Mississippi College Law Review

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

Article 10

1996

Implied Assertions and the Hearsay Rule

Richard B. Kuhns

Custom Citation
16 Miss. C. L. Rev. 139 (1995-1996)

IMPLIED ASSERTIONS AND THE HEARSAY RULE

*Richard B. Kuhns**

It is heartening to know that misunderstanding hearsay is not an exclusively American phenomenon.[1] For example, in *Regina v. Kearley*,[2] the issue before the House of Lords was whether the defendant was a drug dealer. To help establish this fact the prosecution had introduced testimony of police officers that various individuals who visited and telephoned the defendant's premises following his arrest had asked to purchase drugs.[3] The three Lord majority characterized these out-of-court statements as inadmissible hearsay.[4] At the same time, however, they argued that similar evidence of a telephone caller's out-of-court statement in *Ratten v. Regina*[5] was not hearsay. In the latter case, the defendant claimed that the fatal shooting of his wife was an accident.[6] To rebut this claim the prosecutor introduced evidence that moments before her death, the wife made a sobbing, hysterical telephone request for help from the police.[7]

---

* Professor of Law, Washington University.

1. I suspect that some of my colleagues — particularly those who believe that the evidence in Wright v. Tatham, 112 Eng. Rep. 488 (K.B. 1837), should be classified as hearsay under the Federal Rules of Evidence — will dismiss this implied assertion as unreliable hearsay.

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

3. *Id.* at 236.

4. *Id.* at 251 (Bridge); *id.* at 258 (Ackner); *id.* at 276 (Oliver).

5. 3 All E.R. 801 (P.C. 1971).

6. *Id.* at 803.

7. The positions of the three Lords in the majority were a bit more complex than the text suggests. Lord Bridge argued that:

> the making of the telephone call was unquestionably relevant and the words spoken were admissible both on the ground that they were part of the "composite act" [?] of the call itself and as evidence of the wife's emotional state, but *not* as implying an assertion that she was being attacked by the accused.

Regina v. Kearley, 2 App. Cas. 228, 246 (H.L. Eng. 1992).

Lord Ackner reached a similar conclusion but suggested that the evidence may be admissible as part of the res gestae:

> I cannot accept that it would have been permissible to tender the contents of the phone call as containing an implied assertion that the deceased was being attacked by her husband, and thus a permissible exception to the hearsay rule. That her request was part of the res gestae, another ground upon which the evidence was admitted . . . raises quite a different point.

Id. at 258.

Lord Oliver, the third Lord in the *Kearley* majority, was more specific about the possibility of using a hearsay exception to admit the evidence in *Ratten*:

> [The telephone call] was held to be rightly admitted as evidence simply of a telephone call made by a lady in a distressed state made at a time when the accused denied that any call was made and in the context of his contention that the shooting was accidental. It is to be noted, however, that in so far as it was admissible as evidence from which the jury could be invited to infer that the caller was being attacked by her husband, the Board found it admissible only as part of the res gestae, ie [sic] as an exception to the hearsay rule.

Id. at 261.

To the extent that these excerpts suggest that the *Ratten* evidence, if hearsay, is admissible pursuant to an exception to the hearsay rule, they are consistent with the position I take in this Essay. The thrust of each excerpt, however, seems to be that the evidence is admissible because it is not hearsay in the first place. That proposition is sound, as the Lords suggest, only if the evidence is offered to prove whether the victim made a telephone call or what the victim's state of mind was. The victim's state of mind, however, is irrelevant (except to the extent that one infers what caused that state of mind). The fact that a victim made a telephone call is irrelevant except to contradict the defendant's testimony that there was not a call. For this limited impeachment purpose there is no need to reveal the content of the wife's statement.

If the characterization of the *Kearley* evidence as hearsay is correct, the *Ratten* evidence should also be hearsay. Moreover, even if one accepts the position of the *Kearley* dissenters that the *Kearley* evidence is not hearsay, one can make a plausible argument that the *Ratten* evidence *is* hearsay. In other words, between *Kearley* and *Ratten*, the stronger candidate for hearsay classification is *Ratten*. It may well be, however, that the evidence in *Ratten* should be admissible, at least under the Federal Rules of Evidence, regardless of the hearsay classification.

In this Essay I will first discuss briefly the rationale for the hearsay rule and point out the common hearsay-type characteristics of the evidence in *Kearley* and *Ratten*. I will then address the question whether assertions like those in *Kearley* and *Ratten* should be classified as hearsay under the Federal Rules of Evidence. Finally, I will suggest that many *Kearley-Ratten*-type assertions, if they are classified as hearsay, should be admissible as spontaneous declarations.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement.[8] The principal rationale for excluding hearsay evidence is the lack of opportunity to cross-examine the hearsay declarant to test the strength of two inferences: (1) that the declarant honestly believes what the statement appears to assert and (2) that the declarant's belief is an accurate reflection of the fact asserted.[9] I will refer to these inferences as the hearsay inferences.[10]

The first hearsay inference will be incorrect if the declarant is not being sincere or if the factfinder, upon hearing the statement, draws an incorrect inference about a sincere declarant's belief.[11] Such an incorrect inference could result from the declarant's inadvertent slip of the tongue, or it could result from the factfinder's misinterpretation of an ambiguous word or phrase.[12] The second hearsay inference will be incorrect if the declarant misperceived the events related in the statement or if the declarant, at the time of the statement, did not accurately remember the events.[13] I will refer to insincerity, improper narration, ambiguity, misperception, and poor memory as the hearsay problems or dangers.[14]

---

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

9. Some out-of-court declarations require the factfinder to make only the first hearsay inference. Consider, for example, a will contest case in which Harold, one of three sons and the sole beneficiary under his father's will, is trying to rebut a claim that he exercised undue influence over the testator. Harold offers the testimony of witnesses to the effect that long before the alleged undue influence the testator said, "Harold is the finest of my sons" or "I prefer Harold over my other sons." *See* MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 591 (2d ed. Cleary, 1972). Evidence of this type may sometimes be classified as hearsay. *See id. See also* RONALD J. ALLEN & RICHARD B. KUHNS, AN ANALYTICAL APPROACH TO EVIDENCE 344-47 (1989). The classification, however, is purely academic, for all such evidence classified as hearsay falls within the state of mind exception to the hearsay rule. *See* FED. R. EVID. 803(3). As a result, the hearsay rule is never a bar to the admissibility of this type of evidence. Thus, there is no need to consider whether implied assertions that implicate only the first of the two hearsay inferences should be classified as hearsay.

10. For elaborations on the inferential process involved in assessing hearsay evidence, *see, e.g.*, ALLEN & KUHNS, *supra* note 9, at 295-302; Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974).

11. ALLEN & KUHNS, *supra* note 9, at 295-96.

12. ALLEN & KUHNS, *supra* note 9, at 295-96.

13. ALLEN & KUHNS, *supra* note 9, at 296.

14. Forcing the hearsay declarant to testify and be subject to cross-examination will not necessarily expose the hearsay dangers. Nonetheless, in the context of the adversary system cross-examination is an important means of trying to assess the strength or weakness of the hearsay inferences.

Despite the absence of an opportunity to cross-examine a hearsay declarant, the hearsay rule does not exclude statements falling within an exception to the hearsay rule.[15] The rationale for most hearsay exceptions is that one or more of the hearsay dangers is not likely to be present.

Both *Kearley* and *Ratten* involve implied assertions — statements (1) that imply (but do not explicitly assert) the proposition that the proponent wishes the factfinder to draw from the evidence and (2) that require the factfinder to make the same inferences that a factfinder would have to make if the statement had been an explicit hearsay assertion. Thus, in *Kearley*, the relevance of the evidence depends on inferring that the callers and visitors believed the defendant was selling drugs and, further, that this belief was accurate. If the declarants had directly asserted that the defendant was selling drugs, one would have to make the same inferences, and the evidence would unquestionably be hearsay. Similarly, in *Ratten*, the relevance of the evidence depends on inferring that the wife was afraid of her husband and that this fear had an accurate factual basis. If the wife had said, "My husband is threatening me with a shotgun," one would have to make the same inferences, and the evidence would unquestionably be hearsay.[16]

In addition to being analytically similar to explicit hearsay statements, implied assertions are also sometimes analytically even more similar to nonassertive nonverbal conduct, which many evidence codes (including the Federal Rules of Evidence) exempt from the definition of hearsay. In a jurisdiction that treats nonassertive nonverbal conduct as non-hearsay, the key to understanding whether an implied assertion should be classified as hearsay lies in analyzing the relationship between implied assertions and nonassertive nonverbal conduct.

Federal Rule of Evidence 801(a) provides that nonverbal conduct is a hearsay statement only if the actor intends it as an assertion.[17] Thus, for example, if a police officer asked which way the assailant fled and if the victim pointed north, testimony about the pointing to prove which way the assailant fled would be hearsay. The victim intended the nonverbal conduct as a substitute for an oral assertion. Whether the victim pointed or made an oral statement, the hearsay inferences are the same: The factfinder, to credit the evidence, must infer (1) that the victim believed that the defendant fled to the north and (2) that this belief is an accurate reflection of what happened.

---

15. ALLEN & KUHNS, *supra* note 9, at 300.

16. A cry for help that does not identify the source of the difficulty creates an ambiguity problem not present in the direct hearsay assertion that names the husband: perhaps some third person or even some nonhuman force was creating the danger. In some instances independent evidence will be available to minimize this ambiguity problem. For example, in *Ratten*, where the defendant admitted shooting his wife but claimed that it was an accident, there appears to be no question about whether some person or thing other than the husband could have been putting the wife in danger.

17. *See* FED. R. EVID. 801(a), (c). Subdivision (c) defines hearsay as a "statement . . . offered . . . to prove the truth of the matter asserted." FED. R. EVID. 801(c). Subdivision (a) defines "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, *if it is intended by the person as an assertion*." FED. R. EVID. 801(a) (emphasis added).

Frequently out-of-court nonverbal conduct is nonassertive and therefore, by definition, not hearsay under the Federal Rules of Evidence. A classic example of this type of evidence is the sea captain hypothetical set forth in *Wright v. Tatham*:[18] To prove that a ship is seaworthy, a witness offers to testify that the captain inspected the ship and then embarked on it with his spouse and children.[19] The relevance of the evidence requires the factfinder to make the same hearsay inferences that the factfinder must make with the evidence of the victim's pointing. From the captain's activity the factfinder must infer (1) that the captain believed the ship was seaworthy and further (2) that this belief reflected the actual condition of the ship. These inferences, however, may be incorrect. If the captain knew that somebody was watching, the captain may have been trying to create a false impression that the ship is seaworthy (insincerity); the captain may have realized that the ship was not seaworthy but nonetheless decided to risk the voyage, perhaps because of a medical emergency (ambiguity); the captain may not have seen that the ship was leaking badly (misperception); and if there was a time lapse between the inspection and the embarking, the captain may have forgotten how unseaworthy the ship was (poor memory).

There is, however, one significant difference between the sea captain's activity and the pointing activity. Whereas the pointing victim was almost certainly intending to assert the proposition that the assailant fled to the north, it is extremely unlikely that the sea captain was intending to assert that the ship was seaworthy. To the extent that one can be confident that the sea captain was not intending to assert or communicate anything about the seaworthiness of the ship, one can be confident that the sea captain was not being insincere. Because the apparently nonassertive nature of the conduct has eliminated the problem of

18. 112 Eng. Rep. 488, 516 (K.B. 1837).
19. *Id.*

insincerity, the drafters of the Federal Rules of Evidence chose to exempt this type of activity from the definition of hearsay.[20]

Sometimes when a party offers evidence of out-of-court verbal activity, the relevance of which depends on both hearsay inferences, there will appear to be a very tenuous relationship between what the declarant apparently intended to assert and the purpose for which the evidence is being offered. When this is the case, the absence of an intent to assert the proposition for which the evidence is being offered makes the evidence functionally almost identical to nonassertive nonverbal conduct.[21]

Consider, for example, *Wright v. Tatham*,[22] where the question was the admissibility of letters written to a testator, Marsden, to show that he was competent. Both hearsay inferences and the hearsay dangers associated with them are theoretically present. The factfinder must infer that the letter writers believed Marsden was competent. Perhaps they knew he was incompetent and just wanted to bolster his spirits (ambiguity), or perhaps they were trying to deceive peo-

---

20. *See* FED. R. EVID. 801(a) advisory committee's note (citations omitted):

> Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the evidence of the condition and hence properly includable within the hearsay concept. 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. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence.

There are a number of arguments that one might make against the decision to exempt nonassertive nonverbal conduct from the definition of hearsay. For example, one might be mistaken in any given case about whether the conduct really is nonassertive. Even if the conduct is nonassertive, the nonassertive nature of the conduct, contrary to the suggestion in the Advisory Committee's Note, does nothing to lessen hearsay dangers other than insincerity. Furthermore, when conduct is nonassertive there is often a substantial ambiguity about the proper inference to draw about the actor's belief. The medical emergency scenario or some variant of it in the sea captain hypothetical, for example, is not at all farfetched.

On the other hand, there is often (but not always) an added guarantee of sincerity with nonassertive conduct evidence because the actor has relied on the belief implied from the conduct. For example, the sea captain embarked on the boat. In addition, although it would perhaps be preferable to have the out-of-court actor on the witness stand to explore possible ambiguities in the hearsay inference from conduct to belief, it will be relatively easy for counsel to address the ambiguity issue in closing argument and thus give the jury a sense of the strength or weakness of the evidence without cross-examination. Furthermore, because the hearsay dangers in nonverbal nonassertive conduct are not always immediately apparent, one might expect a rule classifying such evidence as hearsay to be applied unevenly and inconsistently. Finally, the likely absence of a sincerity problem arguably should itself be sufficient to justify nonhearsay status for nonassertive nonverbal conduct. Most hearsay exceptions rest primarily on the premise that one or more of the hearsay dangers is unlikely to be present. It would be difficult to make a very strong case for the proposition that factfinders are less able accurately to assess the probative value of nonassertive nonverbal conduct than they are able accurately to assess the probative value of uncross-examined hearsay statements falling within an exception to the hearsay rule.

21. Unlike nonverbal conduct, verbal conduct always carries with it the risk that the declarant/actor has inadvertently used an incorrect word or phrase or has inadvertently omitted an important word or phrase (improper narration). In cases in which the verbal activity is offered to imply some fact not closely related to the direct assertions, it seems unlikely that such a narration error, even if undetected, would affect the probative value of the evidence.

22. 112 Eng. Rep. 488 (K.B. 1837).

ple about Marsden's competence by pretending to treat him as competent (insincerity). Furthermore, the factfinder must infer that the belief in Marsden's competence was accurate. Perhaps when the letter writers last saw Marsden, they failed to perceive how incompetent he was (misperception), or perhaps by the time they got around to writing the letters they had forgotten how crazy Marsden had seemed when they last saw him (poor memory). Of these possible scenarios, the one that seems most farfetched is the insincerity scenario. The reason that it seems farfetched is that it is hard to imagine that the letter writers were trying to assert or communicate anything about Marsden's competence. In other words, in *Wright*, as in the nonassertive nonverbal conduct cases, all of the hearsay dangers are theoretically present, but one can be reasonably sure that the actor/speaker did not intend to assert the proposition that the evidence is being offered to prove. As a result, one can be reasonably sure that there is not a sincerity problem.

The language of Federal Rule of Evidence 801 does not provide a clear answer to whether the *Wright* evidence should be classified as hearsay. Nonetheless, the interpretation of Rule 801 that is most consistent with the views of the Advisory Committee and that brings the most analytical consistency to the federal definition of hearsay is to classify the evidence in *Wright* as not hearsay. The Advisory Committee's Note to Rule 801(a), after noting that nonassertive nonverbal conduct should be exempted from the definition of hearsay because the apparent nonassertiveness eliminates any sincerity problem,[23] specifically acknowledges that "similar considerations" should govern the classification of some instances of verbal conduct.[24] As the preceding analysis indicates, such "similar considera-

---

23. *See supra* note 20.

24. *See* FED. R. EVID. 801(a) advisory committee's note:

> Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c) [i.e., not "offered . . . to prove the truth of the matter asserted"].

This passage is puzzling for several reasons. First, since almost all verbal conduct involves an intent to assert something, the phrase "nonassertive verbal conduct" is an oxymoron. Second, the Note does not indicate what the difference is between "nonassertive verbal conduct" and "verbal conduct which is assertive but . . . ." *Id.* It seems unlikely, however, that the Note is referring exclusively (if at all) to the types of out-of-court statements that involve no hearsay dangers — for example, statements that are legally operative facts or that show notice. The Advisory Committee's Note to Federal Rules of Evidence 801(c) addresses these kinds of statements. Third, it is unclear whether the reference to "subdivision (c)" applies to both "nonassertive verbal conduct" and "verbal conduct which is assertive but . . . ." *Id.* The fact that the quoted passage appears in the explanation of subdivision (a) suggests that perhaps the "similar considerations" governing "nonassertive verbal conduct" make such evidence not hearsay by virtue of subdivision (a). Subdivision (a), however, defines a "statement." *See supra* note 17. Is "nonassertive verbal conduct" not an assertion? With respect to what is an assertion the Advisory Committee's Note unhelpfully states only "that nothing is an assertion unless intended to be one," and "[i]t can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion." *Id.*

Because of these ambiguities in the Advisory Committee's Note and the lack of clear guidance in the language of Federal Rule of Evidence 801, precisely how one reaches the non-hearsay result in *Wright* under the Federal Rules is a bit problematic. Perhaps the specific verbal assertions in the letters are so tangential to or so far removed from the purpose for which the letter writing activity is being introduced that the letter writing activity is not an assertion within the meaning of Rule 801(a). Alternatively, one can maintain that the evidence is not hearsay within the meaning of Rule 801(c) because it is not being offered to prove the truth of any particular assertions in the letters.

Because the rationale for exempting the letter writing activity from the definition of hearsay is similar to the rationale for excluding nonassertive nonverbal conduct from the definition of hearsay, my sense of symmetry moves me in the direction of wanting to rely on the same part of the rule — subsection (a) — to exempt both pieces of evidence. My sense of practicality, however, tells me that a judge is more likely to be comfortable with the not "offered . . . to prove the truth of the matter asserted" language in subsection (c). FED. R. EVID. 801(c).

tions" exist in a case like *Wright*. Indeed, the cases are so similar that much of the caselaw[25] and literature[26] — both before and after the drafting of the Federal Rules of Evidence — treat *Wright* and the nonassertive nonverbal conduct cases as presenting the identical issue.

The fact that the declarant articulates a proposition that is different from the proposition that the evidence is offered to prove should not itself be sufficient to classify the statement as not hearsay under the Federal Rules. Consider, for example, the following out-of-court statement made in the context of a discussion about the defendant charged with bank robbery and offered against the defendant: "Well, at least I never robbed a bank." The obvious relevance of the evidence is to suggest that the speaker believes the defendant did rob the bank and, further, that this belief comports with what happened. Moreover, from the context of the statement it appears that the declarant is probably intending to assert that very proposition. As a result, the evidence should be, and under the Federal Rules of Evidence presumably would be, considered hearsay.[27]

Between the two extremes of *Wright* and the bank robbery hypothetical, both of which it seems to me are quite easy to classify as not hearsay and hearsay respectively, are a variety of more problematic implied assertions. Consider, for example, the following: *A*'s out-of-court declaration "Hello John" offered to prove the implied assertion that John was present with *A*; *B*'s out-of-court declaration "Beware of the dog" offered to prove the implied assertion that the dog is dangerous; *C*'s out-of-court assertion "Give me the ring" to prove the implied assertion that *C* is the owner of the ring. Reconsider also the *Kearley* out-of-court declarations about wanting to purchase drugs offered to prove the implied assertion that the defendant was a drug dealer and the *Ratten* out-of-court cry for help offered to prove the implied assertion that the shooting was not accidental.

In *Kearley* and *Ratten* and in the three preceding hypotheticals the relationship between the declarants' explicit assertions and the implied assertions that they are offered to prove is less tenuous than the relationship between the letter writing and the implied assertion of Marsden's competence in *Wright*. As a result, there is probably a greater likelihood in each case that the declarant may have been intending to assert the proposition that the statement is offered to prove. For example, in *Ratten* it seems plausible that at the time of her call, the wife was thinking, "My God, my husband is threatening me with a shotgun and I'm going to die if I don't get help! Please help me! I need help!" *If* that is a fair representation of what the wife was probably thinking, it seems fortuitous that the only words out of her mouth in the excitement of the moment were the call for help.

---

25. *See, e.g.*, United States v. Zenni, 492 F. Supp. 464 (E.D. Ky. 1980); Wright v. Tatham, 112 Eng. Rep. 488 (K.B. 1837).

26. *See, e.g.*, RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 366-69 (2d ed. 1982); Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930).

27. *See* Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules*, 74 MINN. L. REV. 783, 799-800 (1990).

Viewed from this perspective, *Ratten* is more like the bank robbery hypothetical than *Wright*.[28]

On the other hand, in some implied assertion cases, despite the existence of a more direct relationship between the explicit and the implied assertion than in *Wright*, it is reasonable to assume that the declarants were not intending to assert the proposition that the evidence is being offered to prove. For example, it seems unlikely, at least to me, that the declarants in *Kearley* were intending to assert that the defendant was a drug dealer. Rather, they merely wanted to satisfy their desire for drugs.[29]

There are three possible ways to deal with the hearsay classification of implied assertions like those described in the immediately preceding paragraphs. First, one could ignore or give only very narrow scope to the Advisory Committee's observation that some instances of verbal conduct give rise to considerations similar to those that justify treating nonassertive nonverbal conduct as hearsay. Under this approach all or most implied assertions would be classified as hearsay. Such a rule would have the benefit of ease of application, but it is an approach that seems inconsistent with the Advisory Committee's Note. Moreover, to the extent that this approach would classify as hearsay implied assertions that were analytically very similar to the implied assertions in *Wright*, it is an approach that would treat like situations differently.

Second, one could give a narrow reading to the language in Federal Rule of Evidence 801(c) that defines hearsay as a statement offered "to prove the truth of the matter asserted."[30] Under this view, one might maintain that all exclamatory, hortatory, and other declarations that are not statements of historical fact are not hearsay because, by definition, they do not assert a truth. Furthermore, one could maintain that in any other case where the declarant's explicit or obviously intended assertion was somewhat different from the proposition that the evidence was offered to prove, the declaration is not hearsay. This rule, too, would be relatively easy to apply, but it would result in the non-hearsay classification of some out-of-court statements that are more analogous to undisputed hearsay than to nonassertive nonverbal conduct. Consider, for example, the preceding suggestion that the wife in *Ratten* may have intended to assert that her husband is about to kill her. Or consider the assertion "Give me the ring" to prove that the declarant is the owner of the ring. It seems plausible to assume that the declarant may in fact be thinking and intending to assert, "That ring is mine; give it to me!"

---

28. Even if one disagrees with this characterization of *Ratten*, one might argue that there should be special limitations on the use of implied and explicit out-of-court assertions against criminal defendants. Whether there should be a special hearsay rule for criminal defendants — either as a matter of the Confrontation Clause of the Sixth Amendment or of a special nonconstitutional evidentiary rule — is beyond the scope of this Essay.

29. The multiple requests to purchase drugs and therefore multiple implicit assertions that the defendant was a drug dealer provided an assurance of trustworthiness that would not have existed with only one request. This guarantee of trustworthiness would be just as great, however, if the declarants had specifically asserted that the defendant was selling drugs. One might want a hearsay rule that permits such corroborated statements to be admissible. The corroborative aspect of *Kearley*, however, has nothing to do with whether the evidence should be not hearsay because it is being used to imply a fact different from what the declarants were asserting.

30. *See* FED. R. EVID. 801(c).

The third approach to classifying implied assertions as hearsay is to ask on a case-by-case basis whether the evidence is more like the evidence in *Wright* or the evidence in the bank robbery hypothetical. More precisely, the question to ask is whether the declarant was probably intending to assert the proposition that the evidence is being offered to prove. For example, if one concludes that Ratten's wife was intending to communicate that her husband was threatening her or that the declarant demanding the ring was intending to assert ownership, the evidence would be hearsay. Similarly if one believes (which I do not) that the declarants in *Kearley* were intending to assert, "Kearley is a drug dealer and I want to buy drugs from him," those declarations would be hearsay.[31]

The advantage of this third approach is that it provides an analytically coherent manner for dealing with implied assertions that is consistent with the Federal Rules of Evidence Advisory Committee's comments about implied assertions.[32] The principal disadvantage of the approach is that it may yield inconsistent results. Trying to determine what unarticulated thoughts were in the mind of the declarant will seldom be easy. Moreover, it is not clear precisely what one should be trying to determine. For example, the declarant demanding the ring may be quite consciously attempting to communicate a claim of ownership. Alternatively, although the declarant may not be consciously thinking about asserting a claim of ownership at the precise moment of the statement, the declarant may have been thinking about the ownership question for some time and those thoughts may be the motivation for the demand. I am aware of nothing in either the Federal Rules of Evidence or the literature of implied assertions that grapples with the question how direct or immediate or conscious the intent to assert the proposition that the evidence is being offered to prove should be in order to classify the evidence as hearsay. Moreover, I am skeptical that such an inquiry would be fruitful.

The risk of inconsistent results under this third approach (or the result of exclusion under the first approach) is largely — but not entirely — offset by a point frequently lost in the heat of academic debate over whether implied assertions are hearsay: Whenever an implied assertion is classified as hearsay, the hearsay rule should not be a bar to admissibility if the assertion fits within a hearsay exception; and many implied assertions fit comfortably within one or both of the

---

31. With respect to nonverbal conduct, the Advisory Committee's Note to Rule 801(a) states that the burden of proof on the question whether the conduct is assertive should be on the person claiming that the conduct is assertive. Which party should have the burden of proof with respect to the declarant's intent in implied assertion cases should depend on one's assessment of (a) whether the majority of these cases are likely to be more similar to *Wright* or the bank robbery hypothetical and (b) whether judges are likely to have a bias toward finding that the declarant did or did not intend to assert the proposition that the evidence is offered to prove. For example, if one assumes that most implied assertion cases are analogous to *Wright* and that judges may have a bias toward classifying the evidence as hearsay, the burden of proof should be on the party claiming that the evidence is hearsay.

32. *See supra* note 24.

Federal Rules of Evidence spontaneous declaration exceptions[33] — 803(1) (present sense impression) and 803(2) (excited utterance).[34]

The primary justification for both of these exceptions is that the probable spontaneity of the declaration tends to ensure that the declarant is sincere.[35] Indeed, to the extent that one can be confident that the declaration is spontaneous, it is necessarily sincere, for the spontaneity removes the possibility for forethought and fabrication.[36] With excited utterances, the requirements that there be a "startling event or condition,"[37] that the declaration occur "while the declarant [is] under the stress of excitement caused by the event or condition,"[38] and that the declaration "relate[] to"[39] the startling event or condition tend to ensure that the declaration is spontaneous. With present sense impression declarations, the requirements that the declaration is "describing or explaining"[40] an event or condition and that the declaration occurs during the perception of the event or condition or "immediately thereafter"[41] tend to ensure that the declaration is spontaneous.

At least one and perhaps two or three of the implied assertions discussed in this Essay fall within the excited utterance exception. The wife's call for help in *Ratten* "relat[ed] to" what surely must have been an exciting event,[42] and there

---

33. Implied assertions may satisfy other hearsay exceptions. For example, some implied assertions may be sufficiently reliable to fall within Rule 803(24) or 804(b)(5), the residual exceptions for hearsay not covered by other exceptions "but having equivalent circumstantial guarantees of trustworthiness"; the statement "I need to see an orthopedic surgeon" offered to prove that the declarant has a broken arm, if hearsay, may be admissible pursuant to Rule 803(4) (statements for purpose of medical diagnosis or treatment); and implied assertions offered to show the declarant's state of mind, if hearsay, should be admissible pursuant to Rule 803(3) (then existing mental, emotional, or physical condition). *See supra* note 9.

34. FED. R. EVID. 803(3):

The following are not excluded by the hearsay rule even though the declarant is available as a witness.

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

35. FED. R. EVID. 803(1), (2) advisory committee's note.

The fact that present sense impression declarations must occur and that excited utterances usually occur within close temporal proximity to the event minimizes the risk of a memory problem. The fact of an exciting event, however, may increase the danger of misperception and perhaps inaccurate narration. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432 (1928); Frederic D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 975-88 (1977).

36. *Cf. supra* note 21 and accompanying text (to the extent one can be confident that actor/declarant is not intending to assert proposition for which evidence is offered, one can be confident that actor/declarant is sincere).

37. FED. R. EVID. 803(2).

38. *Id.*

39. *Id.*

40. FED. R. EVID. 803(1).

41. *Id.*

42. There is no precise definition for the phrase "relating to" in Rule 803(2). The Advisory Committee's Note to Rules 803(1), (2), however, makes it clear that one should read this phrase more broadly than the phrase "describing or explaining" in Rule 803(1):

> Permissible *subject matter* of the statement is limited under Exception (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Exception (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage.

FED. R. EVID. 803(1), (2) advisory committee's note.

would seem to be little doubt that she was under the influence of the exciting event at the time of the call.[43] Similarly, if the warning about the dog were prompted by the declarant's perception that the dog was about to attack, or if the demand for the ring were a response to its attempted theft, the excited utterance exception would appear to apply to those declarations. Moreover, each of these three declarations, as well as the declaration "Hello, John" offered to show that John was present, are sufficiently contemporaneous to satisfy the time requirement of Rule 803(1), the present sense impression exception.[44]

With respect to the present sense impression exception, one might object that the call for help or the declarations "Beware of the dog," "Give me the ring," or "Hello John" are not "describing or explaining an event or condition."[45] One must recall, however, that these declarations are hearsay in the first place only if the classifier regards them as tantamount to the assertions "My husband is threatening me," "That dog is dangerous," "The ring belongs to me," and "John is here with me." These statements *do* describe or explain events or conditions. If one characterizes the declarations in this manner to fit them within the definition of hearsay, one should use the same characterization in determining the applicability of the hearsay exceptions.

Of course, not all implied assertions classified as hearsay will fit neatly within one of the spontaneous declaration exceptions. For example, to classify the *Kearley* declarations as hearsay is to take the position that they are tantamount to the assertion, "Kearley is a drug dealer." That assertion describes or explains an ongoing (at least to the point of Kearley's arrest) status or avocation or characteristic, but is being a drug dealer an "event or condition" within the meaning of Rule 803(1)?[46] Moreover, since Kearley had been arrested and the declarants were speaking to police officers, can one reasonably regard the assertions as having been made while or immediately after the declarants were "perceiving" the event or condition? Finally, and most importantly, even if one can stretch the words of Rule 803(1) to encompass the assertion "Kearley is a drug dealer," is that assertion one that is likely to be sincere *because* it is spontaneous?

---

43. There is, of course, always the possibility of fabrication. *Cf. supra* notes 18 and 22 and accompanying text (possibility that sea captain was intending to create false impression about seaworthiness of vessel; possibility letter writers were trying to create false impression that Marsden was competent).

44. In some cases there may be a question whether there really was an (exciting) event or condition. How does one know, for example, that there was an (exciting) event in *Ratten*? If the only indication of an event or condition is the hearsay declaration itself, should that be sufficient to establish that there was an event or condition? For a discussion of these issues see ALLEN & KUHNS, *supra* note 9, at 395-97, 428-29; Carhryn M. Taylor, *The Need for a New Approach to the Present Sense Impression Hearsay Exception After State v. Flesher*, 67 IOWA L. REV. 179 (1981).

45. FED. R. EVID. 803(1).

46. Although the Advisory Committee's Note to Rule 803(1), (2) briefly discusses the meaning of "describing or explaining," *see supra* note 36, there is no discussion of the meaning of "event or condition."

If the answer to any of these questions is no, the only way to admit the *Kearley* evidence is to find some other hearsay exception[47] or to decide in the first instance to classify the evidence as non-hearsay. As the earlier analysis suggested, the most sound result under the Federal Rules of Evidence would be to classify the *Kearley* evidence as non-hearsay.

---

47. If the prosecution could establish that the declarants were unavailable and if one regarded the declarations as assertions about criminal activity of the declarants as well as the defendants, the declaration against interest exception may be available. *See* FED. R. EVID. 804(b)(3). If the prosecution could establish that Kearley and the declarants were coconspirators and that the statements were made during and in furtherance of the conspiracy, the statements would be admissible as coconspirators' admissions. Admissions are treated as an exception to the hearsay rule at common law; under the Federal Rules, admissions are exempted from the definition of hearsay. *See* FED. R. EVID. 801(d)(2)(E). There is also the possibility of admitting the statements pursuant to the residual hearsay exceptions. *See supra* note 33.

DISCUSSION: CONDUCT, PERFORMATIVE SPEECH, AND COMMUNICATION

Christopher B. Mueller

June 14

The split among essayists on the question whether drug calls merit hearsay treatment indicates a borderland where arguments can be made on each side. I think words impart information about the world not only because humans use them to express or communicate ideas but because they are instrumental (they get things done), and the performative aspect sometimes justifies nonhearsay treatment. Under the Rules, the acts by Baron Parke's captain in inspecting the ship, then embarking with family,[1] are nonhearsay if offered to prove that the ship is seaworthy. The same outcome should be possible if he arranges passage for his family and sends them off, even though here he acts using words.

In his essay, Roger Park elaborates themes that he sounded in his path-breaking work about *Reynolds* ("I didn't tell them anything about you"),[2] and I think he is right in important ways — words should not be read to assert points far beyond the meaning intended by the speaker; borderland problems should not be addressed by tinkering with definitions; verbal behavior can be analogous to nonassertive conduct. Richard Kuhns agrees on the latter point in his own strong piece,[3] and I think he is right to treat the problem as one of proper accommodation between the concepts of "verbal conduct" and "assertion."[4]

On the facts of *Regina v. Kearley*,[5] I agree with Kuhns and Park that the customers probably did not intend to say that Kearley dealt drugs, and yet what they did suggests as much. If the words do not say he deals, how do they prove it, and what role does hearsay doctrine play? The situation is similar to the ship captain example. As Margaret Berger says, "the declarants acted — they telephoned the defendant's home and came to his door,"[6] and we might add that they sought the defendant and said, in effect, "I want drugs; let's deal." What they did proves he deals, and hearsay doctrine should not apply to this aspect of their behavior.

Park says that performativity only counts with verbal acts and that my broader concept may not involve significant reliance that would satisfy concerns over sincerity.[7] But reliance elements do not correlate with physical behavior as opposed to verbal conduct, and words are not instrumental only when laws say so. Boarding a ship with one's family and arranging passage for the family bring reliance elements, even if one is mostly action and the other mostly words. (Checking for mail brings trivial reliance elements, and telling one's child she can handle ski conditions on the Wild Irishman ski run brings large ones: The

---

1. Wright v. Tatham, 112 Eng. Rep. 488 (K.B. 1837).
2. Roger C. Park, *The Definition of Hearsay: To Each Its Own*, 16 MISS. C. L. REV. 125 (1995). The reference is to United States v. Reynolds, 687 F.2d 1135 (8th Cir. 1982), *modified*, 710 F.2d 431, 436 (1983).
3. Richard B. Kuhns, *Implied Assertions and the Hearsay Rule*, 16 MISS. C. L. REV. 139 (1995).
4. *Id.*
5. 2 App. Cas. 228 (H.L. Eng. 1992).
6. Margaret A. Berger, *How Would or Should the Supreme Court Interpret the Definitions in Rule 801?*, 16 MISS. C. L. REV. 13, 16 (1995).
7. Park, *supra* note 2, at 132-35.

former is nonhearsay under the Rules if offered to prove the actor had not picked up the day's delivery; the performative aspect of the latter merits consideration for possible nonhearsay treatment if the advice is offered to prove the child has the skill to handle the slope.) Distinguishing *saying* from *doing* confines hearsay doctrine to behavior that proves the point by intentionally communicating or expressing it and behavior that proves it another way; it does not merely distinguish speech from physical movement.

Park says one of my examples ("Don't trip on the curb") works not because the words are performative but because they present low hearsay risks and would fit an exception.[8] He says other examples ("Don't trip the lever" and "Don't go to Dr. Curb") have "as much" performative aspect but should be hearsay if offered to prove some prior fact.[9] We can only know whether his examples may have important performative aspects if we look at context, which means performativity is similar to other criteria: "Here's the car" is a verbal act if we know the speaker handed over the keys, not if he had seen a robbery and was going around with the detective to see if he could find the getaway car. Suppose the fellow who said, "Don't trip the lever," had operated the machine, that it malfunctioned in ways that caused delay or damage, and he spoke to the person on the next shift who would likely operate the lever but would heed the warning, the purpose being to show that tripping the lever had caused the malfunction. Here the words have a significant performative aspect that merits consideration in choosing between hearsay and nonhearsay treatment.

Eleanor Swift reaches what I think is the right answer by another route, emphasizing that factfinders can evaluate such proof by thinking up "the various generalizations that might explain it," which would not depend on "the testimonial qualities of individual declarants."[10] She is right, and right that the sheer number of calls has something to do with our willingness to evaluate the proof without as much fear that the calls are a charade or plot against the defendant (assertions masquerading as acts). In terms I find useful, this feature helps justify giving greater weight to the performative aspect of the calls.

Roger C. Park

June 18

I agree with much of what Chris Mueller wrote, but I will yield to my law professor instincts and focus on a point on which I disagree with him. He wrote:

> Park says one of my examples ("Don't trip on the curb") works not because the words are performative but because they present low hearsay risks and would fit

8. Park, *supra* note 2, at 134.
9. Park, *supra* note 2, at 134.
10. Eleanor Swift, *Relevance and Hearsay in Regina v. Kearley*, 16 MISS. C. L. REV. 75, 82 (1995).

> an exception. He says other examples ("Don't trip the lever" and "Don't go to Dr. Curb") have "as much" performative aspect but should be hearsay if offered to prove some prior fact. We can only know whether his examples may have important performative aspects if we look at context, which means performativity is similar to other criteria: "Here's the car" is a verbal act if we know the speaker handed over the keys, not if he had seen a robbery and was going around with the detective to see if he could find the getaway car. Suppose the fellow who said, "Don't trip the lever," had operated the machine, that it malfunctioned in ways that caused delay or damage, and he spoke to the person on the next shift who would likely operate the lever but would heed the warning, the purpose being to show that tripping the lever had caused the malfunction. Here the words have a significant performative aspect that merits consideration in choosing between hearsay and nonhearsay treatment.[1]

Here is my response:

It seems to me that Chris Mueller's elaboration of my "Don't trip the lever" hypothetical adds facts that make the statement more probative than it otherwise would be. However, it is the statement's enhanced reliability, not its "performativity," that makes the statement in the revised hypothetical a good candidate for admission into evidence. The statement seems reliable because the hypothetical declarant was evidently an experienced machine operator who had observed the malfunction while personally operating the machine. Suppose instead that the person who said "Don't trip the lever" knew little about the machine and had a notoriously weak understanding of mechanical causation, but was a hothead who was known to pick fights with people who did not follow his advice, and furthermore was the operator's boss. Would not my hypothetical hothead-boss's utterance be even more "performative" than the utterance in the enhanced "Don't trip the lever" hypothetical presented by Professor Mueller? Surely the "performative" strength of an utterance offered to show belief depends on factors other than the degree to which the declarant's belief is well-grounded. If one is going to use the term "performative" to cover utterances that are not operative language, then it seems to me that saying that the utterance is "performative" connotes that it has force and power, not that the person making the utterance has a credible basis for the imputed belief.

I think Professor Mueller has not touched my other hypothetical — "Don't go to Dr. Curb." Let us say the declarant who said those words had the power to prevent the addressee from seeing Dr. Curb, so the words were strongly "performative," if "performativity" means that they have force and impact. I would still hate to have the utterance admitted as evidence that Dr. Curb had in fact botched an operation witnessed earlier by the declarant. Words can hit hard without being backed by good facts or good judgment. Might does not make insight.

---

1. Christopher B. Mueller, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 152 (1995) (responding to Roger C. Park) (internal citations omitted).

So, to no one's surprise, I am still not convinced that the performative utterance concept helps here. I would classify operative language as nonhearsay when it is offered to show its operative effect, but where the language is offered to show a belief of the declarant, I would look to guides other than "performativity" in deciding whether an utterance is hearsay.

While I realize that definitions do not solve everything, I think that Chris Mueller could illuminate his theory by more fully defining his concepts. So, here is my challenge to him: set forth a definition telling us what "performative" means.

Christopher B. Mueller

June 19

Although we often come to similar solutions, Roger Park and I seem to differ on an important point. He would "classify operative language as nonhearsay when it is offered to show its operative effect," but not when offered to show "a belief of the declarant," where he would look to "guides other than 'performativity.' "[1] He would surely be even firmer in this view if the purpose were to show an act, event, or condition that the indicated belief suggests. That is a respectable position (close to Baron Parke's), but I think hearsay doctrine should not have so broad a reach. I think the framers of the Rules were right to go another way, and their distinction between saying and doing applies to behavior without words and to behavior with words. I think proof that one wrote a check for a down-payment and signed a contract with a car dealer is properly viewed as nonhearsay evidence to show the deal (verbal act), to show her wish or need (belief), and to show her present car is old or not good enough.

Park fleshes out his example "Don't trip the lever" differently than I did.[2] I added the context under which this command would tend to prove the lever caused a machine to malfunction and in which the command would affect the behavior of the operator. Under Park's different elaboration, the speaker "knew little about the machine," had a "notoriously weak understanding of mechanical causation," was "a hothead who was known to pick fights with people who didn't follow his advice," but he was the "boss."[3] I will respond in three ways.

First, the command is irrelevant if we are sure the speaker did not know what caused the malfunction. If the point is uncertain, the judge can use the doctrine of conditional relevancy to deal with this problem.

---

1. Roger C. Park, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 152, 154 (1995) (responding to Christopher B. Mueller).

2. *Id.*

3. *Id.*

Second, if the speaker is a "fight-picking hothead," his behavior may be less persuasive (same if we use a car filled with teenagers cruising Saturday night to show who had the green light). There are no perfect criteria for reliable proof — not in the categorical exceptions, nor hearsay doctrine generally, nor in relevancy or performativity. But the performative aspect of words gives us additional reasons (beyond their assertive aspects), to appraise human behavior and draw inferences about the world. If the boss gives an order likely to be followed ("Don't trip the lever"), his reaction gives reason to suppose that the lever caused the malfunction that we would not have if he had said to another worker having nothing to do with the machine that "the lever caused the malfunction."

Third, discounting the performative aspect of behavior discounts human rationality. Most bosses are not people who pick fights when directions are followed (do not need to); most do not give orders about equipment they do not understand (useless; risky); most understand the equipment their workers use (to be good bosses, they need to). The very fact that somebody has done something, given adequate contextual information, gives us reason to make intelligent deductions about facts apparently in the purview of the actor.

Other examples ("Don't go to Dr. Curb") can be discussed, and the conversation would parallel this one. We need to know the factual setting to appraise what the statement does. Then we can determine whether this aspect is useful in relation to the point to be proved. If the speaker is a tarot reader advising Nancy, "Don't go to Dr. Curb," the performative aspect may suggest that the cards cast doubt on Nancy's purpose to see that doctor (or the cards do not say anything but the reader needs a "medical hook" to keep Nancy as a customer). If the speaker is Nancy's treating oncologist and he knows Nancy is moving to Santa Barbara and was told to "look up Dr. Curb for further treatment when you arrive," and the speaker says, "Don't go to Dr. Curb, go to Dr. Stone," the performative aspect of redirecting the patient supports inferences that are probably also asserted (Stone would be better to see for someone in her condition). Words do not need to "hit hard" to have a performative aspect, and "might" makes no difference, although perhaps "mighty" people do more things (with words and otherwise) than non-mighty people.

Like assertion itself (which the Rules do not define, but should be understood to mean intentionally expressing or communicating an idea), performativity is a broad concept that reaches all the other things people do with words. Elsewhere I have described performativity as causing things to happen, bringing into being or carrying on human relationships, or changing the positions of the declarant and others. I think further elaboration is possible and inevitable. I have offered it here and elsewhere in particular contexts, and perhaps there are additional ways to elaborate the idea for general application.

Craig R. Callen

June 19

This is in response to Professor Mueller's discussion of performative speech under the hearsay rule. He said:

> Like assertion itself (which the Rules do not define, but should be understood to mean intentionally expressing or communicating an idea), performativity is a broad concept that reaches all the other things people do with words. Elsewhere I have described performativity as causing things to happen, bringing into being or carrying on human relationships, or changing the positions of the declarant and others. I think further elaboration is possible and inevitable. I have offered it here and elsewhere in particular contexts, and perhaps there are additional ways to elaborate the idea for general application.[1]

The concept of performative speech seems to be a good way to explain why communications creating legal rights and obligations are not hearsay when offered to show the existence of those rights or obligations. Drawing concepts such as performative speech from other disciplines, in an effort to understand evidence, is laudable.

The effort to expand the notion of performativity to reach other statements and other probative goals, however, rests on a notion of performative communication that could be very slippery in practice. It may also conflate the definition of hearsay with the exceptions in a way that might make the Rules more confusing. To illustrate, let me use a hypothetical that Chris Mueller and I have discussed privately, in a slightly different form: Suppose that the police raided an apartment and found therein a form letter addressed to Carlos Almaden from a bank, in which the bank thanked him for opening a new account, and enclosed a debit card, saying that "We afford this service to all our new gold-level customers." Alternatively, suppose that the police found a computer-generated NSF check notice addressed to Carlos Almaden from the bank. Assume that the state wishes to show that a person known as Almaden lived in the apartment, or was an associate of the tenants. (Professor Mueller does not agree with one possible argument that the letters should not be hearsay: that the letters do not assert that Almaden may be reached through the apartment. Accordingly, I will not go into that argument here.)

I understand from discussions I have had with Professor Mueller that he would consider the evidence in the NSF check example performative and not hearsay, and I suspect that he would consider the evidence in the debit card example not to be hearsay. This seems hard to square with the recognition that the bank's computer records, from which the computer itself generates form letters and NSF

---

1. Christopher B. Mueller, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 154, 155 (1995) (responding to Roger C. Park).

check notices, would themselves be hearsay if offered to show that someone named Carlos Almaden lived, or received mail at, the apartment.

His argument may be that the bank's action in reliance on the data in its computer banks shows the evidence to be more reliable than one might otherwise think. The bank's willingness to base statements or communications on the data does make those data seem more probative than randomly collected data. Then again, the statements that satisfy hearsay exceptions are more probative than random statements. The reliance argument seems better suited to an argument that the bank's letters should be within an exception than that they should not be hearsay.

Richard B. Kuhns

June 20

If verbal activity theoretically implicating all of the hearsay dangers can ever be nonhearsay, the activities of the bank employees in Craig Callen's hypothetical should easily qualify.[1] It is unlikely that any employee involved in the process of generating the material sent to the (assumed) customer was trying to assert or communicate anything about the customer's address. Indeed, it may be that most of the steps in the process of generating the material were carried out by pre-programmed computers that rely either on the written application supplied by the customer or on a bank employee's transferral of that information into the bank computers. In either case it seems appropriate to characterize the employee's (and programmer's) activities as performance (Chris Mueller's framework) or to analogize the activities to nonassertive nonverbal conduct (my framework).

A second, potentially more difficult question raised by Craig's hypothetical is how to deal with the address information supplied in the application to open the account, for, after all, it is that information upon which the factfinder will ultimately be relying. In the precise context of Craig's hypothetical this question should be easy to resolve. I assume that the customer filled out or approved the information in the application form, and that the information is being offered against the customer. Thus, even if one characterizes the evidence as hearsay pursuant to Federal Rule of Evidence 801(a)-(c), the evidence is admissible as an admission.

In a context in which the admissions exemption is not available, I would still like to admit the evidence. A proper interpretation of the current federal hearsay rule, however, may prevent that result. One might argue that filling out the application was likely to have been a fairly routine process with little likelihood of intentional fabrication; i.e., that the evidence is nonhearsay because it is analogous to nonassertive nonverbal conduct in that the applicant was probably not

1. *See* Craig R. Callen, Electronic Discussion *in The Reach and Reason of The Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 156, 156-57 (1995) (responding to Christopher B. Mueller).

thinking specifically about communicating the place of residence to anybody. On the other hand, the applicant presumably was responding to a particular question on the application form. Moreover, the applicant may have been particularly conscious of stating the address accurately because of an awareness that important correspondence would be coming from the bank. Such an intent to communicate — even if one assumes it is an intent to communicate accurately — should require classification of the evidence as hearsay under the Federal Rules.

What should one assume about how conscious or immediate the customer's intent to communicate the address was? And how conscious or immediate must this intent be in order for the evidence to be hearsay? Nothing in Rule 801 or in the Advisory Committee's Note provides much guidance. Although I confess that I do not really understand the Advisory Committee's terse assertion that "an assertion made in words is intended by the declarant to be an assertion,"[2] I suspect that this language may suggest that providing an address in response to a specific question should be hearsay. If supplying the address information is hearsay, then admissibility depends upon finding an exception. Except, possibly, for the residual exceptions, none seems applicable.

Regardless of what conclusion one reaches about the hearsay classification in Craig's hypothetical, the attempt to apply the hearsay rule requires an incredibly intricate analysis. (Moreover, if one assumes that the evidence is relevant for a slightly different purpose — to show some minimal connection between the customer and the residence or some awareness of the residence by the customer — the hearsay analysis may be a bit different.)[3] I suspect that the intricacies will elude many lawyers and judges in the heat of battle. That, it seems to me, is a strong reason to move in the direction, initially suggested in this Symposium by Ron Allen, of dismantling the hearsay rule.[4] On the other hand, if one assumes that the hearsay rule is easy to apply and works fairly well in the vast majority of cases, leaving discussions of this type to the academics causes no great harm — except to the extent that it keeps us from dealing with problems of more substance (but perhaps that is a benefit).

Briefly, on another strain: I share the concern that without some constraints on the use of hearsay, there may be a relatively high risk of perjury. Indeed, one of the things that struck me about *Regina v. Kearley*[5] was how odd it seemed for so many people to be asking a stranger for drugs. Perhaps the drug users' need to satisfy their habit was so great or the previous enforcement of drug laws was so lax that there were a number of not very cautious would-be purchasers. I am skeptical, however, of the evidence in *Kearley* and other drug and gambling cases where the police testify to similar evidence. (Does anybody have a handle on the perjury problem in these contexts?) On the other hand, the hearsay rule, at least in its current form, is an extremely crude device for dealing with this problem.

---

2. FED. R. EVID. 801(a) advisory committee's note.

3. *See, e.g.*, Bridges v. State, 19 N.W.2d 529 (Wis. 1945) (child molestation case).

4. *See* Ronald J. Allen, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 91, 92 (1995) (responding to Richard D. Friedman).

5. *See* 2 App. Cas. 228 (H.L. Eng. 1992).

Christopher B. Mueller

June 20

Craig Callen asks about letters to Carlos Almaden, offered to prove where he lives.[1] Carlos appeared in *United States v. Singer*[2] where the court said that an eviction notice to him at 600 Wilshire was not hearsay as proof he lived there.[3] In Craig's thoughtful two-part hypothetical, Carlos gets (1) a letter thanking him for opening an account and enclosing a debit card and (2) a NSF notice.[4] Dick Kuhns got it right (nonhearsay if ever such verbal behavior can be nonhearsay).[5]

As Craig knew and Dick recognized, it is hard to put bank records into the business record exception (source of datum is not a business insider). But banks likely have it right: For an established account (many monthly statements), error in the address is unlikely or implausible, and arguably dealing with the customer gives insiders the requisite knowledge in the ordinary course.[6] And courts admit hotel registrations if the clerk verifies identity on check-in, to prove the named person was there (again right; again the result strains theory and the business records exception). When you have a NSF notice, the performative aspect adds significantly to the power of the proof: Failing to give notice affects rights and liabilities of the bank and depositor, and the bank is especially likely to take care. (Of course I would not know firsthand, but I hear tell that banks even phone customers before sending NSF notices, which would insure that the human agent looks, thinks, and takes precautions.)

The Thank You/debit card situation is harder because the account is new and presumably there is no history. But I will bet that banks are careful here, too — barking up the wrong tree (Rich Friedman's happy metaphor) would get 'em in trouble, and not once in living memory have I gotten someone else's credit card or gotten solicitations to take (preapproved) cards that were seriously misaddressed. I would stress what the bank was doing, and it is no leap of faith to suppose they made reasonable checks and likely got it right. And if they are wrong, how likely is it that a jury will somehow be overwhelmed or unwilling to accept corrective information?

---

1. Craig R. Callen, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 156 (1995) (responding to Christopher B. Mueller).

2. 687 F.2d 1135 (8th Cir. 1982).

3. *Id.* at 1147.

4. Callen, *supra* note 1, at 156.

5. Richard B. Kuhns, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 157 (1995) (responding to Craig R. Callen).

6. *See* Posner's opinion in Agfa-Gevaert v. A.B. Dick Co., 879 F.2d 1518, 1523 (7th Cir. 1989) (stating that "All perception is inferential, and most knowledge social; since Kant we have known that there is no unmediated contact between nature and thought"). It suffices that business people would rely on customer responses.

Roger C. Park

June 20

Chris Mueller would admit performative utterances as nonhearsay not only when they are used to show their operative effect, but also when they are used for a double inference to the declarant's belief and then to the truth of the facts on which the belief is evidently based.[1]

In a recent message he gave guidance about the meaning of "performativity." He wrote:

> Like assertion itself (which the Rules do not define, but should be understood to mean intentionally expressing or communicating an idea), performativity is a broad concept that reaches all the other things people do with words. Elsewhere I have described performativity as causing things to happen, bringing into being or carrying on human relationships, or changing the positions of the declarant and others.[2]

Under those guidelines and the ones he has given elsewhere, it seems to me that any accusation of crime has a strong performative aspect (it changes the relationship of the accuser and accused). An accusation that publicly ruptured an intimate relationship would have an especially strong performative aspect. An indictment or criminal complaint would have still more octane. If a high performativity index means that an utterance is not hearsay, is an accusation not hearsay, when offered to show that the accused was guilty?

Now, I do not think Chris Mueller would advocate holding that accusations, indictments, and complaints are automatically not hearsay regardless of the circumstances. It does seem to me, however, that he is advocating a balancing approach to defining hearsay under which an utterance's performativity index is weighed against other considerations. Under that approach, accusations, indictments, and complaints would get some plus points because of their "performativity." That concerns me because I have always thought that those utterances were at the core of what rules excluding hearsay ought to protect against. Even in situations in which the constitutionalized aspect of the hearsay doctrine does not apply (for example, when the evidence is offered to exonerate the defendant by incriminating another person), I would worry about saying that the evidence is not hearsay.

I am not convinced that the fact that an utterance "does" something ought to count in favor of admitting it when it is not offered for what it does, but rather for what it "says." At any rate, performativity is a hard concept to get one's mind around. Hearsay doctrine is too complicated already. I would worry that telling jurists to weigh the performativity index against other factors would just add

---

1. Christopher B. Mueller, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 154, 155 (1995) (responding to Roger C. Park).

2. *Id.*

another layer of complexity. As Chris Mueller has written elsewhere, all words have a performative aspect,[3] so presumably this weighing would have to be done in every case.

Craig R. Callen

June 20

Professor Richard Kuhns makes one point that seems to confirm one of my criticisms of the argument for treating performative communications, which are not offered as operative language, as nonhearsay.[1]

Broadening the concept of performative speech to that extent tends to conflate the definition of hearsay with the exceptions. A good example is Dick's treatment of the computer data in the banking examples I used (as distinct from the hearsay classification of the new customer's initial statements). He says that it may be "more appropriate" to classify the data about depositors that bank employees insert into computer data bases as nonhearsay — as either performative or by analogy to nonassertive nonverbal conduct.[2] That seems to entail the conclusion that any document that might fit under the business record rule should be nonhearsay; at the least it would cover any electronic database used for commercial purposes. The analysis Professors Kuhns and Mueller use is, to that extent, very difficult to square with the current construction of the hearsay rules, and the existence of Federal Rule 803(6).

Dick is clearly correct that the bank's letters would be admissible as admissions if offered against the customer. But what if the letters are offered against a woman (unlikely to have given the new accounts an application stating that her name is "Carlos Almaden"), lessee of the apartment, to show her association with Carlos?

I believe his argument has two strings to its bow. First, the new customer's insertion of information into the name and address blanks (or communication to the new accounts officer) may not assert that the information is correct, since the applicant may not have been thinking about communicating his place of residence to anyone. This is a weak argument, as I think he recognizes. Certainly the new customer would understand the bank officer's request to be one for accurate, rather than random, information.

---

3. Christopher B. Mueller, *Incoming Drug Calls and Performative Words: They're Not Just Talking About It, Baron Parke!*, 16 MISS. C. L. REV. 117 (1995).

---

1. *See* Richard B. Kuhns, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 157 (1995) (responding to Craig R. Callen).

2. *Id.*

Second, he believes that classifying the letters from the bank as hearsay would involve "incredibly intricate analysis."[3] I suspect that people not trained in the intricacies of literalist construction of statements under the hearsay rule would have very little trouble concluding that, by posting a letter to Byron White at the Supreme Court, I am communicating to the Post Office that he receives mail there. Similarly, I doubt that one could convince laypeople that data in a bank's databases are not communications about the persons in whose files the data are placed. The intricacy of analysis only arises when one tries to reconcile treating those communications as hearsay with decisions that seem to find any way possible to exclude statements from hearsay even though those statements might be admissible under exceptions.

I do realize that it may be difficult to admit bank statements or hotel records, to show the customer's identity, under the existing exceptions, assuming one does not employ the residual exceptions. If the probative value of the letters is as high as Dick and Chris seem to believe, though, there is no reason not to use the residual exception, assuming that the prosecution has no better evidence. The residual exceptions certainly do have their flaws. In the final analysis Roger Park is correct in pointing out that the performative speech analysis complicates the definition of hearsay too much.[4] Any communication will have some performative characteristics. Addressing Dick's approach, any communication will be analogous to nonverbal non-assertive conduct in some way — if for no other reason than that the speaker is more likely to say that *X* is the case if *X* is in fact the case. It is better to leave evidence such as the bank's letters to the residual exceptions.

Christopher B. Mueller

June 20

I had hoped to address other issues, but Roger Park's penetrating and thoughtful queries[1] merit response. I hope his interest is shared, and I apologize for what might be harping too much on a theme. You are right, Roger, that I would not admit an accusation of a crime to prove the substance of the allegations in the ensuing trial. That is indeed at the core. You are right again that I would find such accusations have performative aspects. But what performative aspects sup-

3. *Id.* at 158.

4. Roger C. Park, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 160 (1995) (responding to Christopher B. Mueller).

1. *See* Roger C. Park, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 160 (1995) (responding to Christopher B. Mueller).

port in deductions about the past, and what assertive aspects can prove, differ considerably. One reason we depend on language is that it is such a rich medium that conveys information more efficiently and in greater detail than do physical behavior or performative aspects of behavior that include words.

Suppose Wife *N* goes to police/prosecutors and makes allegations about serious physical abuse by Husband *O*, specifying dates/acts. *O* is charged with battery. In doing what she did, *N* creates difficulties and tensions in the relationship (adds to them) and for *O* (who may lose livelihood and freedom). Do *N*'s statements have performative aspects? Yes. (From the fact that *N* did what is hard for spouses and is going to affect the relationship profoundly — invoking police power against the other spouse — you can conclude something untoward happened.) Would I admit *N*'s statements, in the trial of *O* for the crimes *N* charges, as nonhearsay proof that *O* committed the acts? No: Her words only prove the specific acts in their assertive aspect, as intentional claims that *O* did them.

Now suppose *N* has been stabbed to death, and *O* is charged with murder. The prosecutor thinks *O* has long behaved in a hostile and aggressive manner toward *N*; the pattern indicates intent to control, to inflict harm under some conditions, and perhaps even a growing plan to commit murder. Can the prosecutor use the prior behavior of *N* in bringing abuse charges? I would say that the performative aspect of bringing such charges would present a strong argument in favor of admitting proof that she went to authorities and signed statements charging *N* with abuse. I would not admit the statements as such, at least not over a defense objection, but would look for ways to get across to the jury that this woman went to police for help and sought to press abuse charges as a way of proving that some acts of abuse were likely committed.

In the trial of O.J. Simpson, Judge Ito let Ron Ship (then a police officer specializing in domestic violence) testify in this vein: [Question] "Without telling us what Nicole said to you on the phone, please tell us what you did as a result of that call." [Answer] "As a result of that call, I gathered together my materials on domestic abuse and went and talked to Nicole about violence in marriage." I am not sure I would have done it exactly that way, but the message got out that Nicole sought help from authorities, apparently because she was being abused by O.J. (The 911 calls were proved as excited utterances, which made them competent in their assertive aspect to prove exactly what she described. Other instances will not get in — hearsay, ambiguity, remoteness.) Finally, Roger, I do not think it is my concept of performativity that complicates things — we have to take the world as we find it. And I do not think every statement brings a performative aspect that gives judges a choice, or that performativity will make hearsay doctrine disappear or render it squishy soft with evasive potential. While all speech has performative aspects, I do not think those aspects are useful (or would support admissibility) in most cases, in light of the point to be proved. Often the performative aspects are trivial or unrelated to verbal content (or the point to be proved); often, the more general inferences possible from looking at the performative aspects of words are not useful.

Richard B. Kuhns

June 23

Craig Callen suggests that it is unwise to treat performative verbal activity as nonhearsay because such an approach "tends to conflate the definition of hearsay with the exceptions."[1] By this statement I take it he means that it is preferable to rely on an exception to the hearsay rule rather than a limitation on the definition of hearsay to find the performative activity admissible. I do not understand why that should be the case.

Both the definition of hearsay itself and most of the exceptions to the hearsay rule are based on the notion that one should exclude evidence only when there are substantial hearsay dangers. Thus, for example, nonassertive nonverbal conduct (nonhearsay), excited utterances (exception), and dying declarations (exception) are admissible largely because of the presumed absence of a sincerity problem. Similarly, the Advisory Committee's Note to Federal Rule of Evidence 801 demonstrates an intent to exclude from the definition of hearsay verbal activity that the Advisory Committee analogizes to nonassertive nonverbal conduct.[2] Analytically, it would make no difference if the Advisory Committee had included nonassertive nonverbal conduct within the definition of hearsay, crafted an exception for nonassertive nonverbal conduct, and included its comments about analogous verbal activity in the Note to that exception. In short, whether activity implicating the hearsay dangers is admissible as nonhearsay or as an exception to the hearsay rule depends on nothing more than the vagaries of the drafting process.

Craig's substantive concern, as I understand it, is that he would prefer to exclude all or most verbal activity implicating the hearsay dangers unless the activity falls within some existing exception to the hearsay rule.[3] That is the *Regina v. Kearley*[4] position and it is a defensible one. It is also a minority position among the participants in this Symposium, and as I argued in my essay, not the Federal Rules' position.[5]

If one starts with the premise, with which Craig disagrees, that some verbal activity implicating the hearsay dangers should be admissible because it is analogous to nonassertive nonverbal conduct, the critical question becomes what criteria one should use in classifying verbal activity implicating the hearsay dangers as (1) admissible or (2) admissible only if falling within one of the existing hearsay exceptions. Because the Federal Rules offer very little guidance for resolving this issue and because the variety of verbal activity is virtually infinite, it is not surprising that the discussion here has generated disagreement. The disagreement, however, is less significant than some of the rhetoric may indicate.

---

1. Craig R. Callen, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 161 (1995) (responding to Richard B. Kuhns).
2. *See* Fed. R. Evid. 801 advisory committee's note.
3. *See* Callen, *supra* note 1, at 161.
4. *See* 2 App. Cas. 228 (H.L. Eng. 1992).
5. Richard B. Kuhns, *Implied Assertions and the Hearsay Rule*, 16 MISS. C. L. REV. 139 (1995).

I suggested initially that an analytically sound way to deal with this issue was to compare verbal activity to nonverbal activity with a focus on what the declarant/actor was trying to assert. At the same time, however, I noted that both determining a declarant/actor's intent and deciding what the requisite intent should be were difficult, elusive questions. Roger Park takes a similar approach by suggesting (1) that the focus should be on whether "the declarant was aware that someone would find the declarant's words useful in inferring or remembering the [proposed fact]," and (2) expressing ambivalence about how helpful this approach might be.[6]

Chris Mueller's approach, it seems to me, is quite similar, at least to mine. His focus on the performative aspects of verbal activity is an effort to articulate criteria consistent with the Advisory Committee's Note to Rule 801 for deciding when to classify verbal activity involving hearsay dangers as nonhearsay.[7] In addition, Chris Mueller's approach (unlike Roger Park's and mine) has the benefit of directing the judge's attention to factors that are at least a bit less elusive than intent. As Roger Park said, "There never will be one [definition] that completely avoids puzzles and perplexities, especially in the world of hypotheticals."[8] Indeed, I find myself occasionally disagreeing with Roger Park's and Chris Mueller's applications of their own tests. Moreover, I am not sure to what extent their disagreements over specific cases are primarily a function of the different approaches they articulate. The fact remains, though, that they are both trying to do basically the same thing.

A possible difference between their approaches is that Chris Mueller's approach, at least as he interprets it, may tend to place fewer instances of verbal activity within the Federal Rules of Evidence's definition of hearsay than does Roger Park's, as Roger Park interprets his approach. That possibility, even if true, however, is not a good reason for suggesting, as both Craig Callen and Roger Park have, that Chris Mueller's performative activity concept should be limited to verbal conduct involving no hearsay dangers.[9] Such a suggestion in Craig Callen's case is simply a reiteration of the English view that all or most verbal activity implicating hearsay dangers should always be classified as hearsay. In Roger Park's case, the suggestion appears to be simply a manifestation of a disagreement about the appropriate contours of the hearsay doctrine as applied to verbal activity.

If the ultimate goal is to find an approach to implied assertions that is consistent with the Federal Rules, I believe a reasonable argument can be made for adopting a relatively narrow view of the kinds of verbal conduct implicating hearsay dangers that should be classified as nonhearsay: Although the Advisory

---

6. Roger C. Park, *The Definition Of Hearsay: To Each Its Own*, 16 MISS. C. L. REV. 125, 131 (1995).

7. *See* Christopher B. Mueller, *Incoming Drug Calls and Performance Words: They're Not Just Talking About It, Baron Parke!*, 16 MISS. C. L. REV. 117 (1995).

8. Park, *supra* note 6, at 132.

9. *See* Callen, *supra* note 1, at 161; Roger C. Park, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 160 (1995) (responding to Christopher B. Mueller).

Committee's Note makes it clear that some verbal activity implicating hearsay dangers should be excluded from the definition of hearsay,[10] the lack of elaboration in the Advisory Committee's Note coupled with the general exclusionary thrust of the hearsay rule suggests that one should be reluctant to exempt verbal conduct implicating hearsay dangers from the definition of hearsay. On the other hand, the Advisory Committee's liberal approach to exempting nonverbal conduct from the definition of hearsay ("burden upon the party claiming that the intention existed")[11] coupled with the Committee's drawing the analogy between nonverbal conduct and implied assertions[12] suggests that one need not take a narrow view of the extent to which implied assertions should be exempted from the definition of hearsay.

Either Chris Mueller's elaboration of performative conduct or Roger Park's elaboration of assertion could be applied to accommodate either view of the extent to which implied assertions should be nonhearsay. If my sense is correct that Roger Park's approach as he interprets it will classify more evidence as hearsay than Chris Mueller's approach as he interprets it, Roger Park's approach may be a slightly better vehicle for achieving a narrow scope in the category of nonhearsay implied assertions. The case for taking a narrow view of the extent to which implied assertions should be exempted from the definition of hearsay, however, is far from compelling. Moreover, I am persuaded that Ron Allen, Rich Friedman, and Eleanor Swift are on the right track in calling for a major liberalization and/or reconception of the hearsay rule.[13] One of the significant benefits of Chris Mueller's approach is that it tends to move the hearsay doctrine in the direction that their views would take it.

Craig R. Callen

June 23

This is my response to Dick Kuhn's message. Dick wrote:

> Craig Callen suggests that it is unwise to treat performative verbal activity as nonhearsay because such an approach "tends to conflate the definition of hearsay with the exceptions." By this statement I take it he means that it is preferable to rely on an exception to the hearsay rule rather than a limitation on

10. FED. R. EVID. 801 advisory committee's note.
11. *Id.*
12. *Id.*
13. Ronald J. Allen, *Rules, Logic, and Judgment*, 16 MISS. C. L. REV. 61 (1995); Richard D. Friedman, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 87 (1995) (responding to Ronald J. Allen and Alex Stein); Eleanor Swift, *Relevance and Hearsay in Regina v. Kearley*, 16 MISS. C. L. REV. 75 (1995).

> the definition of hearsay to find the performative activity admissible. I do not understand why that should be the case.[1]

My point is two-fold. Dick's insightful synthesis of his approach with Chris Mueller's performativity analysis does not seem to fit with the Federal Rules' approach. Under his analysis, routine entries of computer data in business records (and perhaps all business records) would be nonhearsay. In light of Rule 803(6), it is extremely doubtful that the drafters or Congress intended Rule 801's definition of hearsay to treat business records as nonhearsay.

The second point has to do with the nature of rule systems. There is a mathematical proof (albeit in relatively informal form) that shows that a system of rules composed of a general rule, subject to exceptions, which are themselves subject to exceptions, is a very efficient way of modeling a decision-making task, greatly superior to reliance on a flexible general standard, such as Rule 403, standing alone.[2] The hearsay rule and its exceptions are a system comprised of a general rule with exceptions, etc. Dick's synthesis implies that Rule 803(6) substantially duplicates the definition of hearsay. I suspect that the synthesis might treat statements within a number of exceptions as performative, such as those which satisfy 803(4) - (6), (8), (9), (11) - (16) and (21) - (23). (At least it is not clear that the statements within such exceptions are not performative in their sense.) That degree of duplication would make the hearsay rules a less effective means of conveying information about the decision-making process that Congress or the Court expects trial judges to follow. My point is not that statements such as those in *Regina v. Kearley*[3] should never be admissible. It is rather, that, if we classify those statements as nonhearsay, and make the rules a worse device for conveying information, we impose a lot of unnecessary costs on the system and the parties. Dick said:

> Craig's substantive concern, as I understand it, is that he would prefer to exclude all or most verbal activity implicating the hearsay dangers unless the activity falls within some existing exception to the hearsay rule. That is the *Kearley* position and it is a defensible one. It is also a minority position among the participants in this Symposium, and as I argued in my essay, not the Federal Rules position.[4]

Three points in response:

1. I don't have any difficulty admitting statements under residual exceptions, although I might prefer that the exceptions were tightened up a bit, to deal with the problems Myrna Raeder and others have pointed out. My reasons for preferring to treat the question of admissibility under the exception are those I gave in the prior discussion.

---

1. Richard B. Kuhns, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 164 (1995) (responding to Craig R. Callen).
2. J. HOLLAND ET AL., INDUCTION: PROCESS OF INFERENCE, LEARNING, AND DISCOVERY 66-67 (1986).
3. 2 App. Cas. 228 (H.L. Eng. 1992).
4. Kuhns, *supra* note 1, at 164.

2. John Jackson said, I believe, that he had the impression that most American academics agree with *Kearley*.[5] I doubt that that is the case, at least if the prosecution offers multiple calls. Most would consider it hearsay, I think. If the issue is the question posed to the Lords, whether a single call would be hearsay, I think a majority of American academics might agree with the Lords. Finally, although the result of my position parallels *Kearley*, my reasons (heavy reliance on cognitive science and Gricean pragmatics) are shared by only one other scholar at this point, Professor Ron Shapira of Tel Aviv. So the position is *really* in the minority.

3. As I believe I said in response to Bob Mosteller's comment, I really doubt that the Note to Rule 801(a) can be read to support a literalist interpretation of variants of the word "assert" without treating the plain meaning of the words as governed wholly by the McCormick/Wigmore side of the debate over the common law definition of hearsay. And, even if one adopts such a plain meaning argument, it does not fit what we know about the process of communication in the empirical world. Quoting Dick again:

> I suggested initially that an analytically sound way to deal with this issue was to compare verbal activity to nonverbal activity with a focus on what the declarant/actor was trying to assert. At the same time, however, I suggested that both determining a declarant/actor's intent and deciding what the requisite intent should be were difficult, elusive questions. Roger Park takes a similar approach by suggesting (1) that the focus should be on whether "the declarant was aware that someone would find the declarant's words useful in inferring or remembering the [proposed fact]," and (2) expressing ambivalence about how helpful this approach might be.[6]

Roger's test here seems to me to have the same result as my test, to which he refers in his essay. The only difference is Roger's treatment of *Wright v. Tatham*.[7] Dick seems, in his comment and his essay, very reluctant to allow the hearsay classification of implied assertions to rely heavily on the court's view of whether the declarant intended to convey the proposition for which the utterance is offered. The difficulty with Dick's argument is that the propositions which an utterance conveys depend on the utterer's intent, insofar as the circumstances tend to indicate that intent. If someone were to ask me if I thought Robert Dole was dangerously liberal, I might say "Oh, sure," in jest. The circumstances (whether in this discussion, or from my tone of voice in conversation) manifest my intent to convey the exact opposite of the typical meaning of the words "Oh, sure." The audience would normally infer my disagreement with the criticism of Dole without even reflecting.

Questions of intent are unavoidable when determining whether an utterance positively communicates a proposition. They may be difficult. Employing either

---

5. John Jackson, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 185, 186 (1995).

6. Kuhns, *supra* note 1, at 165.

7. *See* 112 Eng. Rep. 488 (K.B. 1837).

(i) the criterion for intent that I called general intent in the Foreword,[8] or (ii) using the intent criterion that Chris Mueller and Laird Kirkpatrick use in their book,[9] will greatly simplify the problems. It is, concededly, unlikely that any hearsay definition will resolve all the problems. If we ignore questions of intent, though, we have abandoned any real effort to make the distinction between hearsay and nonhearsay fit the process of inference from communication in the empirical world.

Richard B. Kuhns

June 27

This message contains a response to Craig's comments on my previous message. First, however, a general observation about the utility of traditional hearsay analysis:

Commentators who want to limit the extent to which implied assertions are characterized as nonhearsay sometimes focus on the fact that implied assertions may have substantial hearsay dangers other than insincerity. These observations are correct, but in terms of traditional hearsay analysis they miss the mark. Nonassertive nonverbal conduct may have substantial hearsay dangers other than insincerity. For example, as I suggested in my earlier discussion of the sea captain hypothetical, the captain, knowing the ship was unseaworthy, may have been responding to a medical emergency; the captain may not have seen the poor condition of the ship; or the captain, by the time of embarking, may have forgotten the poor condition of the ship.[1] Nonassertive nonverbal conduct nonetheless is a category of evidence that receives nonhearsay treatment under the Federal Rules.[2]

Traditional hearsay analysis applies the same type of categorical approach to verbal assertions that clearly falls within the definition of hearsay. No matter how free from hearsay dangers a statement appears to be, once it is classified as hearsay it will be inadmissible unless it happens to fall within one of the exceptions. (The Federal Rules of Evidence residual exceptions provide some flexibility. There is disagreement, however, about how broadly to interpret those exceptions. Unfortunately, in my view, the legislative history suggests that a relatively narrow interpretation is appropriate.)

---

8. Craig R. Callen, *Foreword to the First Virtual Forum, Wallace Stevens, Blackbirds and the Hearsay Rule*, 16 MISS. C. L. REV. 1 (1995).

9. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE § 8.12 (1995).

---

1. Richard B. Kuhns, *Implied Assertions and the Hearsay Rule*, 16 MISS. C. L. REV. 139, 142 (1995).

2. FED. R. EVID. 801.

Similarly, once a hearsay statement falls within an exception, the hearsay rule will not be a bar to admissibility despite the presence of substantial hearsay dangers. For example, excited utterances or dying declarations, even if sincere, may have substantial perception problems; state of mind declarations, even if apparently free from perception and memory problems, may have substantial sincerity problems.

Just as there is nothing about nonassertive nonverbal conduct that tends to ensure an absence of hearsay dangers other than insincerity, there is nothing about excited utterances that tends to ensure the absence of hearsay dangers other than insincerity (and perhaps poor memory); there is nothing about dying declarations that tends to ensure the absence of hearsay dangers other than insincerity; and there is nothing about state of mind declarations that tends to ensure the absence of hearsay dangers other than misperception and poor memory. In short, in each of these situations the classification that precludes the hearsay rule from being a bar to admissibility does not ensure that all hearsay dangers will be minimal; and in some instances the hearsay dangers may be substantial.

To be consistent with this traditional mode of hearsay analysis one should ask (as the Advisory Committee suggests and as I argued in my essay) the following question about implied assertions: Does the fact that the evidence is being offered to prove something other than what the declarant is apparently intending to assert tend to ensure the absence of a sincerity problem in the same way that the nonassertiveness of apparently nonassertive nonverbal conduct tends to ensure the absence of a sincerity problem?[3] If the answer to this question is yes, the evidence should be nonhearsay despite the presence of hearsay dangers other than insincerity.

The significant insight of those who find serious hearsay dangers other than insincerity in some implied assertions is that the traditional mode of hearsay analysis is not very satisfactory. As I have just indicated, however, the inadequacies of the traditional mode of analysis are not limited to the implied assertion context. Furthermore, there is nothing about the manner in which traditional, categorical hearsay analysis applies to implied assertions that makes it less satisfactory in that context than in other contexts. If one is dissatisfied with the traditional analysis (which I think we all should be), the answer is not to tinker with implied assertions. Rather, the answer is either to take the type of approach to analyzing the admissibility of hearsay that Eleanor Swift advocates[4] or to go further, as Ron Allen and Rich Friedman advocate, and dismantle the hearsay rule.[5]

---

3. *See* Kuhns, *supra* note 1, at 139.

4. *See* Eleanor Swift, *Relevance and Hearsay in Regina v. Kearley*, 16 MISS. C. L. REV. 75 (1995).

5. *See* Ronald J. Allen, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 91, 92 (1995) (responding to Richard D. Friedman); Richard D. Friedman, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 94 (1995) (responding to Ronald J. Allen and Alex Stein).

Now to the specific responses to Craig:

As a result of my failure to address the business records point that Craig raised in his reply to my initial comment,[6] I think he has misunderstood my position. Except in what I regard as a trivial sense, my approach to implied assertions does not conflate the definition of hearsay with the business records exception (in Craig's bank card hypothetical) or with other exceptions. For example, as the Federal Rules seem clearly to provide, specific assertions in business records offered to prove the truth of those assertions would be hearsay under my approach. These hearsay statements, as Craig observed, may be admissible pursuant to the business records exception. The communications sent to the customer in Craig's hypothetical would never fall within the business records exception. Because they were sent to the customer, they cannot qualify as records kept in the ordinary course of the bank's business. The bank employees' activity in processing the records, however, is unlikely to be intended by the employees as an assertion of any particular fact in the records.

What the preceding analysis demonstrates is merely that there is more than one way to prove the customer's address in Craig's hypothetical. The first way is to introduce into evidence the bank's records as business records. This approach would require, first, relying on the admissions exemption to get over the hearsay hurdle from the customer to the bank employee(s) and, second, laying the foundation for the business records exception to get over the hearsay hurdle from the bank employee(s) to the actual record. In terms of hearsay dangers, the primary justification for admitting business records is that the combination of routine recording and reliance by the business tends to ensure the sincerity of the records. To a lesser extent these factors may minimize perception problems. In addition, the time requirement of the business records exception tends to minimize memory problems.

The second way to prove the customer's address is to introduce the data sent from the bank to the customer. This approach would also require relying on the admissions exemption to get over the hearsay hurdle from the customer to the bank employees. The data sent to the customer, although not a business record, would be nonhearsay on the ground that the production of that data by the bank employees, like the production of the letters in *Wright v. Tatham*,[7] was the kind of verbal activity that the Federal Rules exempt from the definition of hearsay. In terms of hearsay dangers, the primary justification for admitting evidence of the bank employees' activity is the likely absence of a sincerity problem due to the fact that the employees were probably not intending to assert, "Hey, everybody, I want you to know that Customer lives at (whatever the address is)."

Of course, the lack of an intent to assert the customer's address is not the only thing that tends to ensure the sincerity of the bank employees' activity. In addi-

---

6. Craig R. Callen, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 161 (1995) (responding to Richard B. Kuhns).

7. 112 Eng. Rep. 488 (K.B. 1837).

tion, the same situational factors that tend to ensure the reliability of business records are present: the routine nature of the activity, the relative contemporaneity of the employees' activity, and the bank's reliance on its own records of identical content. Pursuant to the traditional, categorical approach to hearsay that I described above, however, these added guarantees of trustworthiness are irrelevant — just as in the sea captain hypothetical it is irrelevant to the nonhearsay classification of the evidence whether the sea captain had good eyesight, may have forgotten how unseaworthy the ship was during a long time lapse between inspection and embarking, or may not have embarked at all. Regardless of these variables, the captain was probably not intending to assert that the ship was seaworthy, and that is what counts — and all that counts — for hearsay purposes under the Federal Rules. Similarly, for hearsay purposes all that matters with respect to the bank employees under a traditional hearsay analysis is whether they were intending to assert what the customer's address was. (In either case, the variables may become important in determining whether Federal Rule of Evidence 403 should preclude admissibility.)

A third possible route to admissibility in the bank card hypothetical would be to rely on the analysis in (2) above, but to utilize bank records rather than the data sent to the customers. This possibility may be what Craig has in mind when he speaks of conflating the definition of hearsay with the exceptions to the hearsay rule.[8] I see no reason to be concerned about such a conflation, however.

First, I doubt that this type of situation will often arise. A litigant always has an incentive to present the strongest possible evidence. Because, in my view, the conditions required for the business records exception tend to provide stronger circumstantial guarantees of trustworthiness than the mere likelihood that the employees were not trying to assert or communicate the customer's address, I suspect that a litigant's first choice would be to use the bank's records and to lay the appropriate business records foundation. Second, and more fundamentally, I see no reason to be troubled by the fact that there are several routes to proving the customer's address in the bank card hypothetical. There frequently will be more than one way to prove a particular fact. For example, one may prove a person's presence at the scene of a crime with fingerprint evidence or with eye-witness identification testimony. Even when one is dealing with a single piece of evidence there may be more than one route to admissibility. For example, with a writing, one may be able to lay the foundation for either the business records exception or the past recollection recorded exception (or both); a statement may be both an admission and a declaration for the purposes of medical treatment or an excited utterance and a present sense impression (or even all four).

There may occasionally be a good reason to foreclose to a litigant one means of proof because another means happens to exist. For example, some type of best evidence rule approach to hearsay arguably would be appropriate for available declarants, at least in the context of concerns over a criminal defendant's confrontation rights. That issue is beyond the scope of this Comment.

---

8. *See* Callen, *supra* note 6, at 161.

Craig also said that I seemed reluctant to rely on a court's assessment of the declarant's intent in classifying implied assertions as hearsay or nonhearsay.[9] On this point, I admit some ambivalence. As I argued in my initial essay, the appropriate approach under the Federal Rules is to compare implied assertions with nonassertive nonverbal conduct, and analytically the key to such a comparison is to focus on what the declarant/actor was intending to communicate.[10] Indeed, that is the focus of my discussion of why the bank employees' activity should be nonhearsay.

At least for me the question of intent is a relatively easy one to answer in the bank card hypothetical, as it is in *Wright*. In other cases, however, I find that the question is more difficult. As I have pointed out, (1) not only is it often hard to ascertain actual intent, but (2) it is also unclear what the requisite intent standard should be: How direct or immediate or in the forefront of one's mind must the proposition that the evidence is offered to prove be in order to classify the evidence as hearsay? In light of these difficulties — particularly the latter one — I am skeptical that a focus on intent will promote consensus or consistency in dealing with implied assertions.

Craig R. Callen

July 10

This is a word on behalf of a non-traditional understanding of hearsay, one I've discussed more fully elsewhere.[1]

I justify (or rationalize) this otherwise cheap self-promotion in two ways. First, I'm not sure whether Dick Kuhns was commenting on that work in his last message.[2] In that message, he said that those who are dissatisfied with traditional analysis should not "tinker with implied assertions" but rather should use the sort of approach that Eleanor Swift uses, or dismantle the rule as Ron Allen advocates.[3]

I would have thought that comment directed to my analysis of the role of intent in analysis of implied assertions had Dick not said in his initial essay that he was

> aware of nothing in either the Federal Rules of Evidence or the literature of implied assertions that grapples with the question how direct or immediate or

9. Callen, *supra* note 6, at 161-62.
10. *See* Kuhns, *supra* note 1, at 141-42.

1. *See* Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43 (1994).
2. *See* Richard B. Kuhns, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 169 (1995) (responding to Craig R. Callen).
3. *Id.* at 170.

> conscious the intent to assert the proposition that the evidence is being offered to prove should be in order to classify the evidence as hearsay.[4]

That indicates that he might not have viewed my article the way I did, or, alternatively, might not have meant to refer to it in his last comment. In either event, it indicates my ideas may not have seeped into the collective consciousness. (On the other hand, his reliance on traditional theory in his last comment may have been in response to my mention of Gricean analysis in earlier messages.)

Second, the analysis of intent also relates to a point Margaret Berger made about the officers' interaction with callers in *Regina v. Kearley*,[5] and indirectly to Nancy King's query about the status of implied assertions under the Confrontation Clause.[6]

Communication, particularly oral communication, depends heavily on a set of conventions, known in a number of disciplines as Grice's maxims. Without such simplifying strategies, we could not successfully convey the amount of information that our communications convey with the limited number of words that we use. Those maxims are (i) that the speaker should be neither more nor less informative than necessary; (ii) the utterance should relate to the purpose of the parties to the communication; (iii) the speaker should be perspicuous: orderly, brief, and clear; (iv) the speaker should try to make her contribution true.[7] As far as I am aware (and if I can rely on criteria from another area of controversy in evidence) the theory is generally accepted in a number of disciplines, testable and confirmed by empirical research.

Margaret Berger made the point that the officers in *Kearley* could have engaged in conduct that caused the callers to utter implied assertions.[8] I can base a good illustration of the effect of the maxims on her point. An officer who answered the door of Kearley's flat, and asked the caller "What do you want?" would be quite likely to receive a response such as "Is Chippie here? I need to buy some drugs," if (i) the caller had merely heard Kearley was dealing, (ii) believed Kearley knew where drugs were available (in *Kearley*, Kearley's wife and their lodger pleaded guilty of unlawful possession and he argued that they were the ones dealing), or (iii) had purchased drugs in the past from Kearley. In any of those cases, the response would conform to the maxims by being brief and to the point. Since the officer asked what the caller wanted, sources and contents of the caller's beliefs would be, in the caller's eyes, relatively irrelevant to the apparent purposes of the person answering the door.

Nevertheless, the caller would wish the person answering the door to infer that the caller had an adequate basis for believing that Kearley could be of help in the

---

4. Richard B. Kuhns, *Implied Assertions and The Hearsay Rule*, 16 MISS. C. L. REV. 139, 147 (1995).

5. *See* 2 App. Cas. 228 (H.L. Eng. 1992).

6. *See* Margaret A. Berger, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 103 (1995) (responding to Nancy J. King); Nancy J. King, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 100 (1995).

7. PAUL GRICE, STUDIES IN THE WAY OF WORDS 74 (1989).

8. Berger, *supra* note 6, at 104.

caller's effort to obtain drugs. (Even if one of the callers wished to deceive the person who answered the door or phone, the deceiver would wish his or her audience to infer that the deceiver had an adequate reason to believe Kearley had access to, or information about, drugs.) Police operations such as the one in *Kearley* may well be particularly fruitful sources of utterances that might be classed as implied assertions. It seems likely that, unless an undercover officer wanted to (i) take the risk of making a caller very suspicious by specific or numerous questions, or (ii) detain the caller for questioning, most efforts that the officer would make to obtain information from the caller would result in implied assertions by the caller. (Additionally, as repeat players, police are likely to know if implied assertions are admissible and tactically helpful to the prosecution, and, if so, to strive to obtain such evidence.)

Communication not only depends on the conventions, but on the parties' recognition and reliance, implicit or explicit, upon them. There is, accordingly, one core danger, of which the classic four dangers are aspects (but not aspects that can exist in isolation from each other). A speaker, writer, or communicative actor implicitly claims compliance with Grice's maxims (or cooperation in Gricean terms) in the act of communication. The factfinder's difficulty in assessing the accuracy of that claim is the central danger in evaluating hearsay evidence. The speaker intends to convey conformity with the maxims, and the propositions such conformity entails, in the same way that one intends to follow the rules of baseball when playing. A base runner, for example, may not reflect on any particular rule or rules when deciding to continue running to second base after touching first, and may not even specifically or consciously follow any rule. Nevertheless, in any real sense, the player intends to follow the rules.

Under this theory, the factfinder's task in evaluation of implied assertions differs not from the evaluation of express assertions (each turns on measuring the extent of the speaker's compliance with the implicit assurance of cooperation) but rather from the evaluation of non-communicative conduct, classically known as non-assertive nonverbal conduct. Implied assertions are not necessarily more reliable than express assertions — their probative value is equally dependent on the accuracy of the speaker's implicit claim. In contrast, non-communicative conduct makes no implicit claim of cooperation to the person who perceives the conduct. Accordingly, the inferential problems it poses differ from those communicative conduct might raise.

The point of treating implied assertions as hearsay is not to make them inadmissible, any more than the goal of including electronic recordings in "writings" in Rule 1001 is to make electronic recordings inadmissible. Nor would the point of treating implied assertions as subject to confrontation analysis be to make them inadmissible. Instead, it is simply to set up a system that treats similar inferential tasks, and thus similar evidentiary problems, in a coherent and consistent fashion, in light of implied assertions' role in inference at trial. Similarly, I do not think that anyone believes that the conclusion that a statement satisfies the conditions for an exception entails the conclusion that the hearsay admitted presents no danger. Instead, I would think it more likely that the basis for the exceptions (setting aside Rules 803(7) and (10)) is that the facts which satisfy the

exceptions show that the statement is nevertheless worth evaluating on the data the court has in the particular case, even though some degree of inferential risk may be present.

Dick Kuhns made an argument under the conventional theory that might be used as a response to my distinction between implied assertions and non-communicative conduct.[9] One can argue that neither implied assertions nor non-communicative conduct pose a sincerity risk, in that a speaker who meant to deceive by a statement or action would articulate a false proposition. As Chris Mueller pointed out in an earlier article, this assumes that deceivers would not attempt to deceive by indirection, which is a dubious empirical proposition at best. Professor Imwinkelried argues in another article that the common law's concern with the sincerity danger was misplaced, and in any event, the structure of the Federal Rules reflects concern with other dangers as well.

Finally, it is true that the letters in the hypotheticals that Chris, Dick and I have been kicking around, and the callers' utterances in *Kearley*, would not be admissible under traditional exceptions — indeed, that is why I put the banking hypothetical to Chris in response to the discussion of Singer and performative speech in their new hornbook. But classifying the letters or the *Kearley* statements as nonhearsay, (on the theory that they are worthwhile evidence that need not fit within traditional exceptions to be admitted) simply exempts such evidence from two requirements of the residual exceptions. Those requirements are: (i) notice and (ii) that such evidence be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." The latter requirement looks a good deal like the sort of best evidence device that Dick showed some willingness to consider favorably in his last comment.[10] The notice requirement does not seem sufficiently onerous to require the creation of trapdoors in Rule 801(a) or (c). In a case like *Kearley*, it would merely operate as a minimal version of the restraints on such evidence that Margaret Berger and John Jackson have advocated:[11] it would require, for example, the prosecution to give notice before offering evidence such as that which the prosecution offered in *Kearley*.

---

9. Kuhns, *supra* note 2, at 169.

10. Kuhns, *supra* note 2, at 172.

11. Margaret A. Berger, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 99 (1995) (responding to Alex Stein); John Jackson, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 104 (1995).

Richard B. Kuhns

July 12

Direct assertions, implied assertions, and nonassertive nonverbal conduct all require the factfinder to make similar inferences. Only direct assertions are clearly hearsay, however, and nonassertive nonverbal conduct is not hearsay. The extent to which implied assertions should be hearsay depends — in my view and, I think, in Craig Callen's view — on comparing relevant similarities between implied assertions, direct assertions, and nonassertive nonverbal conduct.

Craig places heavy emphasis on communicative intent to classify implied assertions as hearsay, even when the verbal conduct is offered to prove unspoken points.[1] In his Vanderbilt article he correctly points out that implied assertions are analogous to garden variety hearsay (and unlike nonassertive nonverbal conduct) in that the speaker in both cases is trying to communicate something.[2] As a result of these common communicative aspects (which, in his terms, require that the factfinder "make inferences about the speaker's goals and implicit assurance of the statement's utility and . . . evaluate the communication in that light"),[3] Craig concludes that (almost) all implied assertions, including the letter writing in *Wright v. Tatham*,[4] should be hearsay.[5]

I believe that a more appropriate analogy is between implied assertions and nonassertive nonverbal conduct. The latter are by definition nonhearsay and the former should be as well when the absence of an intent to assert the proposition that the evidence is offered to prove tends to eliminate the danger of insincerity. The Advisory Committee Note's reference to verbal conduct seems to support this view, although the Note is somewhat cryptic and could be interpreted in other ways.[6] I agree with Craig's observation in the Vanderbilt article that there is no express indication of congressional intent on the subject at hand.[7]

In terms of which approach is preferable, my rhetorical question is this: In view of (1) the strong analogy between nonassertive nonverbal conduct and some implied assertions and (2) the fact that substantial hearsay dangers can inhere in both nonassertive nonverbal conduct and statements falling within hearsay exceptions, why should one be so anxious to classify (almost) all implied assertions as hearsay? In order to answer that question affirmatively, it seems to me one must accept two propositions. First, the risk that the factfinder may not be able to evaluate accurately the relevant communicative aspects of implied assertions is so great that even implied assertions with minimal insincerity dangers

---

1. Craig R. Callen, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 173, 174 (1995) (responding to Richard B. Kuhns).
2. Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43 (1994).
3. *Id.* at 92.
4. *See* 112 Eng. Rep. 488 (K.B. 1837).
5. Callen, *supra* note 2, at 82.
6. *See* FED. R. EVID. 801 advisory committee's note.
7. Callen, *supra* note 2, at 82 n.175.

should be inadmissible unless they fall within an existing exception to the hearsay rule. Second, the existing exceptions to the hearsay rule provide an adequate, reasonably coherent approach to the admissibility of declarations with hearsay dangers. I do not believe that either proposition is sound.

Laird C. Kirkpatrick

July 12

I apologize for entering this discussion so late, but I just returned from Japan where I have been since the papers were initially distributed. It is interesting to see such diversity of opinion about how *Regina v. Kearley*[1] would be decided under the Federal Rules of Evidence, and the even broader range of views about how evidence law should treat implied assertions. The range of thought expressed (from abandoning the hearsay rule to expanding the definition of hearsay to include most evidence dependent on the credibility of the declarant or actor) suggests that the Federal Rules of Evidence drafters adopted a middle-of-the-road position in limiting hearsay to verbal assertions or nonverbal conduct "intended as an assertion." Because the Advisory Committee's Note says that "nothing is an assertion unless intended to be one,"[2] Federal Rule of Evidence 801 gives us a hearsay definition that necessarily depends on the intent of the declarant. As several contributors to this Symposium have discussed, the problem with this approach is that it is often difficult for courts to determine precisely what the declarant intended to assert, or (as Richard Kuhns perceptively noted) how conscious that intent must be.[3]

Yet we should not overestimate the difficulty of this issue as compared to the questions that arise under other possible formulations of the hearsay standard. Courts under modern codes already have experience in using an intent standard to draw the line between nonverbal conduct that is hearsay (because assertive) and conduct that is not. Arguably, it is not significantly more difficult to use the intent standard to determine when verbal conduct is hearsay. (It is true that for nonverbal conduct, the Advisory Committee simplified the administration of the rule and tipped the balance in favor of admissibility by placing the burden on the objecting party to prove that an assertion was intended.)[4]

The issue I would like to pursue, using hypotheticals from this Symposium, is whether the concept of performativity can assist courts in determining whether verbal conduct offered to prove what the speaker or actor apparently believes is hearsay. (I am deliberately avoiding use of the term "implied assertion," because

1. 2 App. Cas. 228 (H. L. Eng. 1992).
2. FED. R. EVID. 801 advisory committee's note.
3. *See* Richard B. Kuhns, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 169, 170 (1995) (responding to Craig R. Callen).
4. FED. R. EVID. 801 advisory committee's note.

under Federal Rule of Evidence 801(a) an assertion is defined by the Advisory Committee's Note as an "intended"[5] assertion — and in applying Federal Rule of Evidence 801 the communicative intent of the declarant is often the exact matter at issue.)

The fundamental concept is this: It is a mistake to view words and conduct as two distinct categories for purposes of hearsay analysis. Words are a form of conduct. It is more useful to view words in their assertive aspect and nonassertive conduct as occupying opposite ends of the spectrum comprised of human behavior. Sometimes the words in their assertive aspect dominate, in light of the point to be proved, and we have no problem classifying the words as assertive (hence possibly hearsay). Other times the assertive aspect is incidental or unimportant, and the behavioral aspect of what the person did is far more important in light of the point to be proved. In the mixed words/conduct cases, the question is whether the evidence is closer to one end of the spectrum or the other. Although the degree of performativity does not conclusively resolve whether the evidence is hearsay, it can be a useful and easily applied criterion for courts to evaluate. Consider the following examples:

1. If the government wishes to prove that Carlos Almaden resides in Apt. 412, it would clearly be hearsay for an FBI agent to testify that the apartment manager told him Almaden lived in Apt. 412. It would clearly not be hearsay for the FBI agent to testify that he gave the apartment manager a package for Almaden, the manager agreed to deliver it, and then the agent surreptitiously followed him and watched him deliver it to Apt. 412. What if the evidence is that after accepting the package from the agent the manager wrote a note on it for one of his employees "Deliver to Apt. 412." Is this act of addressing more like the verbal assertion (and hence hearsay) or more like the actual act of delivery (and hence not hearsay)? I would argue it is more like the latter.

2. David Seidelson posed the hypothetical of proving that Dean was drunk when he drove away from a party by testimony about the words and conduct of Jones, who had ridden with Dean to the party.[6] It would clearly be hearsay for *W* to testify that Jones told her: "I'd rather walk home than ride with Dean. He's stinking drunk." But it would not be hearsay for *W* to testify that she saw Jones walk home. What about testimony by *W* that she observed Jones decline Dean's offer of a ride and instead call a cab? Is this more like a verbal assertion or a nonassertive act? Again, I would argue it is more like the latter.

3. What about the facts of *Kearley* itself? Clearly it would be hearsay for a police informant to testify that he was told by several people in the neighborhood that "Kearley is a drug dealer." But it would not be hearsay to offer evidence that several people came to the door while undercover police officers were there and after paying large amounts of cash walked away with packages supposedly containing drugs left for them by Kearley but which actually were empty. (This

---

5. *Id.*

6. David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Continuing Quandary for Federal Courts*, 16 MISS. C. L. REV. 33, 44 (1995).

would be powerful evidence that they had bought drugs from Kearley before and trusted him enough that they didn't even need to open the packages.) What about the attempts to purchase drugs by the various callers and visitors in the actual case? Arguably such verbal conduct is closer to the act of making a purchase than to an assertion about Kearley's activities, which is why most United States courts admit such evidence (often expressly characterizing the attempted purchaser's activity as conduct not an assertion).

4. Finally, Alex Stein suggests in his essay that testimony by *W* that she observed *A* and *B* greet each other should be admitted as nonhearsay to prove acquaintance between *A* and *B*.[7] I agree, partly because of the performative nature of the activity. But performativity is only one factor to be considered and does not resolve whether evidence is hearsay in all cases. Sometimes the assertive aspects of a performative act predominate thereby requiring hearsay treatment. For example, even though a social introduction ("Sandra, I'd like you to meet Arthur") is performative in that it brings two people together and invites further conversation between them, proving the introduction in order to establish the name of the person introduced is likely to depend heavily on the assertive content of the words of introduction (in effect, the speaker says "this person is Arthur"). The performative aspect would not suffice to prove the name, and the hearsay doctrine would apply.

Ronald J. Allen

July 12

Colleagues,

How much weight do the phone calls in *Regina v. Kearley*[1] deserve? If anyone has the audacity to answer that question, I will ask the person to explain how he or she knows. Second, how do we know, whatever weight the phone calls deserve, whether the jury will over or under value it? If we do not know the answers to these questions, how can we keep such evidence out of the process designed to determine what actually happened at the time in question? Note, by the way, that we do not know these answers applied to virtually any evidentiary proffer at trial. That, in large measure, is why we have a trial. If the evidence in *Kearley* looks pretty much like run of the mill evidence, it should be admitted, it seems to me.

---

7. Alex Stein, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 55, 57 (1995) (responding to David E. Seidelson).

---

1. 2 App. Cas. 228 (H.L. Eng. 1992).

Eleanor Swift

July 21

What do the various definitions of hearsay discussed in this Forum require of judicial decisionmaking? A judge's competence to apply the definitions ought to figure in our analysis. For now, I want to comment on the definition proposed by Chris Mueller and Laird Kirkpatrick that embraces a concept they call "performative" speech.[1] As I understand that definition, where speech is sufficiently "performative," although not "operative," it should be non-hearsay even though relevant for the truth of the beliefs of the speaker. Because this concept has captured some attention in this Forum, I think it important to try to capture the meaning of it as well.

Roger Park urged Chris Mueller to "set forth a definition telling us what 'performative' means."[2] Roger agrees, I think, with Chris' point that most speech both asserts things and does things. Roger sees that it will be difficult for judges to grapple with the task given to them by Mueller and Kirkpatrick — the task of differentiating between speech which should be treated as an assertion (and be treated as hearsay) and speech which should be treated as performative (and be treated as non-hearsay). As such, Roger must think that a definition will make judges' tasks easier (or clearer).

Chris responded that performativity exists in speech when speech is "causing things to happen, bringing into being or carrying on human relationships, or changing the positions of declarant and others."[3] I doubt that this definition is specific enough for Roger because, again, most speech between people probably includes such performativity. However, Chris has further elaborated the concept, although not exactly in definitional form.

In his essay, Chris says (in effect) that judges will be asking the right question when they assess the importance of the performative aspect of speech by looking at: (1) what the speaker is trying to accomplish by speaking, (2) what motivates the speaker's behavior, and (3) how likely it is that he would do what he is doing if the point to be proved were not so.[4] Perhaps this can be boiled down further in definitional terms to (1) an assessment of the speaker's intent (does he care more about communicating something or doing something), (2) an assessment of the degree of reliance involved (why does he care), and (3) an assessment of the risk of being wrong (would he do this if the point to be proved were not so). If these are the right assessments, the performativity test is like an intent test (does the speaker really care about communicating, thus affecting the sincerity risk) plus a

---

1. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE (1995).

2. Roger C. Park, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 152, 154 (1995) (responding to Christopher B. Mueller).

3. Christopher B. Mueller, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 154, 155 (1995) (responding to Roger C. Park).

4. Christopher B. Mueller, *Incoming Drug Calls and Performative Words: They're Not Just Talking About It, Baron Parke!*, 16 MISS. C. L. REV. 117 (1995).

reliability test (are there indications from the speaker's behavior that the speaker's beliefs are reliable, thus affecting the perception and memory risks).

This performativity inquiry may then be (in effect) trumped by the second question that Chris says judges should ask: Does the point to be proved depend too much on something that the words specifically assert, like names, addresses, etc.?[5] Where relevance depends on such specificity in assertion, Chris thinks, I believe, that the performative aspect of that same speech should not turn it into nonhearsay.

What does this mean for judges' application of the "performative" definition? First, it requires a very careful analysis of the relevance (the point to be proved) of the speech. Then, it requires a careful analysis of context to evaluate on the basis of generalizations from background knowledge and experience, the speaker's intent, motive, reliance, and risks in speaking. This is a very *ad hoc*, fact-bound judgment. (So is a strictly "intent"-based definition.) I hope to say more on this later.

In his comment, Laird Kirkpatrick states that there is a spectrum from performative to assertive speech, and that the concept of performativity is a "useful and easily applied criterion for courts to evaluate."[6] He then takes us through a few examples and states his conclusions as to where each example falls on this spectrum.[7] But all he states is his view, not the analysis that a judge would have to use to get to that conclusion. Thus, his examples are not yet fully persuasive of the "ease" with which the concept of performativity can be applied.

With regard to example one, what if the manager's note said "Deliver to [Almaden at] Apt. 12"? With regard to example two, is there really any difference in performativity between "walking home" and "calling a cab"? I would argue both are ambiguous on the issue of Dean's drunkenness. Finally, with regard to example three, in his essay, Chris Mueller has attempted to say why he thinks that attempts to purchase drugs are more performative than assertive.[8] But what about the attempt to buy "the usual" from Chippie? Where does this fall on the spectrum? Is this now like example four, where the assertive aspect dominates?

---

5. *Id.*

6. Laird C. Kirkpatrick, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 178, 179 (1995).

7. *Id.*

8. Mueller, *supra* note 4, at 119-20.

Laird C. Kirkpatrick

July 31

I would like to respond to Eleanor Swift's thoughtful comment of July 21.[1] I believe her analysis and attempt to further define "performativity" is quite helpful, particularly her suggested focus on whether the speaker "cares more about communicating something or doing something."[2] Eleanor raises the question whether performativity adds a new level of complexity to hearsay analysis.[3] I would argue that it does not. I said in my last message that the criterion is "easily applied,"[4] which I believe to be the case, but it is not a bright line or mechanical test.[5] Balancing and measuring are involved, which of course is true many places in hearsay analysis, including for many of the hearsay exceptions (such as excited utterance, business records, and of course the catchall exceptions). Even if there were general agreement that the degree of performativity bears on whether verbal conduct should be classified as hearsay, not all judges or law professors would necessarily reach the same conclusion in a given case, just as reasonable minds can differ about precisely where the line is to be drawn between character evidence and habit evidence.

One value of performativity analysis is that it challenges the dichotomy between verbal assertions and nonverbal, nonassertive conduct. It allows courts to view cases of mixed acts and words as being *both* verbal assertions and nonassertive conduct. They do not have to be one or the other. As I type this message, I am engaged in the physical act of moving my fingers over a computer keyboard. That physical act is a component of assertive speech (the message I am sending), but for other purposes it is properly classified as nonverbal, nonassertive conduct. Presumably a colleague could testify that she saw me typing on this keyboard as evidence that the electricity was on in my office at the time or that my computer was in working condition (because I apparently believed it to be). Such evidence would not be hearsay under Federal Rule of Evidence 801, because here the performative aspects of my conduct overwhelm any assertive aspects.

An assessment of the degree of performativity is most useful for verbal conduct that falls in the middle of the spectrum between verbal assertions and nonverbal, nonassertive conduct. If I state that it is hot in my office, my statement is hearsay if it is offered to prove the truth of that assertion. If I get up and turn on the air conditioner, evidence of this act is nonhearsay because it is nonassertive, nonverbal conduct. What if I request someone else to turn on the air condition-

---

1. *See* Eleanor Swift, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 181 (1995) (responding to Christopher B. Mueller and Laird C. Kirkpatrick).

2. *Id.*

3. *Id.*

4. Laird C. Kirkpatrick, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 178, 179 (1995).

5. *Id.*

er? Here, in making the hearsay analysis, it would be useful for a court (and I would argue not difficult or complex) to assess whether such a request is more like the direct verbal assertion or the nonverbal conduct of turning on the air conditioner myself.

Eleanor posed some hypotheticals to me at the end of her message,[6] and I would respond as follows: (1) I would view a manager's note "Deliver to Apt. 12" as nonhearsay evidence that could be used by the defense to challenge the prosecutor's claim that Almaden lives in Apt. 412; (2) While evidence that the friend walked home or called a cab is ambiguous and certainly does not establish that Dean was drunk, such evidence should be able to meet the Federal Rule of Evidence 401 test of relevancy (at least if supported by the other contextual evidence of the type suggested by David Seidelson, such as that the cab ride cost $40, it was a five mile walk, Dean and declarant reside in same apartment building, there was no apparent other reason for refusing to ride with Dean);[7] and (3) Yes, I would view a request to buy "the usual" from Chippie as verbal conduct that includes words asserting a course of prior dealing which means that hearsay risks are increased.

Craig R. Callen

July 31

This message is in response both to Ron Allen's response[1] to some exchanges I had with Dick Kuhns, and to Eleanor Swift's last message.[2]

Ron asked whether anyone could establish the extent to which jurors might overvalue hearsay.[3] Further, if no one can establish (or is willing to specify) that extent, he asks how one can justify excluding hearsay.[4]

One response is that one reason for excluding hearsay that is not accompanied by "foundation facts" as Eleanor calls them,[5] or by facts sufficient to show that the possible impact of the evidence warrants the effort, or costs, of evaluating it. In other words, as I believe Eleanor put it, the exclusion is designed to help the

6. Swift, *supra* note 1, at 182.

7. David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Continuing Quandary for Federal Courts*, 16 MISS. C. L. REV. 33, 44 (1995).

1. *See* Ronald J. Allen, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 180 (1995).

2. *See* Eleanor Swift, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 181 (1995).

3. Allen, *supra* note 1, at 180.

4. Allen, *supra* note 1, at 180.

5. Eleanor Swift, *Relevance and Hearsay in Regina v. Kearley*, 16 MISS. C. L. REV. 75 (1995).

jury do its job by encouraging proffers accompanied by data that assist the jury.[7]

Another response stems from the analysis of Professor Kandel[8] in which she relies heavily on a substantial literature in sociolinguistics, which analyzes reported speech as "constructed dialogue,"[9] and argues that such reports "create a dramatic, emotional involvement between speaker and hearer and . . . shift responsibility and blame from the speaker to the person 'quoted' "[10] and allow parents who tell stories that are constructions, rather than mere verbatim reports, a "potently persuasive" tactic.[11] While this scholarship does not address the same inferential problem as the hearsay rules do, since it focuses on the witness' accuracy, it shows that the difficulty of evaluating second-hand reports is not merely a cobwebbed legal conjecture.

---

6. *Id.*
7. Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 881, 898-902 (1994).
8. *Id.* at 881.
9. *Id.*
10. *Id.*

DISCUSSION: CHARACTER EVIDENCE; UNITED KINGDOM PERSPECTIVES

John Jackson

June 22

KEARLEY: HEARSAY, PROBATIVE VALUE AND FAIRNESS TO DEFENDANTS

In the spirit of Ron Allen's request to participants to be more spontaneous, I have recorded some rather sporadic thoughts on the essays and comments so far.

(1) Reading the essays from this side of the Atlantic, I am struck by the degree to which there is an enduring attachment to hearsay doctrine. With the exception of Allen, the essays seem to admit the continuing need of a hearsay rule, and the essayists are engaged to a large extent in the task of teasing out the proper scope of the rule. The various models suggested — explicitness-based, dangers-based, communication-intention-based, necessary implication-based and risk allocation-based — are presented as solutions to this question, and *Regina v. Kearley*[1] is used to illustrate how the models relate to the particular problem of implied assertions.

On this side of the Atlantic, the problem of the proper scope of the hearsay rule is also considered important, but there is more agreement on this issue. In particular there is more of a consensus that implied assertions should not be covered by the rule. At least one of the majority in *Kearley* took this view, but for rea-

---

1. 2 App. Cas. 228 (H.L. Eng. 1992).

sons pointed out by Ron Allen in his paper, their Lordships felt unable to change the law.[2] The decision was greeted with disappointment by most academic commentators in the United Kingdom, whereas judging from the essayists, reaction to the *Kearley* decision is much more mixed in the United States. There would seem to be an ironic contrast to be made between case law and academic commentary in the United States and the United Kingdom. As not infrequently happens, academic commentary in both countries is critical of the indigenous case law, but for completely different reasons: in the United States the majority of academic commentary would seem to support *Kearley* (again I can judge only from what the essayists have said), in the United Kingdom most thought *Kearley* was wrong. In the United Kingdom most academics appear to share Ron Allen's view that here is a technical, silly rule being used to circumvent the admissibility of perfectly probative evidence, the effect of which was to quash the conviction of a clearly guilty defendant.[3] I am by no means so sure that Kearley was as guilty as is assumed on the count brought against him (for reasons see *infra*), but I share the view that the hearsay rule has operated in an unduly technical manner and that it is increasingly dangerous for any legal system to apply rules that do not make sense to lay persons. *Kearley* certainly goes against the tide of increasing skepticism in the United Kingdom about the use of technical rules, such as the hearsay rule to advance the aims of the law of evidence. As Rich Friedman says, the rule is all but disappearing in civil cases (it has been abolished in Scotland and has been recommended for abolition in England and Wales).[4] Documentary hearsay is now increasingly admitted in criminal cases in England and Wales as a result of the Criminal Justice Act of 1988. The Law Commission is presently considering how much further the rule should be relaxed in criminal cases, and it is not inconceivable that it will recommend virtual abolition in criminal cases.

(2) I also, however, share the concern of a number of essayists about the need to be fair to criminal defendants. Rich Friedman suggests that defendants need to be protected against witnesses who have made statements in the knowledge that it is likely to be used in the investigation of crime.[5] I would go further and say that defendants need to be protected from all statements which are allegedly the product of criminal investigation activity. The real danger in *Kearley*-type situations, which I do not think has been brought out sufficiently so far, was pointed out by Lord Ackner at the end of his speech when he said:

> Professor Cross . . . stated that a further reason justifying the hearsay rule was the danger that hearsay evidence might be concocted. He dismissed this as 'simply one aspect of the great pathological dread of manufactured evidence which beset English lawyers of the late 18th and early 19th centuries.' Some

2. Ronald J. Allen, *Rules, Logic, and Judgment*, 16 MISS. C. L. REV. 61 (1995).
3. *See id.*
4. Richard D. Friedman, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 87, 88 (1995).
5. *Id.*

> recent appeals, well known to your Lordships, regretfully demonstrate that currently that anxiety, rather than being unnecessarily morbid, is fully justified.[6]

Here, his Lordship is referring to a real concern that there has been in the United Kingdom about the fabrication of police evidence which has led to a number of miscarriages of justice. There is a particular danger of this in a *Kearley*-type of situation. Here we had the police raiding the premises of a known drug dealer only to find a very small quantity of drugs. There must have been real disappointment, and in this situation, there is an obvious temptation to manufacture evidence for the sake of what has been called here "noble cause corruption."

Whether the hearsay rule should have been used to prevent the admissibility of the phone call evidence in *Kearley* is another matter. There is no concept of a Confrontation Clause in the United Kingdom, but there is an argument that in fairness to defendants' demands, only evidence obtained as a result of acceptable police investigation practice should generally be used against defendants. This is why I am attracted to Margaret Berger's proposal that the police should be required to tape the messages they intercept in cases like *Kearley* or to demonstrate that a reasonable effort was made to secure the declarant as a witness.[7] (Rich Friedman asks whether detaining the persons who came to Kearley's residence might have posed an unreasonable risk to an ongoing investigation.[8] But how could it in this case? The police had already arrested Kearley who appeared to be the police's main target.) All this would seem to be an application of the best evidence principle to evidence against criminal defendants. One of the reasons underlying such a principle would undoubtedly be the need to allocate risks of error to the advantage of defendants to avoid the conviction of the innocent (Alex Stein's concern).[9] However, I think there is a broader fairness concern at stake here and that is that defendants are entitled to be protected against potential governmental abuse of power.

(3) Turning specifically to the issue of relevancy in *Kearley*, the legal argument in the case turned on the inferences that could be drawn from the phone calls. I address this question in my commentary with Sean Doran and Adrian Zuckerman on the *Kearley* case.[10] As others have said, *Kearley* is principally a decision about relevancy and not hearsay, as the question was whether assuming the hearsay rule extends to implied assertions, the phone calls could be admitted on any nonhearsay basis. I for one think that, taken at face value, the evidence of the calls is primarily relevant by means of the implied assertion that the callers believed Kearley was a drug dealer, but I accept what seems to be Eleanor Swift's view that the fact of numerous callers means that it is possible to draw the inference that Kearley was a drug dealer, other than by reliance on the testimoni-

---

6. Regina v. Kearley, 2 App. Cas. 228, 258 (H.L. Eng. 1992).

7. Margaret A. Berger, *How Would or Should the Supreme Court Interpret the Definitions in Rule 801?*, 16 MISS. C. L. REV. 13, 20 (1995).

8. Friedman, *supra* note 4, at 90.

9. *See* Alex Stein, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 95, (1995) (responding to Richard D. Friedman).

10. Sean Doran et al., *Evidence*, ALL E.R. ANN. REV. 145, 162-67 (1992).

al qualities of the callers.[11] In other words, assuming the hearsay rule applies to implied assertions, the number of callers should make a difference to admissibility because this fact makes the fact that Kearley was a drug dealer more probable on a nonhearsay basis. But there is a further relevancy question in the *Kearley* case which was not raised in argument and which I have not seen raised anywhere else. Assuming the phone calls were made and that they could lead to the inference that Kearley was a drug dealer, how relevant was this to what the prosecution had to prove, namely that the small quantity of drugs that were found in Kearley's possession were intended by Kearley to be supplied to others, contrary to section 5(3) of the Misuse of Drugs Act 1971? (Is it not much more likely that, although Kearley was heavily involved in drug dealing, the very small quantity of drugs that were actually found were not to be used for this purpose?) Assuming the evidence that Kearley was a drug dealer is relevant, is there any way to prevent a real problem of prejudice here? The danger is not that a jury might misestimate the probative value of the evidence, but might be jaundiced towards Kearley when they knew he was a drug dealer with the result that they would be more inclined to convict, no matter what the probative connection between the calls and the intent to supply the actual drugs found. Cheap similar fact evidence?

Eleanor Swift

July 20

Implied assertions of belief bear risks for rational decision making beyond hearsay dangers. The risk of ambiguity in the implied assertions in *Regina v. Kearley*[1] generates an additional risk of impermissible reliance on character evidence.

John Jackson raised an important relevance question in *Kearley*: How were the callers' beliefs about Kearley relevant to what the prosecution had to prove — namely that the drugs possessed by Kearley were *intended* by him to be supplied to others?[2] And did the calls violate the rule against using character to prove conduct?[3] In my essay, I argued that a prior *act* of Kearley's selling drugs would be relevant to prove his intent.[4] This argument was premised on Federal Rule of Evidence 404(b) and the reasoning in *United States v. Beechum*, that a defen-

11. *See* Eleanor Swift, *Relevance and Hearsay in Regina v. Kearley*, 16 MISS. C. L. REV. 75, 76 (1995).

1. 2 App. Cas. 228 (H.L. Eng. 1992).

2. John Jackson, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 185, 187-88 (1995).

3. *Id.*

4. Eleanor Swift, *Relevance and Hearsay in Regina v. Kearley*, 16 MISS. C. L. REV. 75, 78 (1995).

dant's prior act (with an *unlawful* intent) makes it less likely that he had *lawful* intent in the charged offense.[5]

Thus, it seems essential that the content of the callers' "implied assertion" of belief must be about a prior act — that "Kearley sold drugs in the past." If the implied assertion of belief is simply "Kearley is a drug dealer," then relevance depends (more explicitly at least) on a character theory that "if he's a dealer, he's dealing now, and intends to supply any drugs he possesses to others." This reasoning about character would violate Federal Rule of Evidence 404. If, instead, the caller's implied assertion of belief can be articulated more specifically as a prior act — "he has sold to me in the past" — then a line of reasoning under Federal Rule of Evidence 404(b), such as the *Beechum* intent theory, might be permissible. (It should also be remembered that the majority in the House of Lords rejected as irrelevant the callers' belief if articulated simply as "Kearley is a drug dealer"; I think this was because of a lack of personal knowledge.)

The question I want to pose is, assuming a Federal Rule of Evidence 404(b) theory of relevance premised on Kearley's prior act in which he indulged in the same intent of "intending to supply others," whether the callers' statements alone can satisfy the minimum requirements of Rule 404(b)? Moreover, are these statements sufficient to support a finding under Rule 104(b) that Kearley did engage in a prior specific uncharged act that requires the same intent as the charged offense? It seems that this is doubtful. The callers' statements are ambiguous because they are implied, not express, assertions of belief. The callers might believe "Kearley is a dealer," or "Kearley sold drugs before," or even "I have heard Kearley has sold drugs in the past." But can we really say that the callers' statements prove a *specific* prior act by Kearley?

Some callers said they wanted "the usual" from Kearley. This is a more specific reference to a specific past event, but it also makes that caller's statement more like an express assertion of that past event and thus hearsay. The ambiguity of the implied assertions, which preserves their non-hearsay status, increases the risk of impermissible reasoning about character.

Even if the Rule 104(b) and Rule 404(b) thresholds are met (assuming any prior act of sale by Kearley would involve the same "intent to supply others"), Rule 403 remains. As John Jackson points out, the jury is very likely to be "jaundiced towards Kearley when they knew he was a drug dealer with the result that they would be more inclined to convict, no matter what the probative connection between the calls and the intent to supply the actual drugs found."[6] This is a substantial risk of unfair prejudice in a case involving such a small amount of drugs and other possible flat-mates who might own them anyway.

As against this risk, what is the probative value of the alleged specific act of past drug sale? *Beechum* holds that the overall similarity of the uncharged and charged acts is an important component of probative value.[7] We know nothing of

---

5. *See* FED. R. EVID. 404(b); United States v. Beechum, 582 F.2d 898, 911, 913 (5th Cir. 1978).
6. Jackson, *supra* note 2, at 188.
7. *Beechum*, 582 F.2d at 913-14.

the overall similarity of the uncharged act(s) and the charged possession of a small amount of amphetamine from the callers' statements. The callers could have bought different drugs, bought different amounts, and bought at different places. We also know nothing specific about the temporal proximity or remoteness of the uncharged acts. Again, because of the inherent ambiguity of implied assertions of belief, probative value is extremely difficult to evaluate. All we are left with, again, is the fact that a large number of callers impliedly asserted the same belief about Kearley. If this is interpreted to mean that Kearley engaged in a large number of prior sales, across a range of customers and contexts, then the evidence loses its Rule 404(b) focus on specific intent and becomes much more like proof of general character, prohibited by Rule 404.

Sharpening the analysis of what has to be proved in the *Kearley* case, namely, a specific past act involving the same "intent to supply others," affects the application of various hearsay definitions as well. If a Rule 403 type balancing test is used to admit and exclude hearsay, I find that the implied assertions of the callers are not very probative of a specific prior uncharged act. Therefore these assertions would be inadmissible. If a "performative" definition is used, the caller's behavior has to move closer to the "assertion" end of the spectrum and away from the "performative" end of the spectrum in order to prove a specific prior uncharged act which would therefore make it hearsay. If a specific intent test is used, I find it hard to think that the caller has the specific intent to communicate about a specific prior uncharged act, which would therefore be non-hearsay. If a general communicative intent test is used, I find the question too close to call. If the hearsay dangers test is used, it is still clearly hearsay.

Craig R. Callen

July 26

On Thursday, July 20, 1995, in discussing whether the *Kearley* utterances raise Rule 404(b) concerns, Eleanor Swift wrote:

> Sharpening the analysis of what has to be proved in the *Kearley* case, namely, a specific past act involving the same "intent to supply others," affects the application of various hearsay definitions as well. If a Rule 403 type balancing test is used to admit and exclude hearsay, I find that the implied assertions of the callers are not very probative of a specific prior uncharged act. Therefore these assertions would be inadmissible. If a "performative" definition is used, the caller's behavior has to move closer to the "assertion" end of the spectrum and

> away from the "performative" end of the spectrum in order to prove a specific prior uncharged act which would therefore be hearsay. If a specific intent test is used, I find it hard to think that the caller has the specific intent to communicate about a specific prior uncharged act which would therefore be non-hearsay. If a general communicative intent test is used, I find the question too close to call. If the hearsay dangers test is used, it is still clearly hearsay.[1]

Insofar as general intent is concerned, the speaker generally intends to convey that he or she has good grounds to believe the communication is relevant to the hearer's purposes. In other words, the speakers, by making requests of the undercover officers for Chippie and for drugs, implicitly conveyed their opinions that there would be good reason to believe that Chippie would be of assistance in their effort to obtain drugs.[2] (Of course the speaker or speakers who asked for the "usual" intended to convey more information.) The utterances of the speakers who made requests without referring to past transactions, then, would be more analogous to statements of opinion or reputation than to statements about specific prior instances.

John Jackson

July 28

As was widely predicted, the Law Commission's report on criminal hearsay proposes further relaxation in the operation of the hearsay rule, recommending a number of exceptions for first hand oral, as well as documentary hearsay, and recommending also a limited inclusionary discretion (similar in structure to the Federal Rules of Evidence in the United States) to admit hearsay falling outside the recognized categories where the evidence is so positively and obviously trustworthy that the opportunity to test it by cross-examination can safely be dispensed with.[1]

These are perhaps more modest proposals than had been anticipated. I have already referred to the fact that the Law Commission has recommended the abolition of the hearsay rule in civil cases,[2] but I took the view in this report that different considerations apply in criminal proceedings. Of more immediate interest to this Symposium, the Law Commission took note of the criticism of *Regina v.*

---

1. Eleanor Swift, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 188, 190 (1995) (responding to John Jackson).

2. *See* Regina v. Kearley, 2 App. Cas. 228 (H.L. Eng. 1992).

---

1. *See* Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, Consultation Paper No. 138 (1995). This test appears to be extracted from the Canadian Supreme Court case of Regina v. Smith, 94 D.L.R.4th 590 (1992).

2. *See* Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, Consultation Paper No. 138 (1995).

Kearley,[3] and recommended that the hearsay rule should not extend to implied assertions, adopting the view in *Cross on Evidence*[4] that the presence of an intention to assert provides the most defensible watershed between hearsay and non-hearsay, both as a matter of logical coherence and of practical common sense.[5]

As commentators in this Symposium have pointed out, the United States' experience suggests that this may not be as easy a watershed to apply, as is assumed. But the intention of the Commission is clear: *Kearley*-type assertions should be admissible subject to the common law discretion to refuse to admit prosecution evidence, if its prejudicial effect outweighs its probative value, and subject to section 78 of the Police and Criminal Evidence Act, which gives the court a statutory discretion to refuse to allow prosecution evidence which would have an adverse effect on the fairness of the proceedings.[6] If these recommendations are followed, then it will become all the more important that the section 78 discretion is developed, in the way I have argued, to control the admission of statements which are the product of criminal investigation activity.

Certain commentators have said that after reading *Kearley* they are grateful for a written Bill of Rights as this would have provided an explicit additional basis for the Lords' decision in *Kearley*.[7] Although the United Kingdom has never traditionally recognized a right to confrontation, the United Kingdom courts are paying increasing attention to the European Convention on Human Rights and to the jurisprudence of the European Commission and Court of Human Rights which requires proceedings in their entirety, including the way in which evidence was taken, to be fair. There was no argument based on the European Convention in the *Kearley* case, but if, as in *Kearley*, the prosecution case relies heavily on the statements of declarants whom the defense are never given the opportunity to question, then the Strasbourg jurisprudence would seem to question whether such evidence should be used to find a conviction.[8] At the very least it would seem that the prosecution needs to prove that questioning by the defense was genuinely impossible. Section 78 of the Police and Criminal Evidence Act provides a useful mechanism for ensuring that, whatever changes are made to the hearsay rule, the United Kingdom is able to fulfill its international obligation to conform in its domestic law with the Convention's terms and principles.

---

3. 2 App. Cas. 228 (H.L. Eng. 1992).

4. SIR RUPERT CROSS & COLIN LAPPER, CROSS ON EVIDENCE 717 (7th ed. 1990).

5. *Id.*

6. Police and Criminal Evidence Act, 1984, § 78 (Eng.).

7. *See, e.g.*, Eileen A. Scallen, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 25, 31 (1995).

8. Alex Stein states in his correspondence of July 28 that he is more pessimistic than me about the impact of the European Convention. *See* Alex Stein, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case*, 16 MISS. C. L. REV. 193 (1995) (responding to John Jackson). But he acknowledges in a later reply to Craig Callen's query about Ludi v. Switzerland, 238 Eur. Ct. H.R. (ser. A) at 20-21 (1992), that the European Court has recognized some sort of confrontation right but a "weak and truncated confrontation right, which, in addition, is always subject to balancing." Alex Stein, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 194, 195 (1995) (responding to Craig R. Callen). The Strasbourg jurisprudence is still developing in relation to hearsay. There have been a number of recent decisions (*see*, in addition to *Ludi v. Switzerland*, Saidi v. France, 17 Eur. H.R. Rep. 251 (1994)) and the position is by no means clear, but it does seem that a principle is emerging whereby hearsay evidence should not find a conviction if it stands alone.

Alex Stein

July 28

A few points concerning John Jackson's recent contribution to the Symposium:[1]

As he acknowledges, under the new Law Commission's proposal, hearsay problems will not disappear with the relaxation of the hearsay rules. They will simply be relocated from one doctrinal framework (the traditional hearsay doctrine) to another (section 78 of the Police and Criminal Evidence Act,[2] authorizing courts to exclude any evidence, if its admission leads to unfairness of the proceedings).

The confrontation issue will thus have to be dealt with under section 78, which is not new.[3] Similarly, section 25 of the Criminal Justice Act of 1988, provides that documentary hearsay admissible, in principle, under this Act, can be excluded as a matter of discretion, which should be exercised by considering, inter alia, "whether it is likely to be possible to controvert the statement."[4] Hence, the confrontation right is there and cannot, in my view, be denied merely because the judge believes that the disputed statement is creditworthy. This obviously applies to implied assertions. If this discretion is properly exercised, statements such as those dealt with in *Regina v. Kearley*[5] would be excluded anyway under section 78. The Law Lords majority supports this observation by justifying its decision not only doctrinally, but also on the merits.

I am even more pessimistic than John about the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6 (3)(d) of this Convention seemingly guarantees a confrontation right,[6] but if one looks at the Strasbourg judgments, then that does not appear to hold true.[7] I stopped looking at these judgments (which also did not strike me as well-reasoned) in 1992. But I doubt that there are new developments. In 1992, I spoke informally with one of the judges and he told me that interpretation of Article 6 should be consonant with the Continental notion of "free proof." To reiterate what I said previously in responding to Ron Allen: the key question is not how to define hearsay, but what rights the defendant should have. If his/her confrontation right is to be taken seriously, then all kinds of hearsay should be excluded in the absence of a functionally equivalent substitute to cross-examination.[8] In civil trials, where plaintiffs' and defendants' wrongful losses are equally bad, there is generally no need for an exclusionary rule such as hearsay.

---

1. *See* John Jackson, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 191 (1995).
2. Police and Criminal Evidence Act, 1984 (Eng.).
3. *See* Regina v. O'Loughlin, 3 All E.R. 431 (C.C.C. 1988) (out-of-court depositions admissible, in principle, under Criminal Justice Act (1925), section 13, excluded under section 78 of the Police and Criminal Evidence Act). *See also* Scott v. Regina, 2 All E.R. 305, 313 (P.C. 1989), which somewhat qualified the ruling in *O'Loughlin*.
4. Criminal Justice Act, 1988, Section 25 (2)(d) (Eng.).
5. 2 App. Cas. 228 (H.L. Eng. 1992).
6. European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 (3)(d) (1950), as amended September 21, 1970, and December 20, 1971.
7. *See, e.g.*, Unterpertinger v. Austria, 110 Eur. Ct. H.R. 5 (1986) (defendant's wife and step-daughter invoked the relatives' privilege and were exempted from testifying against him; their statements to the police have, however, been admitted as direct evidence of defendant's guilt); X v. Belgium, 16 Eur. Comm'n H.R. 200 (1979) (incriminating statement made to the police by an UNIDENTIFIED (!!!) informer admissible to prove its truth).
8. *See* Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339 (1987).

Craig R. Callen

July 28

In his last message, Alex expressed doubts that the European Convention includes a confrontation right. He said:

> I am even more pessimistic than John about the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6(3)(d) of this Convention seemingly guarantees confrontation right, but if one looks at the Strasbourg judgments, then . . . . [deletion of discussion of some judgments] I stopped looking at these judgments (which also did not strike me as well-reasoned) in 1992. But I doubt that there are new developments. In 1992, I spoke informally with one of the judges and he told me that interpretation of Article 6 should be consonant with the Continental notion of "free proof."[1]

As a query to Alex (John Jackson's system is down until the 1st) or anyone else familiar with the European Court's decisions: Doesn't *Ludi v. Switzerland*[2] seem to recognize some sort of confrontation norm?

Alex Stein

July 31

Here is my response to Craig's query:

Craig Callen wrote: "As a query to Alex (John Jackson's system is down until the 1st) or anyone else familiar with the European Court's decisions: Doesn't *Ludi v. Switzerland*[1] seem to recognize some sort of confrontation norm?"[2]

In this case, an undercover agent, who was a police officer, was exempted from testifying and his statements were admitted against the accused. The accused was not allowed to subpoena the agent. The Strasbourg Court ruled that unlike anonymous police informers whose lives/limbs may be threatened if forced to testify, the present agent was a police officer already known to the accused. Therefore, ON THE BALANCE, he should have been allowed to be called and

---

1. Alex Stein, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 193 (1995) (responding to John Jackson).

2. 238 Eur. Ct. H.R. (ser. A) at 20-21 (1992).

---

1. 238 Eur. Ct. H.R. (ser. A) at 20-21 (1992).

2. Craig R. Callen, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 194 (1995) (responding to Alex Stein).

examined as a witness. The Swiss court's decision to the contrary violated Article 6 (3)(d).[3]

This does contain some sort of confrontation norm, namely, a weak and truncated confrontation right, which — in addition — is always subject to balancing.

---

3. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 (3)(d) (1950), as amended September 21, 1970, and December 20, 1971.