that the declarant was trying to express her opinion that Joe currently is a good shot. This reduces the risk that the declarant was using this out-of-court statement to lie about the fact in question. Likewise, in example number seven, in which the witness saw Joe signing up for a rifle shooting competition, it is unlikely that the actor was using the conduct to say anything, thus there is less danger that he was lying.

30. From a practical standpoint, certain factors may reduce the apparent harm of admitting the evidence even though the hearsay risks are undiminished. In example number 4, the out-of-court statement, "You ought to go hunting with Joe," is somewhat probative that the declarant believed Joe was a good shot. It is also possible, however, that the declarant did not believe this at all. The declarant may have recommended hunting with Joe because Joe is a fun fellow or because Joe owns a nice cabin in the woods. The inference offered from the statement is so attenuated that a jury probably would discount it from the outset. Arguably, this displaces the hearsay concern that the jury will overvalue the evidence because such evidence carries "on its face a warning to the jury against giving the statement undue weight." *Dutton v. Evans*, 400 U.S. 74, 88 (1970).

31. Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277, 279-84 (1952).

IV. THE FEDERAL DEFINITION OF HEARSAY

Federal Rule of Evidence 801 states:

The following definitions apply under this article:

- (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. A "declarant" is a person who makes a statement.
- (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.³²

Some argue that this definition and the advisory committee notes that accompany it are an invitation to hopeless confusion.³³ Although the language of the Rule and the notes is confusing, the situation is not hopeless.

Courts have experienced two major stumbling blocks in the interpretation and application of Rule 801. The first is disagreement and confusion over the meaning of the term "assertion" in 801(a), and the second is difficulty in applying 801(c), which provides that a statement is hearsay only if offered "to prove the truth of the matter asserted."³⁴

A. Three Approaches to the Meaning of "Assertion"

The Federal Rules of Evidence do not define "assertion." For example, the proponent offers Ted's out-of-court statement, "You ought to go hunting with Joe," as evidence that Ted believed, and thus Joe probably was, a good shot. Is this an oral "assertion" under Rule 801(a)? If so, what precisely constitutes the "matter asserted" under 801(c)?

There are at least three competing definitions of "assertion" at work in the cases and commentary: (1) the dictionary definition approach: "assertion" is any direct statement of fact; (2) the *Wright v. Tatham* definition: "assertion" is any fact expressed or implied by the statement; and, (3) the intent-based definition: "assertion" is any fact the declarant intended to express or imply with the statement. Only the intent-based definition, however, provides a viable interpretation of Rule 801.

1. The Dictionary Definition Approach

The dictionary definition approach interprets "assertion" in Rule 801 according to its ordinary meaning—a direct statement of fact.³⁵

32. FED. R. EVID. 801(a)-(c).

33. Wellborn, *supra* note 5, at 71.

34. FED. R. EVID. 801(c).

35. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 131 (Gove ed. 1981) ("asserts: . . . to state or affirm positively, assuredly, plainly . . . , or strongly . . .").

Thus, only direct statements of fact offered to prove the truth of the matter directly stated are hearsay. Under this interpretation, Rule 801 excludes all "implied assertions" from the definition of hearsay.³⁶ One commentator called this interpretation the "most plausible" from the text of Rule 801, but also "the most unattractive . . . from the standpoint of hearsay principles and policy."³⁷ This interpretation is not only unattractive, it is less plausible than the intent-based definition.

The dictionary definition approach is unattractive because it guts the hearsay rule. Recall the earlier example of the out-of-court statement, "Joe can shoot a tick off a running jaguar at two hundred yards," offered to prove that Joe is a good shot. Because the statement is not being offered to prove the matter directly stated, (that Joe in fact can shoot a tick off a running jaguar at two hundred yards), it does not constitute hearsay under the dictionary definition of assertion. This leads to the bizarre result that as long as the declarant exaggerates the truth, the statement is admissible as nonhearsay to prove the underlying truth of the matter.³⁸

The dictionary definition of assertion also excludes from the hearsay rule all out-of-court expressions that are not declarative statements. Instructions, orders, recommendations, and questions, being nondeclarative in form, are not "assertions on their face" and thus not hearsay.³⁹ This leads to even more absurd distinctions. For example, the statement "Joe sells cocaine," offered to prove that Joe sells cocaine, is hearsay, but the instruction, "Ask Joe to sell you some cocaine," offered for the same purpose, is not.

By insisting that only declarative statements are assertions, the dictionary definition places enormous importance on the mere form of the out-of-court locution. Such heavy reliance presumes that the in-court witness will recall the out-of-court expression exactly as it was made; a dubious presumption.⁴⁰ Moreover, making the

36. *United States v. Perez*, 658 F.2d 654, 659 (9th Cir. 1981); *United States v. Zenni*, 492 F. Supp. 464 (E.D. Ky. 1980).

37. Wellborn, *supra* note 5, at 71.

38. See, e.g., *United States v. De Peri*, 778 F.2d 963, 979 (3d Cir. 1985) (out-of-court statement by poker machine vendor that he "understood" the money he paid officer Ricci went to "whoever was in the [police] district" was not hearsay because not offered to prove everyone in the district would get the money but only that declarant believed the payment to Ricci paid those involved in protection in that district).

39. See, e.g., *United States v. Cruz*, 805 F.2d 1464, 1478 (11th Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987); *United States v. Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984); *Zenni*, 492 F. Supp. at 469.

40. See Morgan, *supra* note 4, at 198; Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 150 n.13 (1912).

hearsay issue turn on the mere form of the out-of-court statement may tempt witnesses to "recall" the statement in a nondeclarative form to circumvent the rule.⁴¹

The dictionary definition of assertion entails a radical departure from common-law hearsay doctrine,⁴² but there is no evidence that the drafters of the federal definition of hearsay intended such a departure. In light of the absurd results that such an interpretation causes, a dictionary definition of "assertion" has nothing to recommend it.

2. The *Wright v. Tatham* Approach to "Assertion"

Another definition of assertion has a common law trail leading back to the famous English case of *Wright v. Tatham*.⁴³ In *Wright*, the proponent offered letters written to the testator discussing business affairs to prove by implication that the writers believed the testator to be mentally competent.⁴⁴ The court held that this implication, or "implied assertion," was hearsay.⁴⁵ The rationale

41. In *Park v. Huff*, 493 F.2d 923 (5th Cir. 1974), *different result on rehearing on other grounds*, 506 F.2d 849 (5th Cir.), *cert. denied*, 425 U.S. 824 (1975), the court noted that if the hearsay rule covered only direct assertions of fact, "the hearsay rule could easily be circumvented through clever questioning and coaching of witnesses, so that answers were framed as implied rather than as direct assertions." *Id.* at 928. This practice was condemned in *United States v. Check*, 582 F.2d 668, 675 (2d Cir. 1978), in which the witness, an undercover agent, tried to circumvent the hearsay rule by testifying in a manner that did not directly restate, but only implied, what an out-of-court informer told him. *But see United States v. Lester*, 749 F.2d 1288, 1300 (9th Cir. 1984) (the court essentially invites circumvention of the rule); *United States v. Walker*, 636 F.2d 194, 195 (8th Cir. 1980) (the court demonstrated a more lenient attitude towards such circumvention of the hearsay rule).

42. In 1970, while work was proceeding on the Federal Rules of Evidence, the United States Supreme Court decided *Dutton v. Evans*, 400 U.S. 74 (1970). The prosecution offered the out-of-court statement, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now," to prove the implication that the declarant believed Evans committed the murder. *Id.* at 77. The Court never questioned that this was hearsay. Under a dictionary definition of "assertion," however, the statement is not offered to prove the matter directly stated (that the declarant would not be in trouble but for Evans), and therefore falls outside the hearsay rule. *See also Krulewitch v. United States*, 336 U.S. 440 (1949) (conversation among several women arrested for prostitution in which the declarant suggested that the women take the blame, rather than Kay, the defendant, because he couldn't stand prison, was hearsay when offered to prove the declarant's belief that the defendant was really to blame); Wellborn, *supra* note 5, at 85-87.

43. 7 Eng. Rep. 559 (1838). Modern English law apparently remains unsettled on whether implied assertions are hearsay. CROSS, EVIDENCE 469-73 (5th ed. 1979). Professor Cross submits that the better rule "only applies to statements intended by their makers to be assertive." *Id.* at 472.

44. *Wright*, 7 Eng. Rep. at 559-60.

45. *Id.* at 595-96.

in *Wright* focused on the fact that the declarants' implied beliefs as to the testator's competence were untested by cross-examination and posed the hearsay risks that the declarants were mistaken or being misunderstood.⁴⁶ This reasoning leads to a broad definition of assertion. Under this approach, if the proponent offers the statement as proof that the declarant believed some fact, whether that fact was expressed or implied by the statement, it is an assertion and therefore subject to the federal hearsay rule.

In the search for the proper interpretation of the hearsay rule, the issue is not whether *Wright* represents a better approach, but whether Rule 801 adopted this approach. Although some have urged such a broad reading of assertion,⁴⁷ even the leading proponent of this view concedes that the advisory committee notes to the federal rules contradict it.⁴⁸

The text of Rule 801 itself does not support a *Wright v. Tatham* approach. Subsection (a)(2) rejects this approach in cases of nonverbal conduct. For example, to prove that it was raining at the time, witnesses testify that they saw Mary opening her umbrella as she was walking out the door. Under the *Wright v. Tatham* approach, this evidence is hearsay because Mary's conduct implies that she believed it was raining and her belief implies that it was, in fact, raining. But the language of Rule 801(a)(2) points to a result at odds with the *Wright v. Tatham* approach: "Nonverbal conduct of a person" qualifies as a potential hearsay statement only "if it is intended by the person as an assertion." Opening an umbrella normally is not intended to be an assertion about anything, and, thus, such nonverbal conduct does not fall within the federal definition of hearsay.

The *Wright v. Tatham* approach is therefore at odds with the federal definition of hearsay. The language of Rule 801 precludes it in cases of nonverbal conduct and the advisory committee notes

46. The circumstantial argument incorporates the telltale hearsay inferences:

- (1) The letter writer discussed business affairs in his letter to the addressee.
- (2) People normally do not discuss business affairs with someone they believe is incompetent.
- (3) Therefore, the letter writer probably believed that the addressee was competent.
- (4) People normally are not mistaken about their beliefs concerning matters within their personal knowledge and experience.
- (5) Therefore, the addressee probably was competent.

47. See, e.g., *United States v. Reynolds*, 715 F.2d 99, 102-03 (3d Cir. 1983); Graham, "Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay, 1982 U. ILL. L. REV. 887, 906-10.

48. Graham, *supra* note 47, at 906-10, 921 n.75.

reject it in cases of verbal conduct. Consequently, the approach has gained very little judicial acceptance.⁴⁹

3. The Intent Definition of "Assertion"

The advisory committee notes to Rule 801(a) state, "The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one."⁵⁰ The notes discuss this distinction between assertive and nonassertive conduct chiefly in terms of nonverbal conduct. When the context shows that an actor's nonverbal conduct is intended to communicate something (assertive conduct), that communication is hearsay when offered to prove the truth of the facts so communicated.⁵¹ When an actor's conduct is not intended to communicate (nonassertive conduct), any facts inferred from that conduct are not hearsay.⁵²

Scholars have long debated how extensively the hearsay rule should regulate the use of nonverbal conduct to draw inferences as to what the actor knew or believed.⁵³ The advisory committee embraced the argument that when an actor is not using nonverbal conduct to communicate, there is little danger that the actor is using the conduct to lie, and this reduced risk of insincerity justifies freeing such nonassertive conduct from the hearsay rule.⁵⁴ For example, consider two instances of nonverbal conduct, both offered to prove that the actor owns a particular Buick automobile. In the first, the actor responds to the question "which car do you own?" by pointing to the Buick. Using general hearsay inferences, we infer from this conduct that the actor believed the car was hers, and from that belief we infer that the Buick probably was hers. In the second, the actor is observed sitting in the parked Buick, behind the wheel, reading a newspaper. We infer that the

49. See Wellborn, *supra* note 5, at 81-82.

50. 56 F.R.D. 183, 293 (1973) (FED. R. EVID. 801 advisory committee's notes to subdivision (a)).

51. See, e.g., *United States v. Caro*, 569 F.2d 411, 416-17 n.9 (5th Cir. 1978); *M. GRAHAM*, *supra* note 5, § 801.2 at 690-91.

52. See, e.g., *United States v. Brock*, 667 F.2d 1311, 1315 n.2 (9th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983).

53. See, e.g., *M. GRAHAM*, *supra* note 5, § 801.3, at 694; Wellborn, *supra* note 5, at 58-60.

54. For an example of this argument, see Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MTN. L. REV. 133 (1961). Cf. Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682, 686 (1962).

actor would not be sitting in that car unless she believed that it was hers, and from that belief we infer that the Buick belonged to the actor. Both instances involve the hearsay risk that the actor made a mistake by pointing at or getting into the wrong car. In the latter instance, however, the risk of insincerity is diminished because it is unlikely that the actor was using the conduct to communicate a lie.⁵⁵ Thus, the advisory committee notes single out the risk of insincerity. When that risk is diminished by a lack of communicative intent, it frees the evidence from the hearsay rule, despite the persistence of the hearsay risk that the actor was mistaken.⁵⁶

The advisory committee notes state that "[s]imilar considerations" to those governing nonverbal conduct govern verbal conduct.⁵⁷ The notes presume that verbal statements of fact are intended by the declarant to communicate the facts stated.⁵⁸ Thus, if the declarant said "It is raining," that utterance is an assertion, and is hearsay if offered to prove the truth of the matter asserted. Suppose, however, that the declarant said: "If I go outside, I will get wet." This could be offered to prove the matter directly asserted, (that if the declarant goes outside he will get wet), or to prove the implication that it was raining at the time the statement was made. If offered to prove the implication, the issue is whether the implication is an implied assertion; that is, whether the declarant intended to communicate that implication with his statement.

This analysis helps clarify the advisory committee's cryptic comment that "nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted [are] also excluded from the definition of hearsay"⁵⁹ "Nonassertive verbal conduct," by definition, is not intended to communicate.⁶⁰ Verbal conduct intended to convey

55. Falknor, *supra* note 54, at 136-37.

56. The advisory committee notes state:

Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds.

56 F.R.D. 183, 294 (FED. R. EVID. 801, advisory committee's note to subdivision (a)).

57. *Id.*

58. The advisory committee notes state: "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.'" *Id.* at 293-94.

59. *Id.* at 294.

60. Examples of totally nonassertive verbal conduct are rare, because any use of words

one fact may be offered to prove a different fact that the declarant did not intend to communicate.⁶¹

The rationale for using an intent-based definition of assertion is the same for verbal and nonverbal conduct: the risk of insincerity is reduced when the declarant does not intend to communicate the fact in question.⁶² For example, to prove that a person believed a particular Buick was safe to drive one could offer the out-of-court statement "This Buick is safe." Alternatively, one might offer the declarant's statement, "I want Joe to drive the Buick to Chicago tomorrow," when Chicago is two hundred miles away. Under the federal definition of hearsay, the former statement that the Buick is safe is hearsay if offered to prove that fact, but the latter is not. In the latter statement, there appears to be no intent by the declarant to say anything about the safety of the car. Yet, the expressed desire that Joe drive the Buick to Chicago is consistent with an unexpressed belief that the car is safe. Because the declarant did not intend to say that the car was safe, there is less danger that the declarant was using this statement to lie about that fact.⁶³ Although the risk that the declarant was mistaken about the car's safety persists, the advisory committee's approach accepts the reduced risk of insincerity as sufficient to free the evidence from the hearsay rule.

usually is tied to communication of something. Examples might include talking to one's self, talking to an Irish Setter, or reading a part for a play. See M. GRAHAM, *supra* note 5, § 801.3, at 695.

61. See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 717 (4th ed. 1986); WEINSTEIN's, *supra* note 7, ¶ 801(a) [01].

62. See *Park v. Huff*, 493 F.2d 923, 927 (5th Cir. 1974), *different result on rehearing on other grounds*, 506 F.2d 849 (5th Cir.), *cert. denied*, 423 U.S. 824 (1975).

63. The risk of insincerity, however, is not eliminated entirely, because the inference that the declarant believes that the car is safe cannot be drawn if the declarant was lying about his or her desire that Joe drive the car on a long trip. Two risks of insincerity operate here: (1) the general risk that the declarant was lying about anything or everything (in which case any inferences from the statement will be invalid); and (2) the more specific risk that the declarant used the out-of-court expression to communicate a lie about the fact for which the expression is offered at trial. The latter risk speaks directly to the fear that the out-of-court declarant fabricated facts relevant to the case. The advisory committee suggests that a reduction in the latter risk is sufficient to free the evidence from the hearsay rule despite the persistence of the general risk.

This kind of distinction is present in nonverbal conduct cases as well. For example, suppose a personal injury plaintiff shows a video tape of himself jogging, taken before his accident, to prove that he was active and engaged in exercise that he can no longer enjoy. This evidence appears to be nonassertive and thus not hearsay. Yet, it remains possible that the actor in fact hated jogging and made this video only to convince someone at the time that he loved it. As the committee wrote, "No class of evidence is free of the possibility of fabrication . . .," but if that possibility is reduced, it may free the evidence from the hearsay rule.

In sum, any interpretation of the federal definition of hearsay should recognize two facts: (1) the advisory committee endorsed the argument that use of nonverbal conduct should be governed by an intent-based distinction between assertive and nonassertive conduct; and (2) the advisory committee applied this same distinction to the use of implications from verbal conduct. As a result, "intent to communicate" is the key to distinguishing between hearsay and nonhearsay under the federal definition. Thus, a "statement" under Rule 801(a) is a fact that the declarant intended to communicate orally, in writing, or with nonverbal conduct.

The intent-based definition of hearsay has been attacked both as an illogical departure from traditional hearsay principles⁶⁴ and as an unworkable standard in practice.⁶⁵ The first criticism raises points that deserve consideration if and when a reformulation of the federal definition is undertaken. In the meantime, the courts must apply this definition. The second criticism—that the definition is unworkable—creates the most immediate concern.

B. Applying the Intent-Based Definition of Assertion

1. The Quest for the Declarant's Intent

Determining whether an actor intended to communicate with nonverbal conduct presents a different and easier task than determining such intentions with respect to verbal conduct. Most nonverbal conduct is nonassertive. Our daily behavior may speak volumes to those who observe it closely, but few of our nonverbal actions are meant to communicate. When we do intend to use nonverbal conduct to communicate, the intent often is clear.

When we engage in verbal conduct, however, we almost always intend to communicate something. Our words may speak volumes to those who hear them but we intend to communicate only certain meanings; we have only certain things "in mind." Thus, the quest for the declarant's intent in cases of verbal conduct involves a search for what the declarant truly had "in mind."

This sounds like an impossible task if viewed as a search inside the declarant's head for a particular subjective intent.⁶⁶ For example, suppose the proponent offers the declarant's out-of-court statement, "I want Joe to drive the Buick to Chicago tomorrow,"

64. See M. GRAHAM, *supra* note 5, § 801.7, at 712-17.

65. See *Lyle v. Koehler*, 720 F.2d 426, 437 n.3 (6th Cir. 1983); Wellborn, *supra* note 5, at 74-75, 81.

66. See Finman, *supra* note 54, at 687 n.16, 696-97.

to prove the inference that the declarant believed the Buick was safe to drive and therefore that it probably was safe to drive. An inquiry under the federal definition of hearsay into whether the declarant in fact intended to communicate that the Buick was safe to drive runs into several difficulties.

There are numerous possibilities for what the declarant may have intended to communicate with this statement, and they are not mutually exclusive: (1) the direct meaning—the declarant wanted Joe to drive the Buick to Chicago the next day; (2) an inference—the declarant believed the Buick was safe to drive; (3) another inference—the declarant believed Joe was capable of driving to Chicago; (4) another inference—the declarant believed Joe would agree to drive the car to Chicago; and so forth. The question cannot be which proposition the declarant most likely intended to communicate because proving that the declarant intended to express one fact does not preclude the possibility that she also intended to communicate other facts. Because a reduced risk of insincerity flows only from unintended inferences, the question must be whether the declarant intended to communicate the specific inference in question.⁶⁷

Because the declarant is presumably unavailable for cross-examination, the lawyers and trial judge are left to speculate as to the declarant's actual intent. In the above example, the proponent predictably will argue that the declarant only intended to express her desire that Joe drive the Buick to Chicago and did not intend to make any implied assertion about the safety of the car. The statement, therefore, is not hearsay when offered to prove that unintended implication. The opponent predictably will argue that the statement makes little sense unless the declarant believed that the Buick was safe to drive and, therefore, the statement is an implied assertion and hearsay. Note that if the statement is admitted, the proponent and opponent will make nearly opposite arguments to the jury. The proponent will invite the jury to infer that the declarant believed that the Buick was safe to drive. The opponent, however, will remind the jury that the declarant's statement does not necessarily imply that she even considered the Buick's safety. The fact that the lawyers are likely to make one argument to the judge regarding admissibility and the opposite argument to the jury regarding interpretation of the evidence indicates how much self-serving speculation this quest for the declarant's true subjective intent generates.

67. See M. GRAHAM, *supra* note 5, § 801.7, at 713-14.

2. Toward a More Objective Test

To escape this speculative quest for the declarant's intent, one must return to the purpose of the quest; to identify situations in which it appears unlikely that the declarant was using the out-of-court statement to lie about the fact in question. The declarant's use of the language, together with certain basic assumptions about liars, helps to objectively identify such situations.

A person who intends to lie will make some effort to convey the false information with enough clarity and credibility that it will be understood and, the liar hopes, accepted as true by the listener. Thus, if the relationship between the out-of-court statement and the inference for which it is offered in evidence is such that the former would be a poor choice for a liar hoping to communicate the latter, there is a reduced risk that the declarant was using the expression to lie about the fact in question. For example, if the declarant intended to assert a lie about the safety of the Buick, it is unlikely that he would choose the expression, "I want Joe to drive the Buick to Chicago tomorrow," to convey that lie. The listener is unlikely to infer from this statement that the Buick is safe to drive. Thus, we are less worried that the declarant was using this statement to communicate a lie about the fact in question. This reduced risk of insincerity is enough to free this statement from the federal hearsay rule.

This leads to an objective, rather than subjective, test of the declarant's intent under the federal definition of hearsay. The focus shifts from trying to fathom what propositions the declarant intended to communicate to whether the use for which the statement is offered carries the usual hearsay risk of insincerity. If it appears from the circumstances and the language used that the declarant probably would not have used that particular locution to lie about the fact in question, then the reduced risk of insincerity frees the evidence from the definition of assertion and the federal definition of hearsay.

3. A Test for Determining if the Offered Inference from the Out-of-Court Expression is an "Assertion"

Sometimes it will be clear from the circumstances that an out-of-court statement was intended by the declarant to convey a particular implication. For example, in *Parks v. Huff*⁶⁸ the declarant told the witness that "the old man would get him and his

68. 493 F.2d 923 (5th Cir. 1974), *different result on rehearing on other grounds*, 506 F.2d 849 (5th Cir.), *cert. denied*, 423 U.S. 824 (1975).

family" if the witness did not go through with a plan to kill a local prosecutor.⁶⁹ Independent evidence established that in this local community, defendant Park was widely known as "the old man."⁷⁰ Thus, what otherwise might seem to be a vague reference appeared, in context, to be an intentional implication that Parks was behind the murder plot.⁷¹ The court agreed that the statement was hearsay.⁷²

The more difficult issues arise when it is not clear from the circumstances whether the declarant intended to communicate a particular implication by what was said. In these cases, the following two-step analysis reveals whether using the out-of-court statement to prove the implied proposition presents the kind of reduced risk of insincerity that the federal definition seeks in its distinction between assertive and nonassertive verbal conduct.

A. Step One. The first step is to determine the relevant purpose for which the proponent is offering the statement by completing the following sentence: the proponent offers this out-of-court statement to prove that the declarant⁷³ believed: [proposition of fact]. For example, in a fraud case the proponent offers the out-of-court statement "Don't cash this check until Tuesday" to prove that the declarant believed: [there were insufficient funds in the account to cover the check until Tuesday].

B. Step Two. Assuming, for the purposes of this analysis, that the proposition of fact the declarant allegedly believed was, in fact, incontrovertibly false, was the declarant necessarily lying or mistaken when he made the out-of-court statement? If so, this use of the out-of-court statement is hearsay.⁷⁴

69. *Park*, 493 F.2d at 926.

70. *Id.*

71. *Id.*

72. *Id.* at 928. The statement, however, was admissible under the co-conspirator exception.

73. The declarant is the person behind the expression. The declarant may use others to make the expression (a secretary types the employer's letters, a jeweler engraves a watch) but these others are not declarants.

74. This test is similar to the one suggested in 2 S. SALTZBURG AND M. MARTIN, *FEDERAL RULES OF EVIDENCE MANUAL* 137 (5th ed. 1990):

To the extent that one fact must be being asserted if another that is directly asserted is to be taken as true, both should be treated as hearsay when the direct assertion is offered to prove the other. When one fact may be, but is not necessarily, true if another fact is also true, a statement directly concerning only the latter fact is not automatically treated as hearsay if offered to prove the former; the statement only is hearsay if there is a finding that the speaker intended to assert the implied fact.

Cf. M. GRAHAM, *supra* note 5, at 715; Graham, *supra* note 47, at 921 n.75; Wellborn, *supra* note 5, at 81-83.

Applying step two to the example above, we assume that the proposition of fact identified in step one is false (assume there were sufficient funds in the account when the declarant said "Don't cash this check until Tuesday"). The test then asks whether the declarant must have been lying or mistaken when he made the out-of-court statement. The answer here is "No." The declarant could have had other reasons for requesting that the listener not cash the check until Tuesday consistent with a belief that there were sufficient funds to cover the check if it was cashed earlier than requested.⁷⁵ Thus, the declarant's statement would have been a poor choice to convey the lie that there were insufficient funds to cover the check. This reveals the kind of reduced risk of insincerity that supports a finding that the out-of-court statement was not an assertion of the fact in question and therefore not hearsay under the federal definition.⁷⁶

To the extent that the inference drawn from the out-of-court expression appears attenuated—that is, not necessary or exclusive—the expression is a poor choice to communicate the implied fact and thus is nonassertive when offered to prove that fact. The attenuation, however, creates an ambiguity and the risk that the jury will misconstrue the evidence.⁷⁷

This ambiguity, however, does not create as great a concern as the more familiar hearsay risks of insincerity or mistaken perception for several reasons. First, problems with the declarant's sincerity, perception, or memory usually do not appear on the face of the out-of-court statement and require cross-examination to be exposed. The ambiguity faced here, however, is patent. A statement is self-impeaching when offered to prove something it only ambiguously expresses. The opponent only needs closing argument, not

75. For example, the declarant may have wanted a few extra days to stop payment on the check if conditions warranted such action, or the declarant may have believed that the listener had no legal right to cash the check until Tuesday.

76. Although it may be more likely that the declarant wanted to delay cashing the check because there were insufficient funds in the account, this possibility speaks to the probative value of the evidence, not to the reduced risk of insincerity that the evidence presents. Because this out-of-court statement would less clearly convey a lie about the insufficiency of funds than a more direct statement of that fact, there is less danger that this statement was chosen to express such a lie. The test directs the analysis away from speculative attempts to determine what the declarant most likely intended to say (a matter about which judges and lawyers can argue *ad infinitum*) and towards a more formal test of whether the statement was a good choice for a person who intended to lie about the implied proposition in question.

77. Finman, *supra* note 54, at 688; Maguire, *supra* note 3, at 760-63; Wellborn, *supra* note 5, at 80-81.

cross-examination, to point out the weakness of proponent's inferences from the evidence.

Second, the heart of the hearsay danger is the risk that the jury will overvalue hearsay evidence by crediting the declarant with average sincerity, perception, memory, and communication skill when cross-examination could have shown that the declarant was below average in one or several respects.⁷⁸ The use of attenuated inferences, on the other hand, presents little danger of overvaluing the declarant's credibility. Indeed, the ambiguity presented is not the product of the declarant at all. It emanates from the proponent's attempt to use the declarant's expression to draw a possible, though attenuated, inference. When the declarant said "Don't cash this check until Tuesday," his direct instruction appears unambiguous. The ambiguity arises only when the proponent presses this expression into service to prove the inference that the declarant believed there were insufficient funds to cover the check until Tuesday. The declarant's statement suggests, but does not demand, that inference.⁷⁹

An interesting case with which to illustrate this test for implied assertions is *United States v. Zenni*.⁸⁰ In *Zenni*, the police raided an alleged betting parlor and, while on the premises, answered the phone several times. The callers all tried to place bets. At trial the prosecution sought to introduce testimony from the police regarding what they heard on the phone. The issue was whether the out-of-court statement, "Put two dollars to win on Paul Revere in the

78. See *supra* text accompanying notes 25-28.

79. Professor Wellborn says that allowing out-of-court verbal expressions only if they are not intended as assertions has the bizarre effect of preferring less reliable evidence over more reliable. Wellborn, *supra* note 5, at 80-81. The purpose of the hearsay rule, however, is not to advance the most reliable evidence but, to insist that evidence not gain reliability from positive assumptions that the jury probably will make about the credibility of the declarant in the absence of an opportunity to cross-examine the declarant. See 5 J. WIGMORE, *supra* note 25, § 1362. Moreover, Professor Wellborn uses "reliable" in two different senses. If "reliable" means that the evidence strongly proves the point for which it is offered (a better word would be "probative"), then a nonasserted inference is less "reliable" because it only supports the point ambiguously. If "reliable" means credible or trustworthy, however, the direct statement carries a greater risk of insincerity than the nonasserted inference, and thus the nonasserted inference is more "reliable."

The same is true for nonverbal conduct. Recall the earlier example in which two instances of conduct were offered to prove that the actor owned a particular Buick. In the first, the actor pointed to the Buick when asked which car the actor owned. In the second, the actor was observed sitting behind the wheel of the parked Buick, reading a newspaper. The first conduct is assertive and therefore hearsay; the latter is not. In one respect, however, the first is more "reliable" evidence, because it directly asserts the fact in question, while the latter only ambiguously implies ownership.

80. 492 F. Supp. 464 (E.D. Ky. 1980).

third at Pimlico," was intended to assert that the caller believed he had reached a betting parlor.⁸¹

The court held that the call was "nonassertive verbal conduct" and thus not hearsay.⁸² The court found that "it is obvious . . . [that the caller] did not intend to make an assertion about the fact sought to be proved or anything else."⁸³ This is "obvious," however, only if one begs the question. The federal definition excludes nonassertive verbal conduct from the hearsay rule only because it presents less risk of declarant insincerity. If one assumes, as the *Zenni* court apparently did, that the caller was sincere, then it is "obvious" that the caller was only trying to place a bet and not trying to indicate his belief that he had reached a betting parlor. If one assumes, however, that the caller was insincere then this call was an excellent way to create the false impression that the caller believed he had reached a betting parlor.

This statement is inadmissible hearsay under the test described above. Under step one, the proponent offers the call to prove that the caller believed that he had reached a betting parlor. Under step two, assuming that the caller had *not* reached a betting parlor, was the caller necessarily lying or mistaken when he placed his bet? The answer is "Yes," and thus the call is an implied assertion subject to the hearsay rule. The evidence fails to escape the definition of hearsay because it does not present a reduced risk of insincerity. Attempting to place a bet clearly indicates that the caller believed that he had reached a betting parlor. Such a call is a good way for a liar to fabricate evidence. Without a reduced risk of insincerity, there is no justification under the federal definition for keeping it outside the hearsay rules.⁸⁴

V. DISTINGUISHING HEARSAY AND NONHEARSAY USES OF OUT-OF-COURT STATEMENTS

Under Federal Rule of Evidence 801(c), an out-of-court statement is not hearsay if offered to prove something other than the truth of the matter asserted. This corresponds to the common-law doctrine that preceded the federal rules.⁸⁵

81. *Id.* at 466 n.7.

82. *Id.* at 469.

83. *Id.* (footnote omitted).

84. For a discussion of why the calls do not qualify as nonhearsay verbal acts, see *infra* text accompanying notes 112-14.

85. 6 J. WIGMORE, *supra* note 25, § 1766; MCCORMICK ON EVIDENCE § 249 (3d ed. 1986) [hereinafter MCCORMICK].

When an out-of-court statement is offered for a nonhearsay purpose but also is likely to be used by the jury as proof of the matter asserted,⁸⁶ the statement is admissible only if the probative value of the nonhearsay use is not substantially outweighed by the dangers of any hearsay use of the evidence.⁸⁷

Courts often fall back on common-law terminology in identifying relevant nonhearsay uses of statement. Phrases such as "effect on hearer"⁸⁸ and "verbal act"⁸⁹ are often helpful, but others, such as "verbal part of an act"⁹⁰ and "circumstantial evidence of state of mind"⁹¹ are not. What is lacking is a single method for testing *any* claim that an out-of-court statement is offered for a relevant, nonhearsay purpose. Without such a test, courts may be tempted to invoke the common-law terms in a conclusory and incorrect manner.

For example, one of the most confusing and persistent relics of the common-law effort to distinguish hearsay from nonhearsay is the notion that evidence that is "merely circumstantial" is not hearsay.⁹² On its face, this is a distinction without a difference,

86. For example, the declarant's out-of-court statement to the physician, "My spouse is allergic to penicillin," is relevant for the nonhearsay use of proving that the doctor had notice that the patient might be allergic. The statement, however, also might be used by the jury as proof that the patient was, in fact, allergic to penicillin.

87. FED. R. EVID. 403. *See, e.g.,* United States v. Parry, 649 F.2d 292, 295 (5th Cir. Unit B June 1981).

88. McCORMICK, *supra* note 85, § 249. For example, in a medical malpractice case, the declarant told the doctor, "My spouse is allergic to penicillin." Offered to show the effect on the hearer, the evidence is relevant even if we assume that the declarant had no idea whether what she said was true, because the statement still put the doctor on notice. *See* United States v. Chavis, 772 F.2d 100, 105 (5th Cir. 1985); Moore v. Sears Roebuck & Co., 683 F.2d 1321, 1322-23 (11th Cir. 1982). A subset of "effect on hearer" is the use of an out-of-court statement only to make other admissible parts of a conversation not misleading. *See, e.g.,* United States v. Jordan, 810 F.2d 262, 264 (D.C. Cir.), *cert. denied*, 481 U.S. 1032 (1987)).

89. 4 J. WEINSTEIN's, *supra* note 7, ¶ 801(c)[01]. For example, in a breach of contract case, the declarant's statement, "We cannot ship your order," is offered as a verbal act constituting a repudiation of a contractual obligation. It is relevant even if we assume that the declarant had no idea whether the order could be shipped. *See, e.g.,* Local 512, Warehouse & Office Worker's Union v. NLRB, 795 F.2d 705, 713 n.4 (9th Cir. 1986); United States v. Jones, 663 F.2d 567, 571 (5th Cir. 1981).

90. McCORMICK, *supra* note 85, § 249; M. GRAHAM, *supra* note 5, § 801.5, at 698 n.6.

91. M. GRAHAM, *supra* note 5, § 801.6, at 708-12; McCORMICK, *supra* note 85, § 294; J. WIGMORE, *supra* note 25, § 1790.

92. United States v. Hensel, 699 F.2d 18, 31 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983); United States v. Mazyak, 650 F.2d 788, 792 (5th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982); D. BINDER, *HEARSAY HANDBOOK* § 2.09 (2d ed. 1983).

because all hearsay evidence is circumstantial.⁹³ The fact that the declarant said "The light was green" is circumstantial evidence that she believed that the light was green, and this in turn is circumstantial evidence that the light in fact was green.

The courts, however, mean "circumstantial" in the special sense described by Wigmore. Wigmore distinguished "two great classes" of evidence involving inferences; testimonial and circumstantial.⁹⁴ Testimonial evidence depends for its value on the credibility of the witness or declarant. Circumstantial evidence is "all offered evidentiary facts not being assertions from which the truth of the matters asserted is desired to be inferred."⁹⁵

Applying Wigmore's distinction to the federal definition of hearsay says only that out-of-court statements are not hearsay unless offered to prove the truth of the matters asserted.⁹⁶ Beyond providing a synonym for "nonhearsay," the label "circumstantial evidence" provides little guidance for distinguishing between circumstantial and testimonial evidence. This would be innocuous if the phrase was not invoked so often in a conclusory fashion to declare that evidence is nonhearsay when it in fact carries the full panoply of hearsay risks.⁹⁷

In *United States v. Mazyak*,⁹⁸ for example, the court upheld the admission of a letter addressed to the four defendants that wished the defendants well on their journey with certain "precious cargo." The defendants were charged with importing drugs by boat. The court stated that "[t]he letter was not introduced to prove the truth of the matter asserted; rather, it was introduced as circumstantial proof that the appellants were associated with each other and the boat."⁹⁹

The court's conclusory incantation of the term "circumstantial" and its citation to Wigmore cannot hide the hearsay use of this evidence. The letter is circumstantial proof of the appellants'

93. BLACK'S LAW DICTIONARY 309 (4th ed. 1968) ("Circumstantial evidence. The term includes all evidence of indirect nature."); McCORMICK, *supra* note 85, § 185 ("Circumstantial evidence may also be testimonial"); Wellborn, *supra* note 5, at 62; *see also supra* text accompanying notes 23-25.

94. 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 25 (2d ed. 1923). Wigmore noted his discomfort with the ambiguous term "circumstantial," which he felt was "unfortunately but inevitably fixed upon on us." *Id.*

95. 1 *id.* § 478; 3 *id.* § 1766.

96. 1 *id.* § 25; *see also* 3 *id.* § 1788.

97. *See, e.g.,* *United States v. Wilson*, 532 F.2d 641, 645-46 (8th Cir.), *cert. denied*, 429 U.S. 846 (1976). *See* Wellborn, *supra* note 5, at 62-63 nn.78-79.

98. 650 F.2d 788 (5th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982).

99. *Id.* at 792.

association with one another and the boat if, and only if, we draw the inferences that the declarant addressed the letter to all four defendants because he believed them to be associated with one another and with the boat, and from the declarant's expressed belief in that fact we infer its truth. All of the hearsay risks are present. If the declarant was lying or mistaken as to each defendant's involvement, the evidence will mislead the trier of fact. The declarant's unavailability for cross-examination makes it impossible to assess these risks, leaving the trier of fact to speculate on, and therefore perhaps overvalue, the declarant's credibility.

In *United States v. Snow*¹⁰⁰ a briefcase, to which was affixed a red tape with the lettering "Bill Snow," was admitted to prove that the case belonged to the defendant.¹⁰¹ The court claimed that the name tape was not hearsay, but circumstantial evidence and a mechanical trace. The court noted that "to exclude the name tape as hearsay . . . it would be necessary to find that the tape is a testimonial assertion of the proscribed sort."¹⁰² The court never determined, however, whether the tape was such an assertion. Ownership of the briefcase was at issue and the "assertion of a human being"¹⁰³ (the person who applied the tape to the case) was offered to prove that issue. The evidence asked the jury to assume that whoever put the tape on the case knew what he or she was doing, made no mistakes, and was not lying. The evidence was thus testimonial and therefore hearsay.¹⁰⁴

100. 517 F.2d 441 (9th Cir. 1975).

101. *Id.* at 443.

102. *Id.*

103. *Id.*

104. See also M. GRAHAM, *supra* note 5, § 801.6, at 704. The *Snow* court concluded its argument with reference to Wigmore's example of a father who has "forbidden a certain young man to court his daughter and then one morning f[inds] on the parlor floor by the sofa a bunch of keys with the tabooed young man's name . . . [on them]." 517 F.2d at 444. Wigmore suggested that it would be absurd to exclude such evidence on hearsay grounds. At one level, however, the name tag on the keys constitutes testimonial evidence. One infers from the tag that the person who made and affixed it to these keys believed that the keys belonged to the tabooed young man. This inference is testimonial because it plainly substitutes for an in-court assertion of the same fact. The value of the evidence depends on the declarant's credibility and the assumption that the declarant was not lying or mistaken.

Wigmore did not acknowledge any testimonial hearsay inferences in the tag, but simply insisted that the tag was admissible as proof of who owned the keys. Yet, one of the purposes of the hearsay rule is to act as an incentive for advocates to go beyond unexamined out-of-court assertions of fact and look for more primary evidence. One hopes that even in Wigmore's time an irate father would not rely on the tag alone but would verify that the keys fit the young man's locks before taking any precipitous action in defense of his daughter's honor.

In sum, the vague distinction between hearsay and circumstantial evidence has hindered the analysis of close hearsay questions. Although the phrase circumstantial evidence includes many categories of nonhearsay evidence, it offers little clarity in close cases and too often is pressed into service in a conclusory fashion to admit hearsay.¹⁰⁵

Whether a court calls evidence "merely circumstantial," "effect on hearer," "verbal part of an act," or just "nonhearsay," it still must ascertain whether the statement's relevance does not, in fact, draw on hearsay inferences.¹⁰⁶ The following tests check whether the offered nonhearsay use is truly free of hearsay inferences. An out-of-court statement offered as relevant, nonhearsay evidence must fit into one of the following two categories.¹⁰⁷

A. Category One Nonhearsay: Statement Relevant for its Objective Effect

The first category includes statements relevant for their objective effect, regardless of the declarant's knowledge or intent. This test covers effect on hearer,¹⁰⁸ verbal acts,¹⁰⁹ and proof of demonstrably

105. See M. GRAHAM, *supra* note 5, § 801.6, at 703-05; Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions for Law Teachers*, 65 MINN. L. REV. 423, 430-35 (1981). Likewise, the category of nonhearsay called "circumstantial evidence of state of mind" has proved to be confusing and subject to misuse. 3 J. WIGMORE, *supra* note 94, § 1790; Graham, *supra* note 47, at 917-20; Morgan, *supra* note 4, at 206.

106. See Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 9 (1937) ("[t]he courts do not . . . get down to fundamentals . . . through the series of inferences which must be made in the mental journey from the item of evidence to the fact which it is offered to prove."). See, e.g., *United States v. Giraldo*, 822 F.2d 205 (2d Cir.), *cert. denied*, 484 U.S. 969 (1987). In *Giraldo*, an answering machine tape that recorded calls requesting purchases of drugs was admitted as nonhearsay because it was not offered to prove the matters asserted, but "to show that it was more likely than not that the cocaine possessed by Giraldo was possessed for purposes of distribution." *Id.* at 213. The calls only prove this, however, if the hearsay inference is drawn that the callers believed that they were leaving messages for a drug dealer. See also *United States v. Zenni*, 492 F. Supp. 464, 469 (E.D. Ky. 1980); M. GRAHAM, *supra* note 5, § 801.6, at 706 n.13.

107. A third category of relevant nonhearsay use, prior inconsistent and consistent statements used to impeach or rehabilitate the credibility of a witness, is not problematic in its application and requires no test to confirm it. See, e.g., *United States v. Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983); *United States v. Lay*, 644 F.2d 1087, 1090 (5th Cir.), *cert. denied*, 454 U.S. 869 (1981); *United States v. Abascal*, 564 F.2d 821, 830 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978). Under Rule 801(d)(1), if the declarant is available for cross-examination, prior consistent statements are admissible as substantive evidence, FED. R. EVID. 801(d)(1)(B), as are prior inconsistent statements that were made under oath at a trial, deposition, or other proceeding. FED. R. EVID. 801(d)(1)(A).

108. See *supra* note 88.

109. See *supra* note 89.

false statements.¹¹⁰ The test for this category assures that the relevance of the evidence is not drawing on hearsay inferences by negating the critical hearsay premise that declarants usually believe what they say.¹¹¹ The test asks us to assume that unbeknownst to the listener or reader, the declarant had no idea what she was saying. Next, the test asks whether that assumption destroys the relevance of the statement. If the evidence is truly relevant for its objective effect, the assumption that the declarant had no idea what she was saying should not destroy its relevance.

For example, the proponent offers the declarant's out-of-court statement to the defendant doctor, "My wife is allergic to penicillin," for the nonhearsay purpose of showing notice. The evidence passes the test. If we assume that the declarant had no idea what he was saying it does not destroy the relevance of the statement. Regardless of what the declarant knew or did not know, his statement put the doctor on notice that the patient might be allergic to penicillin and the doctor's subsequent professional conduct should be evaluated in light of that fact.

On the other hand, suppose that the prosecution in *United States v. Zenni*¹¹² argued that the caller's statement "Put two dollars on Paul Revere to win in the third at Pimlico," was not hearsay but a "verbal act."¹¹³ Using the test outlined above, we assume that the caller had no idea what he was saying. With that assumption in place, the relevance of the evidence is lost. Although labeling the call a "verbal act" might sound good on the surface, the test shows that the statement acquires its relevance only by drawing on the hearsay inference that the caller believed he had reached a

110. For example, in a robbery case the prosecution offers the statement of the defendant's spouse on the day of the robbery, "Joe is out of town," to prove, together with independent evidence that Joe was not out of town, that the defendant's spouse was lying or mistaken about the defendant's whereabouts at the time in question. Even if we assume that the declarant had no idea where Joe was when she made the statement, the fact that she made an incorrect assertion regarding his whereabouts is relevant. See, e.g., *Anderson v. United States*, 417 U.S. 211, 219-20 (1974); *United States v. Adkins*, 741 F.2d 744, 746 (5th Cir. 1984), cert. denied, 471 U.S. 1053 (1985).

Some suggest that this statement is hearsay because its relevance is based on the assumption that the declarant believed that her statement was false and that she was concocting an alibi. This assumption involves the hearsay risks that the declarant was lying or mistaken. M. GRAHAM, *supra* note 5, § 801.10, at 719, n.3. The federal definition of hearsay, however, does not extend this far. It only polices the assertive use of out-of-court expressions; what the declarant intends to communicate. There is no sense in which the declarant used the expression "Joe is out of town" in order to assert her belief that the statement was false.

111. See *supra* text accompanying notes 23-25.

112. 492 F. Supp. 464 (E.D. Ky. 1980).

113. See McCORMICK, *supra* note 85, at 249.

betting parlor. If the caller was lying or mistaken, the evidence is not only irrelevant, but also misleading.

B. Category Two Nonhearsay: Demonstrated Evidence of Declarant's State of Mind

The second category of nonhearsay covers cases in which what the declarant said or agreed to say demonstrates a relevant fact about her state of mind.¹¹⁴ For example, in *United States v. Lieberman*¹¹⁵ the defendant allegedly was part of a large conspiracy to import and distribute marijuana. The prosecution presented evidence strongly linking Robert D'Ambra to the drug operation. Part of the case against Lieberman was linking him to D'Ambra. The prosecution offered evidence that someone checked into the Newport Resort Hotel, filled out a registration card with the name "Robert D'Ambra," listed an address that was independently verified as D'Ambra's, and later made a call from this hotel room to Lieberman's unlisted phone number. The prosecution invited the jury to infer some association between D'Ambra and the defendant. The defense objected, claiming that the hotel registration card was hearsay.

The registration card sustains both hearsay and nonhearsay inferences. The hearsay inference invites us to accept what the declarant said as true; he said that he was Robert D'Ambra because he was D'Ambra. The nonhearsay inference is that the declarant was someone who at least knew D'Ambra's correct name and address. This inference is not based on the truth of the statement but on the declarant's ability to state certain facts correctly. From this the jury could infer that the declarant was D'Ambra or someone associated with him. The nonhearsay inference is possible only because there was independent evidence that D'Ambra's address on the registration card was correct.¹¹⁶

The following test for category two nonhearsay helps police the imprecise and sometimes reckless use of such terms as "circum-

114. See, e.g., *United States v. Webster*, 750 F.2d 307, 330-31 (5th Cir. 1984), cert. denied, 471 U.S. 1106 (1985) (fact that declarant agreed to say "I have a plane on my property" in front of a group of people is evidence the declarant was not hiding the fact and this, in turn, indicated a lack of knowledge on his part that the plane was stolen); *United States v. Parry*, 649 F.2d 292 (5th Cir. 1981) (fact that defendant was able to correctly identify Bob Staratt as a narcotics agent relevant to support defense that defendant thought he was working for Staratt); M. GRAHAM, *supra* note 5, § 801.6, at 707-08; MCCORMICK, *supra* note 85, § 249.

115. 637 F.2d 95 (2d Cir. 1980).

116. See *United States v. Garcia-Duarte*, 718 F.2d 42, 47 (2d Cir. 1983); M. GRAHAM, *supra* note 5, § 801.6, at 707-08.

stantial evidence of state of mind." It screens out efforts to use hearsay inferences to prove the declarant's state of mind¹¹⁷ and instances in which the declarant's state of mind is relevant only to support a further inference of some objective fact, thus raising all the hearsay risks.

The test for this category of nonhearsay has three parts. First, there must exist some independent evidence that supports the truth of all or some relevant part of the declarant's statement.¹¹⁸ Second, we assume that the independent evidence is incontrovertible. Finally, we ask whether this assumption makes the declarant's statement merely cumulative evidence or whether the statement is still relevant as proof that the declarant was able or agreed to make the statement.

For example, a prosecutor needs to prove that Sally knew where Joe lived. The prosecutor offers a witness who testifies that Sally told her that Joe lived on Oak Avenue. Applying the test, we need independent evidence that Joe in fact lived on Oak Avenue.¹¹⁹ If we assume that this independent evidence is incontrovertible, would Sally's statement become merely cumulative? It does not. Sally's out-of-court statement is still relevant because it shows that she was able to give Joe's correct address, and this demonstrates that she knew where Joe lived.

Compare another example involving a tax fraud case in which the defendant offers a statement he made to his spouse while working on the tax return, "I don't want to cheat on my taxes," as nonhearsay proof of his innocent state of mind at the time. This sounds appealing. The defendant's statement is consistent with, and therefore circumstantial evidence of, an innocent state of mind. This is true, however, only if we draw the hearsay inferences that the defendant is saying what he truly believes and

117. Statements such as "I am angry" are hearsay, but fall under the exception in FED. R. EVID. 803(3) as a statement of a then existing physical, emotional, or mental condition. Statements of belief are also hearsay and come within the 803(3) exception only if not offered to prove the truth of the matter believed.

118. When a statement is offered to prove the declarant knew of someone or some thing, the independent evidence requirement is satisfied if the person or thing mentioned in fact exists. Thus the statement, "I bought this at Chase Hardware," when offered for the nonhearsay purpose of proving that the declarant knew of Chase Hardware, satisfies the independent evidence requirement if Chase Hardware in fact exists.

119. To use Sally's statement to prove that she knew where Joe lived, independent evidence must show that the statement was accurate. We cannot turn to the statement itself to prove its own accuracy because this would be based only on the hearsay inferences that the declarant said what she believed and what she believed was probably true. Only with independent confirmation can the out-of-court evidence *demonstrate* the declarant's knowledge or ability regarding the matter in question.

that what he believes is true. Applying the test, if we assume that there is independent, incontrovertible evidence that the defendant did not want to cheat on his taxes, the defendant's statement loses its relevance; it is needlessly cumulative. This demonstrates that the statement has no relevance outside of using hearsay inferences to prove the truth of the matter asserted.

VI. APPLICATIONS

Applying the methods described above for distinguishing assertive from nonassertive evidence and hearsay from relevant nonhearsay provides the coherence and consistency that is missing from many court opinions analyzing difficult hearsay issues. An analysis of the following four federal appeals court cases demonstrates the need for and usefulness of a critical, tested approach for discerning hearsay from nonhearsay under the federal definition.

In *United States v. Day*,¹²⁰ the prosecution offered the testimony of a witness who saw the victim shortly before the murder. The victim handed the witness a piece of paper on which was written "Beanny, Eric, 635-3135" and told the witness to call the police and give them this note if he was not back by three o'clock the next day.

Two out-of-court expressions were present in *Day*: what the note said, and what the victim said to the witness while passing the note. The two expressions must be analyzed separately. The prosecution argued that the note was nonhearsay, offered not to prove the truth of the matter asserted, but to show that the victim knew Beanny and Eric.¹²¹ As purported nonhearsay, the evidence must pass the test for one of the two categories of nonhearsay. The test for category one,¹²² however, is clearly not met. If we assume that the declarant had no idea what he was writing when he made the note, that assumption directly destroys any relevance the note may have.

The test for category two nonhearsay¹²³ first asks whether there is independent evidence verifying that what the note says is true—that Beanny and Eric do have this particular phone number. If there is such independent evidence and we assume it is incontrovertibly true, the test asks whether that assumption makes the note irrelevant, merely cumulative evidence. It does not. The note is

120. 591 F.2d 861, 880 (D.C. Cir. 1978).

121. *Id.* at 883, 885.

122. See *supra* text accompanying notes 109-11.

123. See *supra* text accompanying notes 115-20.

not being used to prove the defendants' phone number, but to show that the victim possessed the correct phone number and therefore probably knew the defendants.

The court reached the same result, admitting the note as non-hearsay, but its reasoning was questionable. The court stated that "the words [on the note] do not assert anything except that Beanny and/or Eric might have a particular telephone number."¹²⁴ The confusion begins here. To say that the note only asserts that Beanny and Eric *might* have that particular phone number is to purposefully misdescribe the conventions of language used by the declarant. When a person writes a name and number on a note and passes it to another, the normal use of that act is to assert that the person named has (not "might have") this particular phone number.

The court misdescribed what the note asserted because it wanted to neutralize its assertive nature.¹²⁵ The court's confusion deepened as it argued that the relevance of the note did not depend on the truth of what the note said. There was no independent evidence verifying that the phone number was correct! If this was not Beanny and Eric's phone number, then the evidence suggests that the victim did not know Beanny and Eric very well, or at least not well enough to have their correct phone number. The non-hearsay relevance of the note heavily depended on the accuracy of the phone number. If the prosecution relied solely on the note to establish that accuracy, then the note was hearsay. If the prosecution, however, had independently established the accuracy of the phone number, then that fact, together with the victim's possession of the note, suggests some relationship between the victim and the defendant. Because the majority used faulty reasoning to reach a correct result, it lost the dissenter, Judge Robinson, who was not convinced that the note was relevant as nonhearsay.¹²⁶

The second piece of evidence at issue was the witness's testimony that, as the victim handed him the note, the victim said, "If I'm not back by three o'clock tomorrow, call the police, tell them what I said, and give them this number."¹²⁷ The prosecution might have argued that what the victim said was not offered to prove the truth of anything asserted, but only for the fact that it was said. The evidence, however, does not qualify as relevant non-

124. *Day*, 591 F.2d at 883.

125. *Id.* at 883-84 n.43.

126. *Id.* at 894.

127. *Id.* at 881.

hearsay. Under the test for category one, if we assume that the victim had no idea what he was saying, it destroys the relevance of the statement. The prosecution might have argued that the statement explained the witness's subsequent conduct of calling the police when the victim did not return, but there is no need to explain the witness's conduct because it is not in issue.

The statement also fails the test for category two nonhearsay as circumstantial evidence of the victim's state of mind. If we assume that there is independent, incontrovertible evidence that what the victim's statement suggested—that he had reason to believe that the defendants might harm him—was true, then the victim's statement is needless, cumulative evidence. The relevant issue is not whether the victim believed that the defendants might harm him, but whether what the victim believed was in fact true.

Finding no relevant nonhearsay use, the prosecution could have attempted to avoid the hearsay rule by arguing that the victim's statement was not being offered for what it asserted but rather to prove the nonasserted implication that the victim believed he had reason to fear the defendants. Applying the test described above for distinguishing between assertions and nonassertions,¹²⁸ the proponent offers the statement to prove that the declarant victim believed that Beanny and Eric might harm him. The test asks us to assume that what the declarant believed was incontrovertibly false; that is, to assume that Beanny and Eric were not at all likely to harm the declarant. In that case, was the declarant necessarily lying or mistaken when the statement was made to the witness? The answer is "Yes." What the victim said makes no sense unless the victim believed Beanny and Eric might harm him. The statement and the context in which it was made would have been a good choice for a liar attempting to communicate the false inference that there were reasons to fear that the defendants might harm him. Thus, this use of the victim's statement does not present the reduced risks of insincerity required for evidence to qualify as nonassertive under the federal definition of hearsay. The court in *Day* reached the same result, finding that the government was offering the out-of-court expression to prove the inference that the victim feared the defendants.¹²⁹

In *United States v. Singer*,¹³⁰ the defendants were charged with drug related offenses.¹³¹ The prosecution wanted to prove that the

128. See *supra* text accompanying notes 68-76.

129. *Day*, 591 F.2d at 881-83.

130. 687 F.2d 1135 (8th Cir. 1982), *different result on rehearing on other grounds*, 710 F.2d 431 (8th Cir. 1983).

131. *Id.* at 1137.

two defendants lived together at a particular address by offering a letter in an envelope addressed to the two defendants from their landlord terminating the tenancy.¹³² The letter does not qualify as relevant nonhearsay under either category. Under the category one test, if we assume that the person who addressed the letter had no idea what she was writing, the letter's relevance is destroyed. Under the test for category two, assuming that there was incontrovertible evidence that what the letter said was true and that the defendants did live at that address, the letter is needless, cumulative evidence.

Nor can the letter qualify as some sort of nonassertive evidence. The proponent offered the letter to prove that the declarant believed the defendants lived at that address.¹³³ Under our test, if we assume that they did not live at that address, it follows that the declarant was necessarily lying or mistaken in addressing the letter. There is no reduced risk of insincerity evidenced here, so the letter is hearsay.

The court held that the letter was not hearsay.¹³⁴ It reasoned that:

If this letter were submitted to *assert* the implied truth of its *written contents*—that Carlos Almaden lived at 600 Wilshire—it would be hearsay and inadmissible. It is, however, admissible nonhearsay because its purpose is to imply from the landlord's *behavior*—his mailing a letter to "Carlos Almaden," 600 Wilshire—that "Almaden" lived there.¹³⁵

The court unsuccessfully tried to free the letter from the hearsay rule by focusing on the landlord's nonverbal conduct of mailing the letter. The only evidence, however, that the landlord mailed the letter was the hearsay inference that the return address was true and accurate. Moreover, the nonverbal conduct of mailing a letter is irrelevant without the written assertion of to whom and at what address the letter was to be sent.

The form of the court's argument has unacceptable implications. For example, to prove that Joe is a good shot, the proponent offers into evidence a certificate issued by Fred's Shooting Range which says that Joe is an excellent shot. This is hearsay of course. Under the *Singer* court's argument, however, the certificate is not offered to prove its specific written content (that Joe is an excellent shot), but only to prove Fred's behavior in giving such a certificate to Joe. From this the jury can infer that Fred believed what the

132. *Id.* at 1147.

133. *Id.*

134. *Id.*

135. *Id.*

certificate said. Admitting evidence like this creates a giant new hole in the hearsay rule.

In *United States v. Martinez*,¹³⁶ the defendant was charged with attempted murder. The prosecution offered the testimony of a prison inmate informant, McNeil, that the defendant contacted him about arranging a murder. Cross-examination brought out that the witness had done a great deal of past informing against other prisoners and prison guards. The implication was that the witness had a history of making charges against others. On redirect, in an effort to rehabilitate McNeil's credibility, the prosecution asked about the disposition of the charges McNeil made against the prison guards. McNeil replied that all of the guards pled guilty. The defendant objected to this evidence as hearsay.

The prosecution argued that the pleas were nonhearsay because they were offered not for their truth, but for the mere fact that they were made. The court agreed.¹³⁷ The pleas, however, do not qualify for either category of relevant nonhearsay. They fail the test for category one because, if we assume that the guards had no idea what they were saying, the relevance of the evidence is destroyed. They are not admissible as verbal acts because, while pleading guilty has certain objective, legal consequences, none of those consequences was relevant in this case. The guilty pleas only rehabilitate McNeil if we draw the inference that the guards believed that his accusations were true, from which we infer that his accusations were in fact true. The witness's credibility is not supported if the guards were lying or mistaken when they entered their pleas. If they pled guilty to very minor charges for reasons of convenience, even though they believed that the charges were baseless, the pleas do not support McNeil's credibility.¹³⁸

The guilty pleas also fail the test for category two nonhearsay as circumstantial evidence of the guards' states of mind. If we assume that there was independent, incontrovertible evidence that

136. 775 F.2d 31 (2d Cir. 1985).

137. *Id.* at 37.

138. A court understandably might wish to admit the guilty pleas because if the charges were at all serious, the inference that the guards believed that there was some merit to the charges is quite reliable. The guards were unlikely to lie or make a mistake on a matter of such personal importance. FED. R. EVID. 803(22) recognizes this increased reliability in serious cases and provides a hearsay exception to admit them. The rule, however, forbids prosecutorial use of judgments against anyone other than the accused, when offered for purposes other than impeachment. The *Martinez* court would have been on far more coherent grounds had it argued that the guards' guilty pleas were offered for purposes of impeachment as read in the broad sense to cover both attacks on and rehabilitation of a witness's credibility.

the guards were in fact guilty, the pleas are cumulative and irrelevant. Although it is tempting to say that the guilty pleas are offered only to prove the guards' consciousness of guilt, this test shows that the real object of interest is not whether the guards believed they were guilty, but whether what the guards believed was true.

The court admitted the guards' guilty pleas as nonhearsay, claiming that the evidence was not offered to prove that the guards were in fact guilty. The court stated that "[w]hether or not each of the guards was in fact guilty, . . . [the witness's] credibility was supported by the fact that all those . . . guards chose to plead guilty rather than to stand trial."¹³⁹ The court appears to argue that people do not normally plead guilty unless there is at least some merit to the charges against them. This, however, is a hearsay inference.¹⁴⁰ Suppose several of the guards said, "McNeil has made true charges against us." Following the court's argument, these statements are not hearsay because whether or not the charges were true, the witness's credibility was supported by the fact that the guards chose to say this rather than protest their innocence.

Finally, in *United States v. Reynolds*,¹⁴¹ the defendant was charged with possession of stolen unemployment insurance checks. The prosecution offered the testimony of a postal inspector that after he arrested the defendant's alleged co-conspirator and as the defendant approached them, the co-conspirator said to the defendant, "I didn't tell them anything about you."¹⁴² The defense objected on hearsay grounds.

This statement does not qualify as nonhearsay. Using the test for category one, if we assume that the declarant had no idea what he was saying, his statement is irrelevant. Under the test for category two, even if there was incontrovertible evidence that what the declarant said was true—that he really said nothing to the police about Reynolds—this fact is simply irrelevant. The relevance of the statement is in what it implies—that Reynolds was involved in criminal activity. Thus, the real issue is whether this implication is an assertion under the federal definition of hearsay.

Using the test for assertions, the proponent offers the statement to prove that the declarant believed Reynolds was involved in criminal activity. If we assume that Reynolds was not involved in criminal activity, must the declarant have been lying or mistaken

139. *Martinez*, 775 F.2d at 37.

140. See *supra* text accompanying notes 23-27.

141. 715 F.2d 99, 100 (3d Cir. 1983).

142. *Id.*

when he said to Reynolds "I didn't tell them anything about you"?

Although this is a close case, the better answer is "Yes." In this context, the statement appears to express the declarant's belief that there were things the declarant could but did not tell the police about the defendant's criminal activities. Therefore, the statement would be a reasonably good choice for a liar attempting to falsely implicate the defendant in the crime. Without a reduction in the risk of insincerity, the statement should not qualify as nonassertive under the federal definition of hearsay.

The court held that the statement was hearsay. The opinion includes a good discussion of implied assertions and why a definition of hearsay must include these assertions to some extent. Under *Reynolds*, if an implication must be true in order for the out-of-court expression to be relevant, then the proponent is offering that expression to prove that implication and the expression is hearsay.¹⁴³ While the court cited Morgan's theory of implied assertions for authority, it did not explain how Morgan's theory is incorporated in Federal Rule of Evidence 801. Additionally, the court failed to recognize that just as Federal Rule of Evidence 801 sets limits on the classification of nonverbal conduct as hearsay, it also sets limits on the classification of implied assertions as hearsay.

All four of these cases presented difficult hearsay issues and provoked widely varied, and in some cases, very confusing approaches. Applying the methods and tests described in this Article to each of the cases illustrates that asking the right questions sharpens the true issues and keeps the analysis focused.

VII. CONCLUSION

After nearly fifteen years with the Federal Rules of Evidence, courts and commentators still do not agree on the proper interpretation of the federal definition of hearsay.¹⁴⁴ Some courts ignore the definition and dip back into pre-Federal Rules sources to resolve difficult hearsay questions. The result is a doctrinal free-for-all that leads to inconsistent results and squanders judicial credibility.

Blaming the confusion on the poorly drafted federal definition and the cryptic advisory committee notes is not entirely fair.

143. *Id.* at 102.

144. See Wellborn, *supra* note 5, at 72 ("The machine as constructed will not run very well if skilled mechanics cannot concur in describing it.").

Hearsay confounded courts long before the Federal Rules of Evidence were adopted. The kinds of discriminations called for in close hearsay questions are far more intricate and subtle than many judges have the time or inclination to entertain. The interpretation of the federal definition and methods for applying it presented in this Article attempt to organize and simplify that task. McCormick wrote in connection with defining hearsay that "simplification has a measure of falsification."¹⁴⁵ Experience with the hearsay rule proves that complexity has a measure of impracticality. Our efforts to tame the hearsay rule should concentrate on the middle ground.

145. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 225 (1954).