Mississippi College Law Review

Volume 16
Issue 1 *Vol. 16 Iss. 1*

Article 9

1996

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16 Miss. C. L. Rev. 125 (1995-1996)

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THE DEFINITION OF HEARSAY: TO EACH ITS OWN

*Roger C. Park**

I.

In thinking about how hearsay should be defined, I believe it useful to distinguish between assertion-oriented and declarant-oriented definitions of hearsay. An example of an assertion-oriented definition is one that defines an act or utterance as hearsay if it is assertive and is offered to prove the truth of the matter asserted. An example of a declarant-oriented definition is one that defines an act or utterance as hearsay if it is offered for an inference about a belief of the declarant. The declarant-oriented approach could also be called "dangers analysis" because it classifies evidence as hearsay when the proposed use of the evidence would expose the trier to dangers of reliance on the declarant's unexamined memory, perception, narrative ability,[1] or sincerity.

Some authors have treated these two definitions as functional equivalents,[2] but I think that there is a difference between them. My favorite illustration is the utterance offered as a falsehood. Suppose that the prosecution seeks to prove a crime partly by showing efforts at a cover-up.[3] The cover-up stories, offered by the prosecution as falsehoods, are not hearsay under an assertion-oriented definition because they are not offered to show the truth of any assertion they contain. In contrast, the cover-up utterances would be hearsay under a modestly strong declarant-oriented definition. They depend for value upon the declarant's memory, perception, and narrative ability; moreover, there is a significant danger of mistake in inferring belief from action.

There are weak and strong versions of the two approaches to defining hearsay. A jurist applying a strong version of the assertion-oriented approach is likely to focus upon what an utterance "literally" asserts. This focus can lead to distinctions that have no basis in hearsay policy, because arbitrary differences in the

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1. When the declarant's conduct is verbal, the "narrative ability" danger is that defects or peculiarities in the declarant's verbal expression will cause the trier to misunderstand the declarant's belief. When the challenged evidence is nonverbal conduct, there is a cognate danger of ambiguity of inference from conduct to the actor's belief.

2. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 246, at 584 (Edward W. Cleary ed., 2d ed. 1972), criticized in Roger C. Park, *McCormick on Evidence and the Concept of Hearsay*, 65 MINN. L. REV. 423 (1981). The treatise seems to have abandoned this view in later editions. *See* 2 MCCORMICK ON EVIDENCE § 246 (John W. Strong, et al. eds., 4th ed. 1992) (setting forth the assertion-centered definition of the Federal Rules and omitting the claim that when utterances are not offered for their truth, they do not depend for value on the credibility of the declarant) and *id.* § 250, at 435 ("[a]t this point it is apparent from the treatment of what is and what is not hearsay that the definition of hearsay previously advanced is less inclusive than the logical and analytical possibilities would allow.").

3. *See* Anderson v. United States, 417 U.S. 211, 219-20 (1974) (holding evidence of co-conspirators' false testimony at prior proceeding not hearsay when offered against defendant because not offered to prove the truth of the matter asserted). *Cf.* United States v. Hackett, 638 F.2d 1179, 1186 (9th Cir. 1980) (co-defendant's false denial of acquaintance with defendant admissible to show defendant's guilt).

wording of a verbal utterance can determine whether the utterance is classified as hearsay. Weaker versions of the assertion-oriented definition seek to avoid this problem by taking into account whether a difference in the form of an utterance is likely to make a difference in the hearsay dangers it presents, or by taking a broad view of the intent of the declarant in deciding what an utterance asserts. As noted below, weaker versions of the declarant-oriented approach overlook hearsay dangers when they are minimal. The weaker versions of the two approaches tend to converge, though their difference in focus may still nudge jurists in different directions in some situations — for example, in classifying the intercepted requests for criminal activity involved in *Regina v. Kearley*,[4] or in dealing with the example of an utterance offered as a falsehood described above.

The assertion-oriented approach to defining hearsay is as workable as any. It points quickly to the right solution in easy cases — for example, the case in which a statement is offered solely to explain the subsequent conduct of the hearer. No other definition is likely to do much better. Therefore, I believe there is no need to change American codifications, such as the Federal Rules of Evidence, to adopt a declarant-oriented approach like that endorsed in *Wright v. Tatham*[5] and apparently reaffirmed in *Kearley*.[6] A declarant-oriented definition is less handy as a courtroom formula, is not needed to guard against injustice, and is just as indeterminate in hard cases as an assertion-oriented approach.

The indeterminacy of a declarant-oriented definition stems from the fact that the definition goes too far unless practical limits are placed upon its operation. Under the strongest form of the definition's dangers analysis, testimony would be hearsay if it required the trier to rely *to any degree* upon the accuracy of an out-of-court declarant or if the value of the testimony would be reduced *by any amount* by a mistake in the inference from act or utterance to belief. Testimony by a witness who saw an actor open an umbrella, offered to show that it was raining, would be hearsay because its value depends on the accuracy of a belief imputed to the umbrella-opener. Testimony that the witness looked at the courthouse clock and saw that it was 3:00 would be hearsay because it depends on the credibility of the clock-setter. A disquisition on the laws of physics would be hearsay when offered to show that the declarant understood physics because of

4. 2 App. Cas. 228 (H.L. Eng. 1992).

5. 112 Eng. Rep. 488 (K.B. 1837).

6. *Kearley* reached a result consistent with a declarant-oriented approach without expressly rejecting the "truth of the matter asserted" formula. *See Kearley*, 2 App. Cas. 246, 255 (Bridge and Ackner). For example, after stating that both "implied" and "express" assertions are hearsay, Lord Ackner added that in *Kearley*, "[t]he object of tendering the evidence would be to establish the truth of what is contained in the statement." *Id.* at 255. The scope of this "implied assertion" concept is unclear. In Lord Ackner's usage, it appears that an utterance is offered to prove its "implied assertion" even when the author of the utterance was not aware that the utterance might be useful in inferring the fact sought to be proven, so long as the proponent proposes that the utterance be used for an inference about a fact believed by the author.

Kearley conveys the message that "implied assertions" are hearsay, but does not give much guidance on the difference between use of an utterance for its "implied assertion" and use of an utterance in some other fashion for an inference about the state of mind of the declarant. Apparently the latter is sometimes permitted because *Kearley* does not overturn Ratten v. Regina, 3 All E.R. 801 (P.C. 1971). *See* Lord Ackner's speech at *Kearley*, 2 App. Cas. at 252.

the possibility of lucky guesses or a memorized script. Testimony of an in-court witness about her own age would be hearsay because it depends on the credibility of declarants who told her the date of her birth. Testimony by an in-court witness that she saw an umbrella, offered solely to show that she *did* see an umbrella, would also be hearsay because it depends on the credibility of the out-of-court declarants who taught the witness how to know an umbrella. Carried to its logical extreme, dangers analysis would make all testimonial evidence hearsay.[7] To avoid absurdity one needs to adopt a weaker form of dangers analysis, one that overlooks minor reliance upon the memory, perception, sincerity, or narrative ability of an out-of-court declarant.

This weaker variety of dangers analysis has a degree of indeterminacy and requires situationally specific judgments about hearsay policy (as does any other attempt to apply the hearsay rule). A declarant's statement describing a location in exquisite detail might be deemed not to be hearsay when offered to show that the declarant had been to the location, at least if there was no evidence that the declarant had heard a description from some other source.[8] The description might be considered hearsay when it was less detailed or when there was a significant chance that the declarant had heard someone else describe the location. A name listed in an address book might be considered nonhearsay when offered to show association between the owner of the book and the person named,[9] but the name on the front of the book might be considered hearsay when offered to show who owned the book.[10] Traditional categories of nonhearsay, such as prior statements offered to impeach and statements that have operative effect when accompanied by a certain subjective intent, would be deemed not to be hearsay despite the existence of some hearsay dangers. Testimony about statements made by many independent declarants might be considered hearsay even if the state-

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7. *Cf.* Mary Morton, *The Hearsay Rule and Epistemological Suicide*, 74 GEO. L.J. 1301, 1305-07 (1986).

8. *See* 2 MCCORMICK ON EVIDENCE, *supra* note 2, § 250, at 436 (arguing that a statement describing a house does not depend for value on declarant's observation, memory, or veracity when offered to show that the declarant had visited the house).

9 *Cf.* United States v. Woods, 544 F.2d 242, 267 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) (holding names mentioned in telephone conversation not hearsay when used to show association).

10. At least one adherent of the declarant-oriented approach would classify as hearsay (noting that "all four hearsay risks are present") evidence that the defendant's name was on a briefcase name tag, when the evidence is offered to show that the briefcase belonged to the defendant. *See* Michael Graham, *"Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay*, 1982 U. ILL. L. REV. 887, 906-22 (criticizing United States v. Snow, 517 F.2d 441 (9th Cir. 1975)). On the other hand, one Court of Appeal did not find *Wright v. Tatham* an obstacle to holding that a paper containing the words "Sean rules," found near the scene of criminal activity, was not hearsay when used to show that Sean had been at the scene. *See* Regina v. Lydon, 85 Crim. App. 221 (1987); *cf.* Regina v. Rice, 1 All E.R. 832 (Q.B. 1963) (used airline ticket bearing Rice's name admissible to show he took the flight). *But see* Patel v. Comptroller of Customs, 1966 App. Cas. 356 (P.C.) (inscription "Produce of Morocco" on seed bags hearsay when offered to show place where seeds originated).

ments strongly corroborated each other,[11] or even if they linked with other evidence in a way that practically excluded the possibility that they were inaccurate.[12]

All those examples to some degree require inferences about the declarant's state of mind and depend for value to some degree on the credibility of the declarant.[13] The weaker form of the declarant-oriented analysis does not give us instant answers in any of those situations. Nor do its answers come from a reasoning process in which the analyst identifies a conceivable danger and then deduces that the evidence is hearsay. The answers come from tradition and from a situationally-specific judgment about the pros and cons of admitting the evidence.

Any definition of hearsay that purports to explain what courts have done will break down at some point. The purposes of the hearsay rule are manifold and the constellations of evidence are infinite, so it is impossible to draw sharp *a priori* lines. One encounters diminishing returns very quickly when one tries to refine the definition of hearsay to guide judges in the borderland.

For jurisdictions now governed by codes defining hearsay as a statement "offered in evidence to prove the truth of the matter asserted," I believe there is little to be gained by trying to change the definition to clarify its application in borderline cases. Interpreters of the definition should apply a few basic principles and leave it at that. First, they should not give the words of the definition a meaning they will not bear, or, put in another way, they should not interpret the definition in a way that clearly violates conventions of language in the lawyer-judge interpretive community. Thus, an utterance offered as a falsehood is not offered for the truth of its assertion. Second, in choosing between meanings that the words will bear, jurists should not create formalistic distinctions that are unrelated to any likely policy aim of the hearsay ban. Thus, the sarcastic statement "At least *I* never forged a will" should be considered hearsay when offered to show that the person addressed forged a will. No purpose would be served by treating the sarcastic statement differently from the direct statement "You forged a will."

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11. *Cf.* Regina v. Kearley, 2 App. Cas. 228, 273 (H.L. Eng. 1992) (Oliver) ("cumulative beliefs" of many callers no more admissible than statement of single caller).

12. For example, suppose that an accused child abuser claims that he never disrobed in front of the child. The child says he did disrobe in her presence, and that she saw a distinctive scar. Then police discover that defendant did have that scar, at a location that could only be seen when the defendant was naked. The conjoining of the evidence practically eliminates the possibility that the child was inaccurate, especially if the accused was previously a stranger to the child so that she was not likely to have learned of the scar from another person. But the majority in *Idaho v. Wright* was apparently willing to let such statements be excluded as constitutionally impermissible hearsay, or at least did not answer the dissent's claim that this result followed from the majority's reasoning. *See* Idaho v. Wright, 497 U.S. 805, 828-29 (1990) (unanswered scar hypothetical of the dissent).

13. The use of prior statements to impeach involves hearsay dangers under a strict analysis because one must infer something about the state of mind of an out-of-court declarant who was not subject to cross-examination at the time of making the statement. The degree to which the statement has value for impeachment purposes depends on one's inference about the declarant's state of mind while making the statement used for impeachment. If one infers that he was sincere at the time of the prior statement it strongly impeaches the trial testimony. If one infers that he merely misspoke when making the prior statement, its impeachment value is minimal. The use of statements that have operative effect only when accompanied by a certain subjective intent incurs hearsay dangers because it also requires an inference about the state of mind of the declarant, for example, an inference that the declarant intended a gift when he announced a gift.

In the borderland areas where neither of the two principles stated above apply, courts should reach the result that they believe best serves the various purposes of the hearsay rule in the context of the particular situation. Then subsequent interpreters can use that situationally-specific precedent to help make an irrefutably open-textured definition more predictable in practice.

Testimony about intercepted requests to drug dealers falls in the borderland. It is not a violation of ordinary conventions of language to say that the requests are nonassertive or that they are not offered to prove the truth of any assertions they contain. Moreover, to treat them as nonhearsay does not create a distinction without a difference. Evidence that the declarant called a defendant's home to request drugs, apparently unaware that he or she was addressing a police officer, raises fewer dangers than evidence that a declarant reported to police that defendant was a drug dealer. There is less danger of insincerity and less reason to fear a strategic decision by the prosecutor to offer hearsay in lieu of live testimony.[14] So in jurisdictions that follow an assertion-oriented definition I think it is reasonable to rule that the statements are not hearsay. That bit of precedent, once established, is not particularly hard to apply in later cases involving intercepted requests to drug dealers, bookmakers, and pornographers.

That does not mean that the *Kearley* majority erred in its treatment of the definition of hearsay. Given the precedent of *Wright v. Tatham*, it was reasonable to classify as hearsay an intercepted request to buy drugs. There is nothing illogical or unfair about that interpretation of *Wright v. Tatham*'s declarant-oriented approach. The statements offered in *Kearley* did depend for value to some degree upon the credibility of the declarants. A moderately strong "dangers analysis" leads to classification as hearsay. Moreover, the declarant-oriented definition, while it does not accomplish miracles of clarification, does have the advantage of focusing attention on dangers that are highly relevant to the question whether hearsay ought to be received.

In short, to each its own. Precedent ought to be followed unless there is a reason to depart from it. Once a hearsay definition is in place, not much is to be gained by changing it for purposes of settling something about the class of cases that have been called "implied assertions."[15] It is better to apply situation-sense to the particular problem presented by the specific configuration of facts.

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14. The effect of exclusion of evidence on prosecutorial conduct is an important factor in the formulation of constitutionalized hearsay doctrine. *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992); Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987). I think it should be considered in formulating all hearsay doctrine.

15. As Professor Christopher B. Mueller has noted in *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 418 n.153 (1992), hearsay writers use the term "implied assertion" in an odd way. In most discourse, when one says that a speaker "implied" a proposition, one means that the speaker *intended* to convey the proposition (albeit in a veiled way) rather than merely that someone else can use the speaker's words for an indirect inference about the speaker's state of mind. But in the context of writing about hearsay, the phrase "implied assertion" is used to embrace acts and utterances whose author did not intend to assert the proposition that the proponent seeks to prove.

The feature of the House of Lords hearsay doctrine that seems most foreign to me — in *Kearley* and in *Myers v. Director of Public Prosecutions*[16] — is the pronouncement that the door is closed on judicial creation of new exceptions to the hearsay rule. Common-law rules ordinarily come with a repair warranty. A judge-made rule is mended with judge-made exceptions. Judicial law-making of this nature does not overrule precedent unless the exceptions destroy the rule. A rule creating a new category of admissible hearsay would merely add detail to the general principle that hearsay is admissible when it is not too dangerous.

None of the most obvious reasons for judicial withdrawal apply in the situation presented by *Myers* and *Kearley*. There had been no all-embracing preemptive codification. No one made commitments or changed institutional arrangements in reliance on prior law. Moreover, no other institution is better fitted to do the repair. Courts are as competent to make law on evidence and trial procedure as a legislative body.

The "make do and mend" approach derogated in *Kearley* and *Myers*[17] seems to me a desirable exercise in practical reason, a sensible avoidance of the temptations of reductionism and foundationalism. There's nothing wrong with small improvements. Hearsay is a good arena for makers-do and menders.

There may be institutional considerations that, as an American, I simply do not understand. But it seems to me that the House of Lords took a wrong turn in *Myers*, and thereby deprived itself of the option of doing the sensible thing in *Kearley*. Free of the *Myers* precedent, the *Kearley* Court could still have said that the intercepted requests were hearsay but then could have created an exception that let the utterances into evidence. The exception could have been a narrow one. It could have required that there be evidence of multiple requests. The details would not have been hard to work out or very important.

Perhaps the House of Lords is simply too great a body to hear appeal after appeal from supplicants asking for new hearsay exceptions. If so, it is unfortunate that there was not at hand a third way to mend the hearsay rule. The predicament of the Lords in *Myers* and *Kearley* suggests that the enabling-act process under which an advisory committee proposes and a judicial body promulgates is a desirable supplement to legislation and adjudication.

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16. 1965 App. Cas. 1001 (H.L. Eng.). For a cogent criticism of *Myers* on grounds that its restriction on the creation of new exceptions to the hearsay rule may lead to distortion of other areas of the law, *see* COLIN TAPPER, CROSS ON EVIDENCE 520 (7th Ed. 1990).

17. "A policy of make do and mend is no longer adequate." Regina v. Kearley, 2 App. Cas. 228, 250 (H.L. Eng. 1992).

II.

In the preceding section I suggested a general approach for jurisdictions that apply the assertion-oriented definition of the Federal Rules of Evidence. I am not sure that further attempts to refine or elaborate the assertion-oriented definition do much good. Nonetheless, I will try my hand at it. Suppose a hearsay objection to a verbal assertion.[18] Let *PF* be the fact the proponent proposes to have the trier of fact infer from the declarant's words. When the proponent asks the trier to believe that the declarant desired to send the message *PF* with the words, the utterance is hearsay whatever its form. When it appears likely that the declarant was aware that someone would find the declarant's words useful in inferring or remembering *PF*, then the utterance is also hearsay. When the proponent was apparently unaware that the utterance might be useful to infer or remember *PF*, then the words are not hearsay because they are not offered for the truth of any assertion they contain.

Under that formulation, an utterance offered as a falsehood would not be hearsay. The declarant apparently expected the auditors to infer the opposite of the fact sought to be proven. In contrast, the utterance "Harold is the finest of my sons" would be hearsay when offered to show that the declarant was fond of Harold.[19] The declarant would have expected the auditors to draw an inference of fondness from the statement. The intercepted utterance "Put $5 on Nick's Arrival in the 5th" would not be hearsay when offered to show that the intended addressee was a bookmaker. Unless one assumes unusual facts, the declarant would not have thought that the utterance provided information that anyone would find useful in drawing an inference about the addressee's status as a bookmaker. The declarant took that status for granted, and assumed that the addressee would also take it for granted. In other words, he was not communicating or asserting that the addressee was a bookmaker. He was communicating something else on the basis of an assumption about that status.

Perhaps the concepts in this section would be helpful to judges, perhaps not. Even without extra guidance, judges appear to have been able to reach reasonable results in "implied assertion" cases decided in jurisdictions that define hearsay as a statement offered to prove the truth of the matter asserted. The reported case law does not contain any obvious injustices, much less any agonized calls for reform by judges who felt helpless in the face of an arbitrary rule. The little clusters of precedent provide intelligible guidance for commonly recurring situations. There is uncertainty, but at a tolerable level. Uncertainties about when grand jury testimony is admissible under the residual exception, or the degree to which experts may be used as a conduit for hearsay, cause practitioners and judges to lose far more sleep than the "implied assertion" puzzle.

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18. I would construe the requirement of an "assertion" to mean that legally operative language offered solely to show the legal relationship created by the language is not hearsay because the language is not being offered to prove anything it "asserts."

19. For the history of the "Harold" hypothetical, see Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 45 n.8 (1994).

III.

One cannot expect too much from a definition of hearsay. I have suggested that the declarant-oriented definition has a large measure of indeterminacy. So does the assertion-oriented definition. There never will be one that completely avoids puzzles and perplexities, especially in the world of hypotheticals.

For example, one can hypothesize situations in which an utterance would not be hearsay under Rule 801(c)[20] even though it is offered to prove what it "literally"[21] asserts. Suppose that *C* and *M* agree that the sentence "You are competent to make a will" will be taken between them to mean "The cocaine is in the locker." Given that code, *C*'s subsequent statement to *M* "You are competent to make a will" would arguably not be hearsay when offered as evidence that *M* was competent to make a will. *C*'s real message would have been that the cocaine was in the locker, and the proponent would arguably be asking that the message be used circumstantially for the inference of competence.

I am not entirely happy with the guidance that Federal Rule 801(c) gives in that hypothetical, or for that matter in the situation presented by *Wright v. Tatham*. But so far as I know the hypothetical has never arisen and *Wright v. Tatham* has happened only once, so I would not reject a generally good guide because it might sometimes fall short.

IV.

Christopher Mueller has suggested that the concept of performatives is helpful in refining our understanding of the definition of hearsay in situations such as that presented by *Kearley*.[22]

The concept of performative utterances[23] is indeed helpful in explaining the law's treatment of legally operative language. Suppose that the proponent offers the utterance "I accept your offer" to show acceptance of a contract offer. A hearsay novice might think that the statement is offered for the truth of what it

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

21. The concept of "literal" meaning is itself a rather confusing and indeterminate one. I mean to evoke the notion that, by using one's background knowledge about the way words are commonly used and by taking only a shallow look at context, one can often assign a surface meaning to a word or sentence. *Compare* ERVING GOFFMAN, FORMS OF TALK 64-65 n.39 (1981) (" 'Literal' here is a wonderfully confusing notion, something that should constitute a topic of linguistic study, not a conceptual tool in making studies. Sometimes the dictionary meaning of one or more of the words of the utterance is meant, although how *that* meaning is arrived at is left an open question. And the underlying, commonsense notion is preserved that a word *in isolation* will have a general, basic, or most down-to-earth meaning, that this basic meaning is sustained in how the word is commonly used in phrases and clauses, but that in many cases words are used 'metaphorically' to convey something that they don't really mean.").

22. Mueller, *supra* note 15, at 416-22.

23. I first encountered the phrase "performative utterance" in J.L. Austin's work. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 5-6 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975). To Austin, performative utterances "do not 'describe' or 'report' or state anything at all, are not 'true or false' "; and "the uttering of the sentence is, or is a part of, the doing of an action, which again would not *normally* be described as, or as 'just,' saying something." *Id.* At the time, I wondered how anyone other than a hearsay buff could be interested in the subject. Now I am beginning to think that it belongs to philosophers.

asserts. One way of explaining why the language is not hearsay is to say that it is not assertive but performative. The words are not offered for what they say, but for what they do.

It is easy to see why performative utterances are exempt from the hearsay ban when they are offered to show their operative effect. When the utterance "I accept your offer" is offered to show that the offer was accepted, the mere fact that the statement was made changed the legal relationship of the parties. No significant issues of hearsay policy are raised by allowing the evidence to come in without further examination.

An utterance can have both a performative aspect and an assertive aspect. For example, allegations in pleadings are both performative and assertive. Suppose that plaintiff's complaint alleges that defendant manufactured a faulty valve. When the utterance is offered to show its legally operative effect (plaintiff is entitled to mandatory disclosure about valves and may produce evidence about them at trial) then the utterance is not hearsay. When the utterance is offered assertively to show that defendant indeed made a faulty valve, then it is hearsay.

Professor Mueller, using an inclusive concept of "performative," has argued that we should realize that all utterances have both performative and assertive aspects, and that they may be both performative and assertive even when offered for a single purpose.[24] He has suggested that the performative aspects of utterances can be a basis for holding that they are not hearsay even when they are offered for some purpose other than showing their operative effect.[25]

I have reservations about his approach. I would prefer to say that performative utterances *are* hearsay *except when* they are offered for the purpose of showing their legally operative effect. In my view, if a performative utterance is offered to show its operative effect — to show a change in legal rights, duties, powers, privileges, or disabilities wrought by the utterance itself — then it is not hearsay; but if it is offered to invite an inference about a fact believed by the declarant, then its performative aspect does not save it from being hearsay. Thus, evidence of a judgment of conviction is not hearsay when offered to show the convicted person's disability under a statute prohibiting felons from carrying handguns, but evidence of the conviction is hearsay when offered to show that the convicted person actually committed the crime that led to conviction.

Utterances that are "performative" in the Mueller sense, but that are not offered as operative language to show operative effect, can have the same infirmities as utterances that are clearly hearsay. His concept of "performatives" includes verbal communications offered for an inference about the belief of the declarant, for the further inference that the belief was accurate.[26] It includes utterances offered for that two-step inference that are made in circumstances where the declarant would have been aware of the likelihood that someone would draw the inference.

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24. Mueller, *supra* note 15, at 420.
25. Mueller, *supra* note 15, at 421.
26. Mueller, *supra* note 15, at 421.

I agree with Professor Mueller that performative utterances are analogous to nonverbal conduct. But I do not agree that verbal Mueller-performatives offered to show declarant's belief should be treated in the same way as nonverbal nonassertive conduct offered to show the actor's belief. An actor's nonverbal acts often, though not always, take place in circumstances that obviate dangers of insincerity and that involve significant reliance by the actor on the belief manifested by the conduct. Consider Baron Parke's hypothetical of the ship captain who boards a ship with his family after inspecting it, his conduct being offered to show that the ship was seaworthy.[27] It is unlikely that the captain sought to mislead observers about the safety of the ship, and the captain's reliance on his own judgment is manifest. I am not sure that verbal Mueller-performatives offered to show belief as often involve the same sort of reliance or the same safeguards against insincerity. Moreover, the strongest reason to exempt nonassertive *non*verbal conduct is that lawyers seldom realize that testimony about it might be objectionable on hearsay grounds. Rules excluding such conduct as hearsay would be arbitrary because they would be applied sporadically. This consideration does not apply when verbal conduct is involved. When an opponent seeks to question a witness about what someone said out of court, any functioning lawyer will be alert to the possibility of a hearsay objection.

In their textbook,[28] Professors Mueller and Kirkpatrick give the example of the warning "Don't trip on the curb."[29] They indicate that, when offered to show the existence of the hazard, the performative aspect of the statement makes it nonhearsay because it fits the concept of nonassertive conduct.[30] I think the real reason that nonhearsay treatment is attractive is that under the circumstances the evidence does not present strong hearsay risks (indeed, even if classified as hearsay it would be admissible as a present sense impression). Suppose that the warning had been about a hazard that the declarant had observed on another occasion, or the inference that the condition was hazardous required the declarant to exercise sophisticated judgment. For example, suppose that the declarant's warning "Don't trip the lever" was offered to show that a machine was dangerous when its lever was tripped, or the utterance "Don't go to Dr. Curb" was offered to show that the declarant had seen Dr. Curb botch a surgical procedure. Those utterances have as much of a performative aspect as "Don't trip on the curb," but I would hope to see them classified as hearsay when offered for a two-step inference to belief and the accuracy of the belief.

Professor Mueller's ample gifts as a scholar and explicator make it hard to foreclose the possibility that he will develop his approach in a way that clarifies the concept of hearsay. Perhaps I am a victim of "Law Professor's Disease,"[31] but

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27. "[T]he conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family." Wright v. Tatham, 112 Eng. Rep. 488, 516 (1837).

28. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE § 8.22 (1995).

29. *Id.* at 1114.

30. *Id.* at 1117.

31. *See* Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 805 (1992) ("The most common symptom of Law Professor's Disease is an extremely close and critical analysis of an unfavored position, followed by the assertion of some more favored alternative, which remains untouched by the ferocious critical capacity previously demonstrated by the author.").

I nonetheless fear that his broad concept of "performatives" will turn out to be no more helpful than its spiritual ancestors "verbal act" and "res gestae." I would be happier just telling judges that when the formula "offered for the truth of the matter asserted" does not provide clear guidance, then they should look to hearsay policy in deciding how to classify the utterance.

V.

Craig Callen has argued for a "general intent" approach to hearsay definition.[32] In doing so, he has brought to our attention some thought-provoking literature on the nature of communication, and has analyzed the problem intelligently and thoroughly.

The impressive body of knowledge that he brings to the treatment of communications is, I think, an embarrassment of riches in its application to the core hypothetical that he discussed in his leading article in the *Vanderbilt Law Review*.[33] The hypothetical was one in which a sarcastic utterance was offered into evidence to prove the fact that the declarant apparently intended to convey.[34] Professor Callen indicated that a mechanical application of the "literalist heuristic" could lead to classification of the statement as nonhearsay.[35] Thus, the utterance "Well, at least *I* didn't forge a will" might be regarded as nonhearsay when offered to show that the declarant was accusing the addressee of forging a will.

I doubt that a jurist using an assertion-oriented or "literalist" approach would actually say that a sarcastic statement was not hearsay on grounds that it asserted the opposite of what it was being offered to prove. Were judges treating sarcastic statements as nonhearsay, there would be evidence of it in the case law. There is plenty of sterile formalism surrounding the hearsay rule, but no one seems to have carried it that far. To reach the common-sense result, a court need only hold that when the proponent asks the trier to believe that the words "ABC" were meant as an assertion of fact *PF*, then the words "ABC" are offered for their truth when offered to show *PF*.

Professor Callen was correct, however, in pointing out that there are cases in which the form of the utterance may have been given undue importance, at least in the court's statement of the rule that it purported to be applying.[36] There are judicial opinions suggesting that questions cannot be hearsay or that orders can-

32. Callen, *supra* note 19, at 113.
33. Callen, *supra* note 19, at 113.
34. Professor Callen sets forth the hypothetical as follows:

> Suppose a murder defendant were to claim that the police mishandled evidence at the scene of the crime and falsely accused him. Defendant offers the statement of Reporter, a since-deceased veteran of the police beat, to show that the forensics officer at the scene, Daryl, damaged the evidence, a shell casing, in a way that prejudiced the defendant. A witness heard Reporter say to the officer "Yup. Way to go, Daryl, way to handle the shell casing flawlessly." The witness says that Reporter "seemed to be sort of a wise-acre about it." The central question for this Article is whether Reporter's statement would be hearsay to show that Officer Daryl mishandled the evidence.

Callen, *supra* note 19, at 49-50.
35. Callen, *supra* note 19, at 50.
36. Callen, *supra* note 19, at 110.

not be hearsay, on grounds that questions and orders are not assertive.[37] These suggestions tend to be made in cases in which the form of the utterance, combined with the circumstances, make it sensible to admit the evidence. The circumstance that an utterance takes the form of a question or command can indeed, in context, make the utterance better evidence than a "literal" direct declarative sentence would be. The utterance "Could you stop whistling?" would normally be better evidence that the addressee was whistling than the utterance "You are whistling." The second utterance is more likely to be metaphor, sarcasm, a verbal mishap, or an attempt to obtain confirmation of that which the speaker doubts. However, a flat rule that a sentence that is formally a question or order can never be an assertion is too broad and ought to be rejected.

After describing literature setting forth Grice's cooperative communication theory, Professor Callen glossed the assertion-oriented definition by stating that a communication should be considered to be hearsay "(i) if the proponent offers it to establish any inference that the actor generally would have intended the audience to draw from the communication, and (ii) if assessment of the degree of accuracy of the actor's implicit claim of co-operation would be essential to a thoughtful, unprejudiced factfinder's determination of the inference's reliability."[38] He wrote that the statements in *Wright v. Tatham* (and "probably" in *Kearley*) would be hearsay under this approach.[39] An utterance offered as a falsehood would not be hearsay, even though it depends for value upon the credibility of the declarant.[40]

I believe that the Callen approach is basically sound, though it has not yet been stated in a way that will make it easy for judges to understand or apply. It points toward sensible results. If a statement is arguably inadmissible under the assertion-oriented definition (i.e., flunks the first part of the Callen test), then it is to be evaluated under the second part of the Callen test, which seems close to being a form of qualified "dangers analysis." The "implicit claim of co-operation" in the second part of the Callen test appears to refer to a communicator's claim to be offering something useful, true, and to the point.[41] That claim may be wrong, and if so it is wrong because "hearsay dangers" are present — because the trier would have to rely significantly on the memory, perception, sincerity, or narrative ability of the communicator.

Professor Callen's definition does not clearly convey to me how he would treat an utterance that is being used at trial in a way in which the declarant would not have expected the intended audience to use it. Suppose that the fact that the declarant called and said "Put $100 on Tucson Don in the 9th" is offered for the inference that the intended auditor was a bookmaker. Is this an inference that the

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37. *See* United States v. Oguns, 921 F.2d 442, 448-49 (2d Cir. 1990) (intercepted message asking whether "apples" had arrived; court endorses proposition that "an inquiry is not an 'assertion' "); United States v. Zenni, 492 F. Supp. 464, 466 n.7 (E.D. Ky. 1980) (intercepted attempt to place bet; court indicates that a "direction" is not an "assertion").

38. Callen, *supra* note 19 at 86-87.

39. Callen, *supra* note 19, at 101-02, 109.

40. Callen, *supra* note 19, at 61.

41. Callen, *supra* note 19, at 61.

declarant "generally would have intended the audience to draw from the communication?" If so, the first prong of the Callen test does not add much to the second prong.

I believe that my approach to interpreting the "truth of the matter asserted" definition is pretty close to that urged by Professor Callen. I am, however, perhaps a bit more ready to classify requests for illegal activity as nonhearsay than is Professor Callen. Consider the situation in which police raid an establishment and intercept calls, the calls later being used to incriminate the defendant. Here it seems to me that Grice's maxims support the proposition that requests for illegal activity ought to ordinarily be treated as better evidence than explicit accusations of criminal conduct. An explicit accusation (for example, "You are a bookmaker") made in the apparent belief that the declarant was talking to the defendant, would carry the implicit message that the speaker wanted confirmation of something that was in doubt, or wanted to assert something that the addressee might well deny. Similarly, had a caller-declarant said directly "Kearley is a drug dealer," the message would have been that the caller knew she was talking to someone other than Kearley and believed that she was providing helpful information. The information would be helpful, in the caller's cooperative assumption, if the caller believed the information about illegal activity otherwise available to the auditor to be deficient. Were she convinced that the other evidence was overwhelming, she would not have made the explicit accusation because to do so would have violated the Gricean maxims of economy and utility.

Undoubtedly everything depends on context; one cannot give a statement meaning in isolation. But given the right surrounding context, the difference between explicit accusations and utterances offered for an indirect inference has a bearing on reliability, and the difference seems to be one that the federal rulemakers wanted us to think was significant.

VI.

The law of "implied assertions" is not in grave need of reform. A scholar eager to improve the accuracy, speed, or efficiency of trials would choose another topic. As someone whose ostensible goal is to write about rules and how to improve them, perhaps I should be working on something else. However, the implied assertion puzzle is simply a delight in itself, as this Symposium proves.