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INCOMING DRUG CALLS AND PERFORMATIVE WORDS: THEY'RE NOT JUST TALKING ABOUT IT, BARON PARKE!

*Christopher B. Mueller**

While arresting a suspected drug dealer at the flat he shares with others, police repeatedly answer a ringing phone and hear a succession of voices asking for the suspect and trying to buy drugs. Something is up. The incoming calls corroborate tips and suspicions leading to the arrest, and strengthen inferences of drug dealing suggested, weakly perhaps, by other circumstantial evidence — paraphernalia used in the trade and drugs or ingredients in small amounts, all recovered at the scene.

In the trial of the suspect for possession with intent to distribute, proving the incoming calls raises hearsay concerns because the callers *talk about* buying drugs. But they are not just talking — they are *actually trying to buy drugs.*[1] Hence their behavior has an important performative aspect. American and British courts disagree on the hearsay issue. The former generally (but not always) admit such proof as nonhearsay, but the 1992 British decision in the case of *Regina v. Kearley*,[2] where would-be buyers phoned and came in person to the flat seeking drugs from the suspect, rejects such proof as hearsay (with two dissents).[3]

In this Essay, I argue that wise application of hearsay doctrine requires paying some attention to the performative aspect of human behavior, including spoken words. Incoming drug calls involve a performative aspect that supports the suggested inference and justifies nonhearsay treatment, so American courts are headed in the right direction. I then argue that the "implied assertion" concept, a key element in the British approach that has impact in other areas in both Britain and America, is misleading and too broad. Finally, I consider some difficulties presented by incoming drug calls and suggest approaches to them.

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1. In David Mamet's play, *Glengarry Glen Ross*, Dave Moss drafts George Aaronow into stealing sales leads, but begins by offering reassurance. "Aaronow: I mean are you actually *talking about this, or are we just* . . . . Moss: We're just *speaking about it. (Pause.)* As an *idea*." Aaronow senses the difference between just talking and planning, but he's no match for Moss, and begins to lose his footing: "Moss: That's right. It's a crime. It is a crime. It's also very safe. Aaronow: You're actually *talking* about this?" *See* DAVID MAMET, GLENGARRY GLEN ROSS 39-40 (Grove Press 1983) (emphasis added).

2. 2 App. Cas. 228 (H.L. Eng. 1992).

3. *Id.* (opinions by Bridge, Ackner, and Oliver say drug calls should have been excluded as hearsay; dissents by Griffiths and Browne-Wilkinson approve use of the calls). American cases admitting incoming drug calls include State v. Collins, 886 P.2d 243 (Wash. Ct. App. 1995); United States v. Oguns, 921 F.2d 442 (2d Cir. 1990); United States v. Long, 905 F.2d 1572 (D.C. Cir.), *cert. denied*, 498 U.S. 948 (1990); United States v. Lewis, 902 F.2d 1176 (5th Cir. 1990). *But see* People v. Scalzi, 179 Cal. Rptr. 61 (Cal. Ct. App. 1981) (incoming drug calls should have been excluded).

I. PERFORMATIVE ASPECT

The right focus of hearsay is assertions rather than acts, and this salient point suggests that *words* need not be hearsay when they have important performative aspects and are offered to prove other acts, events, or conditions in the world. The beginning point is to consider conduct without words: Proof that someone puts up an umbrella, when offered to show it is raining, should *not* ordinarily be viewed as hearsay.[4] Such proof involves a two-step inference — act suggests belief, which suggests another act or an event or condition in the world (putting up an umbrella suggests the actor *thinks* it is raining, which suggests that it is).

There are lots of reasons why this view is right: First, we should let juries sort out the ambiguities and implications of human acts. We ask them to assess the quality and nature of behavior and interpret states of mind contextually in resolving issues of criminal or civil liability, and we should trust them to assess conduct by participants, observers, and victims in settings like the drug prosecution in *Kearley*. Second, hearsay should not become the "pac-man" of trial rules, devouring inference after inference as it chews its way through common proof, exhausting courts and litigators. Most conduct reflects thoughts on the mind of the actor about what others have done (or events or conditions in the world), and a great many arguments and inferences would be tangled in technical problems or forbidden if hearsay doctrine applied. Third, the great hearsay dangers come with written and spoken utterances offered because of their extraordinary power to express and communicate, as proof of the very points the speaker put into words. We ask enough of this doctrine when we apply it to words offered for this use, even though the two-step inference described above brings risks that parallel the hearsay risks.[5]

While it is right to apply hearsay to assertions but not acts, it is a mistake to suppose human behavior divides neatly into these categories. The reality is that act and assertion are inseparable aspects of much that people do. Consider the mugger who says "gimme your wallet" in a situation filled with menace (he shows a gun; the place is a dark street; he is stronger than his mark; he has the advantage of surprise; he will risk more). Here words force a taking, by themselves or with gestures or movements, and talk about assertions and hearsay risks seems wide of the mark regardless what the purpose of proving the mugger's behavior might be.

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4. The qualifier "ordinarily" is necessary because *any* conduct *might* be designed to express or communicate, in which case it is potentially hearsay after all. Henceforth I will not repeat the qualifier, and I use "conduct" to mean nonassertive conduct. I agree with the assumption in the Rules, which is that on balance it seems wiser to assume that what seems nonassertive *is* nonassertive, a point verified in common experience (putting up an umbrella is not a communicative act). *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE §§ 1.2 and 8.9 (1994) (for apparently nonassertive conduct, party raising hearsay objection bears burden of showing assertion was intended). For a cogent argument in the other direction, *see* Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682 (1962).

5. This Essay criticizes the "implied assertion" concept, but the strong point in Baron Parke's position is that risks of ambiguity, perception, and memory are entailed in conduct offered to prove an act, event, or condition. And if the actor intends to communicate after all, that raises the candor problem.

This example is extreme because the mugger's words are strongly coercive in verbal form (imperative phrasing), in meaning and in circumstance, and they are part-and-parcel of a crime.[6] Yet the example is not unique, and in fact *every* statement has at least *some* performative aspect. At a minimum, speaking or writing is performative in the senses of showing the speaker lives (breath and movement), demonstrating literacy or familiarity with terms, and creating or shaping the relationship between speaker and listener. In trials, usually these minimal and inevitable performative aspects are unremarkable because they have little or no bearing on the point to be proved, and only the assertive aspect is useful. "He's the one who robbed the bank" tends to identify the culprit only because the speaker *asserts* this point. Performative aspects showing life, literacy, and the attitude of the speaker toward police (shedding light on the relationship) would not help the factfinder figure out who robbed the bank, although they may count in appraising the speaker and the assertion.

In a significant number of cases, however, the performative aspect of speaking or writing merits special attention: In what are usefully called mixed act-and-assertion cases, where expressive behavior in its performative aspect is probative of the point to be proved, the assertion is not all that counts. Here the fact that hearsay does not reach acts, coupled with the fact that verbal behavior may have important performative aspects, suggest that it is wise to allow flexibility in applying hearsay doctrine. Proper assessment of mixed act and assertion should take into account what the speaker/actor is trying to accomplish, what motivates his behavior, and how likely it is that he would do what he is doing if the point to be proved were not so.[7] And here as in the case of conduct alone (umbrella example), the veracity of the actor is a less important factor than it is with assertions offered as such. Incoming drug calls fit the mixed act-and-assertion category. As Lord Griffiths said in dissent in *Kearley*, the callers and visitors "were acting as customers or potential customers," which supports an inference that Robert Kearley "was trading as a drug dealer."[8] Of course the *words* are crucial in appraising the conduct (that was also true of the mugger), and the words *did assert* something (interest of callers in buying drugs from defendant), but this point does not obscure the fact that the callers did try to buy drugs. The right questions to ask are whether there is enough trying (a strong enough performative aspect), and whether the point to be proved depends too much on what the words merely assert (too much hearsay risk).

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6. We would call the mugger's words verbal acts if offered to prove a crime. It is a curious conceit that we as a profession are at home with words that in law are instrumental, yet focus so hard on verbal meaning in words that are instrumental in life.

7. Proof of drug calls does not typically involve elements of risk or reliance, especially if the caller is anonymous or the dealing isolated rather than continuous, but in other settings the performative aspect may entail risk or reliance.

8. Regina v. Kearley, 2 App. Cas. 228, 238 (H.L. Eng. 1992). According to police testimony, more than ten phone calls came to the flat over several hours, and seven people came in person to the door, all asking for "Chippie" (defendant), not for his wife or a third occupant of the flat. *Id.* at 236.

Consider the degree of trying: If ten people, desperate for drugs, get cash from muggings and come immediately to defendant's door demanding drugs, the performative aspect would justify the suggested inference, supporting nonhearsay treatment. If one person phones, asking vaguely about availability and price, the inference rests mostly on words in their assertive aspect (he implies an interest in buying, using "imply" in the strong sense examined below), which supports hearsay treatment. The cases usually fall between these examples, less performative than the first one, more than the second. Consider the words: If they indicate that defendant deals *only by asserting* the point, they are hearsay, and the same would be true if words only expressed a wish or idea (saying is not doing; what remains is the assertive aspect, which is what hearsay is all about).[9] But more typically, the words of drug callers *do not* assert or imply in the strong sense that defendant deals, perhaps because that would be beside the point and doing so would gain little (why initiate a purchase by accusing the supplier of a crime?), *nor* do they express a mere wish or idea. Instead they say in substance "I want to buy drugs; let's come to terms."[10]

American courts have leeway in deciding whether to apply hearsay doctrine to verbal behavior having both performative and assertive aspects, which is good. In jurisdictions following the Rules, the key point is that the framers wisely decided to apply hearsay only to assertions, not conduct (so putting up an umbrella is not hearsay when offered to prove rain).[11] Since mixed act-and-assertion cases involve both expression and conduct, courts applying the Rules can pay appropriate attention to the performative aspect and, if it adequately supports the point to be proved, treat it as nonhearsay.[12]

II. IMPLIED STATEMENTS

The three in the majority in *Kearley*, who thought the incoming drug calls were hearsay, relied on the "implied assertion" concept developed by Baron Parke more than 150 years ago.[13] Recall that Parke said in *Wright v. Tatham*[14] that let-

9. The state-of-mind exception allows use of a statement to prove wish or belief, but not to prove defendant was a dealer. *See* FED. R. EVID. 802(3) (cannot prove facts "remembered or believed").

10. Treating an *attempt* as nonhearsay might be proper even if the words include an assertion. A drug call might expressly say the other person deals ("I know you deal"), or imply as much in the strong sense ("we both know why I'm calling; let's just get to it"). Still there is an attempt to buy, and nonhearsay treatment is plausible if the attempt is probative enough to support the inference of dealing. Words saying or implying that defendant deals could be excluded.

11. Under Federal Rule of Evidence 801, hearsay doctrine applies only to statements, which include any "oral or written assertion" or conduct "intended" as an assertion. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.9 (1994) (developing point that conduct is not hearsay under the Rules); United States v. Zenni, 492 F. Supp. 464 (E.D. Ky. 1980) (Rules "abolished" notion that "implied assertions" are hearsay).

12. *See* Headley v. Tilghman, 53 F.3d 472, 477 (2d Cir. 1995), rejecting challenge to state drug conviction based partly on calls that could be characterized as "mixed acts and assertions" admissible because of their "performance aspect," but expressing skepticism. Court says assumptions made by callers may be treated as nonhearsay since the "attendant risks are not as intensively implicated."

13. Regina v. Kearley, 2 App. Cas. 228, 256 (Ackner), 266 (Oliver), 285 (Browne-Wilkinson).

14. Wright v. Tatham, 112 Eng. Rep. 488 (K.B. 1837).

ters to John Marsden were hearsay when offered to prove he was competent to write a will: The letters "impl[ied] a statement or opinion" on his competence and were to be treated as "direct and positive" statements on this point.[15] Similarly each caller in *Kearley* "impliedly assert[ed] that he had been supplied by the defendant with drugs in the past,"[16] so the inquiries might be said to contain "in substance, but only by implication," an assertion that defendant dealt drugs,[17] and there is no difference between "an express assertion" and "an inference to be drawn from precisely the same assertion made by implication."[18]

Consider more closely this idea of "implied assertions." Because of the conventions of idiomatic speech, every statement (*almost* every one) implies something in the strong sense that the speaker means to express or communicate a point that lies beyond the literal meaning of her words or differs slightly from it. One who says "I'm sick of all this rain" implies in the strong sense that it is raining and there has been lots of rain lately, even though these points lie beyond literal meaning. And the statement implies in the strong sense that the speaker is down because of the weather (moody, depressed, fed up), although these ideas differ slightly from the literal meaning of sick. By any reasonable definition of hearsay (including the one in the Rules), such words are hearsay if offered to prove these additional points.[19]

Cases like *Wright* and *Kearley*, however, use "implied statement" in a much broader sense. In substance, the author of one letter in *Wright* said "let's sit down and talk,"[20] and each caller in *Kearley* asked for the defendant and said "I want to buy drugs; let's come to terms."[21] There is no reason to think the one meant to say "John Marsden, you are competent," or the other meant to say "Robert Kearley, you deal drugs." Calling these interpretations "implied statements" is a rhetorical shorthand (or sleight-of-hand) that actually means "indicated conclusion." The effect is to reach everything a statement implies in the strong sense, plus *every conclusion* suggested by all statements and all conduct that depends on the two-step inference (statement or conduct shows what

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15. *Id.* at 518.

16. *Kearley*, 2 App. Cas. at 243 (Bridge).

17. *Id.* at 255 (Ackner) (doubting that drug calls were even relevant, since they only showed state of mind of callers, which was irrelevant).

18. *Id.* at 273 (Oliver) (similarly doubting that state of mind of callers was relevant).

19. *See* Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 87-88 (1994) (elaborating on appropriate interpretive conventions in applying hearsay doctrine; arguing that a communication asserts propositions its author "would generally intend it to convey"); Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783, 799 (1990) (assertions made "metaphorically, sarcastically, or in some other non-literal form" should be hearsay if offered to prove what speaker meant to assert). *And see* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.12 (1994) (matter asserted refers to "points declarant intended to express or communicate," and should reach "closely connected" points).

20. Wright v. Tatham, 112 Eng. Rep. 488, 492 (K.B. 1837).

21. Regina v. Kearley, 2 App. Cas. 228, 236 (H.L. Eng. 1992).

actor/speaker thought, which shows some act, event, or condition), extending hearsay doctrine far beyond its reach under the Rules.[22]

Used in this broad sense, the "implied statement" concept is too broad because it overextends hearsay doctrine. And it is misleading because it severs the idea of statement from the expressive or communicative intent of its human source and creates a fiction that is disconnected from the conventions of human verbal expression. We can be sure what authors of the letters in *Wright* had in mind, and what the callers in *Kearley* had in mind, but their words do not express their thoughts, either directly or by implication in the strong sense: In everyday terms, we speak of *assumptions*, and are sometimes confident that these are "known points that went unsaid," and not mere "suppositions lacking any basis."

The judges in *Kearley* wrote with force and skill, but I think the "implied statement" concept led them into two mistakes. First, they did not adequately appreciate what the callers were doing. In *Kearley*, Lord Bridge said the fact of incoming calls was "by itself of no relevance,"[23] and Lord Oliver said using the "combination of words and acts" to prove defendant dealt drugs would invest the callers' behavior with "false significance" as a means to introduce their statements.[24] But this view is embarrassed by the decision in *Ratten v. Regina* [25] reviewing the conviction of a husband for murdering his wife, which approved evidence that she placed an emergency call just before being shot ("get me the police please").[26] In *Kearley*, Bridge said her making the call was relevant in showing "her emotional state,"[27] and Oliver said her being "frightened and hysterical" was directly in issue.[28] There was an act in *Ratten* (wife at home with husband places emergency call, setting in motion a police response), but there were acts in *Kearley* too (customers tried to buy). It cannot be right that the wife's call was a relevant act in the murder trial, but not the calls in the drug trial. Both shed light on what was going on (her call indicated an attack, begun or imminent; drug calls indicated drug dealing).

Second, the judges in *Kearley* focused too narrowly on the state of mind of the callers. One said their state of mind was "of no relevance," apparently because it could *only* be understood as implying an inadmissible statement, and that the wife's statement in *Ratten* could not be used "as implying an assertion" that she

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22. That Parke intended this result is made clear by his example of the captain boarding the ship with his family. *See Wright*, 112 Eng. Rep. at 516 (his behavior hearsay if offered to prove soundness of vessel). Parke would say putting up an umbrella is an implied statement that it is raining, and "shut the window" is an implied statement that the person addressed has physical capacity to do what is asked.

23. *Kearley*, 2 App. Cas. at 246.

24. *Id.* at 271-72.

25. 3 All E.R. 801 (H.L. Eng. 1971).

26. *See id.* (apparently approving wife's call to prove her emotional state under *res gestae* rule, where American court would invoke excited utterance exception; husband denied, at trial or in pretrial statement, that she called police, so her call was relevant to contradict).

27. *Kearley*, 2 App. Cas. at 246.

28. *Id.* at 266.

was being attacked.[29] But what wife and callers thought in those cases was relevant and had implications far broader than telling us what they thought, because they were reactions to and reflections of the situations they saw before them.

III. SOME CONCLUDING REFLECTIONS

To say incoming drug calls involve an important performative aspect is to say nonhearsay treatment is plausible and may be the wiser choice. Such evidence can be persuasive proof, and treating it as hearsay fails to account for much that is going on. But it would be a mistake to overstate the conclusion: It seems wiser to treat such calls as hearsay if performative aspects are minimal or assertive aspects are prominent. If the callers simply made inquiries ("do you deal?") or leveled accusations ("I know you're a dealer"), arguments for hearsay treatment would be much stronger. No doubt such proof brings risks: Police might fabricate their testimony, since drug calls are evanescent events, and police accounts hard to verify or refute. Or the callers themselves might connive to leave a false impression. But no evidence is immune from these risks. Hearsay doctrine properly pays attention to both concerns, but many oral utterances are admitted despite the first of these risks (reports of excited utterances and admissions could be fabricated). And drug sales are themselves evanescent events, accomplished in out-of-the-way places by furtive exchanges, and much testimony and other evidence given by police and informants could be fabricated (the choice between criminalizing and legalizing drug distribution is not an entirely happy one).

Nonhearsay treatment does not mean throwing caution to the wind. Exclusion may be justified even if the incoming calls are *not* hearsay. Callers or visitors may lack reliable knowledge, having been misinformed or misled. This risk can be addressed by argument or cautionary instructions. It could also be addressed by requiring proof of knowledge as a matter of conditional relevance. Calls could be excluded unless knowledge were shown or circumstances, such as repetition by numerous callers, suggest the knowledge was there because too much baseless coincidence is implausible. (The jury could resolve this issue if facts or circumstances justify a positive finding but leave room for the opposite conclusion too.) And calls could be excluded under Federal Rule of Evidence 403 as confusing or misleading.

In cases like *Kearley*, the sheer number of callers seeking drugs make it less likely that they acted in the dark or connived, or that the proof was made up, and more likely that it shows dealing. Here, courts should have room to admit.

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29. *Id.* at 246 (Bridge).