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"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence

Roger C. Park*

INTRODUCTION

Definitions of hearsay are either assertion-centered or declarant-centered. Under an assertion definition, an out-of-court statement is hearsay when offered in evidence to prove the truth of the matter asserted. Under a declarant definition, an out-of-court statement is hearsay when it depends for value on the credibility of the declarant.

Over much hearsay territory, the difference between the two definitions has no effect. Most utterances that would be nonhearsay under the assertion definition also would be nonhearsay under the declarant definition. The two definitions can produce different results, however, in classifying an "implied assertion."

An utterance is being used to prove an implied assertion when it depends for value on the credibility of the declarant, but is not being offered to prove the truth of the matter asserted. An example of such an utterance is a letter describing a voyage, offered in evidence not to prove anything about the voyage, but to prove that the person to whom the letter was addressed was a person of ordinary understanding. When offered for this purpose, the letter is not being offered to prove the

* Professor of Law, University of Minnesota. I thank Charles W. Adams, Richard D. Friedman, Edward J. Imwinkelried, and Roger W. Kirst for their helpful comments on earlier drafts, while exonerating them from any responsibility for the contents. I am grateful to Stefan Sarles for his valuable work as a research assistant, and also to colleagues John J. Coud and Donald G. Marshall for their illuminating comments about implied assertion issues. This article is dedicated to my wife, Suzanne Park, with love and gratitude.

1. FED. R. EVID. 801(a)-(c).
2. See infra note 17.
3. See infra notes 20-22 and accompanying text.
4. See infra notes 23-26 and accompanying text.
5. See infra notes 23-25 and accompanying text.
truth of what it asserts. Its use in evidence, however, does require reliance on the declarant's credibility.\(^6\)

Hearsay scholars tend to prefer the declarant definition to the assertion definition,\(^7\) or to conclude that the two definitions are the same.\(^8\) I disagree with both positions, and attempt in this Article to refute them. First, I believe that to treat the two definitions as the same in all circumstances requires an extremely strained reading of the language of the assertion definition and, in the federal system, a willingness to ignore the Advisory Committee's Note.\(^9\) Second, the declarant definition is not superior to the assertion definition, or at least not so clearly superior that a change in the Federal Rules of Evidence is needed. Change would eliminate a familiar formula that provides quick and satisfactory guidance for most situations, and would raise new interpretive problems.\(^10\) Moreover, the assertion definition has led to acceptable results under modern caselaw.\(^11\) A rigorous application of the declarant definition would require that certain reliable utterances that are now admissible as nonhearsay find a new route to admission.\(^12\) This need would entail either creating still more hearsay exceptions, or torturing the contours of existing exceptions. A perfect hearsay definition is unattainable.

This Article examines treatment of implied assertions under modern caselaw. Part I explains the two definitions and introduces the implied assertion problem. Part II reviews modern federal caselaw applying the Federal Rules assertion definition to implied assertions. Part III analyzes whether the Federal Rules should adopt a declarant definition in light of modern caselaw. The Article concludes that the existing definition remains preferable to a declarant definition.

\(^{6}\) See infra notes 27-34 and accompanying text.


\(^{8}\) See, e.g., commentators cited infra note 20; see also Falkner, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct, 33 ROCKY MNT. L. REV. 133, 136-38 (1961).

\(^{9}\) See infra notes 46-79 and accompanying text.

\(^{10}\) See infra notes 243-62 and accompanying text.

\(^{11}\) See infra PART II.

\(^{12}\) See infra notes 265-66 and accompanying text.
I. A PRELIMINARY LOOK AT THE IMPLIED ASSERTION PROBLEM

A. TWO DEFINITIONS OF HEARSAY

The primary reason for excluding hearsay is that the trier of fact has no adequate basis for evaluating the declarant's credibility, because the declarant was not subject to cross-examination under oath in the trier's presence. Sometimes the trier can use the declarant's statement without relying on the declarant's credibility. This is true, for example, when the statement "John hit me" is offered solely to show that the declarant was conscious at the time of making the statement. What is important is that the statement was made, not the credibility of the person making it. The opposing party can test the credibility of the trial witness reporting the statement, and need not test the declarant's credibility.

In contrast, when the out-of-court statement "John hit me" is offered to prove that John hit the declarant, the trier must rely on the declarant's credibility to reach the desired conclusion. A mistake or lie by the declarant would undermine the value of the evidence. Because the out-of-court declarant is not on the witness stand, the opponent has no opportunity to explore defects in credibility through cross-examination.

One might expect this explanation for excluding hearsay to foster a definition that treats out-of-court statements as hearsay whenever they depend for value on the declarant's credibility — that is, whenever the "hearsay dangers" of defects in


14. Admittedly, cross-examination of the declarant might serve some purpose. For example, it would help clarify whether the in-court witness was accurately describing the declarant's verbal conduct. Cross-examination is unnecessary, however, for probing the declarant's credibility.

15. The phrase "hearsay dangers" comes from Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948). Different commentators have given the four dangers different names: Morgan refers to sincerity, misuse of language, perception, and memory. Id. at 182-88; see also Friedman, Route Analysis of Credibility and Hearsay, 96 Yale L.J. 667, 685 (1987) (describing dangers as perception, memory, sincerity, and articulateness); Graham, "Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay, 1982 U. Ill. L. Rev. 887, 893-898 (1982)
memory, perception, narration, or sincerity could affect the value of the testimony. Many courts and commentators have defined hearsay on the basis of whether the trier must rely on the declarant's credibility. Although these definitions vary, I will refer to them collectively as the declarant definition because they focus on the declarant's testimonial capacities.

The Federal Rules definition differs at least superficially from the declarant definition. I will call it the assertion definition, because it focuses on whether an assertion was made, and the purpose for which the assertion is being offered in evidence. Under this definition, an out-of-court utterance is hearsay if it is an assertion offered to prove the truth of the matter asserted.

B. IMPLIED ASSERTIONS UNDER THE TWO DEFINITIONS: THE COMMON-LAW BACKGROUND OF WRIGHT v. TATHAM

The declarant and assertion definitions often yield the

(designating dangers as narration, sincerity, recordation, and recollection, and perception). Those who wish to include dangers produced by use of nonverbal conduct substitute the word "ambiguity" for the danger of misuse of language. See R. ALLEN & R. KUHNS, AN ANALYTICAL APPROACH TO EVIDENCE 309 (1989) (defining dangers as sincerity, narration/ambiguity, perception, and memory); Tribe, Triangulating Hearsay, supra note 13, at 958 (describing dangers as ambiguity, insincerity, faulty perception, and erroneous memory); A declarant's statement containing an opinion also involves a danger that the declarant has drawn an illogical inference, but omission of this danger from the list seems to make no difference in result.

16. Of course, many statements that depend on credibility for value must be received into evidence for the judicial system to function rationally. Defining such statements as hearsay would not make them inadmissible; the proponent simply would need to find an exception to the hearsay rule to put them into evidence. See FED. R. EVID. 801(d), 803, 804. A hearsay definition encompassing all statements that depend for value on the declarant's credibility would not exclude all such statements, but would highlight the primary reason for excluding hearsay.


18. Compare the definition illustrated in R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 337-59 (2d ed. 1982) (defining utterance as not hearsay even if it depends for value on sincerity and narration, as long as memory and perception dangers are not involved) with the definition illustrated in Tribe, supra note 13, at 957-61 (stating that an utterance is hearsay if any of four dangers are involved).

19. See FED. R. EVID. 801(a)-(c). This article deals solely with the Rule 801(a)-(c) definition of hearsay, not with the additional categories of nonhearsay utterances created by Rule 801(d). When I refer to definitions of hearsay in this article, I am referring to the definition in Rule 801(c) and its alternatives, not to the motley collection of statements defined as nonhearsay under Rule 801(d).
same results. For example, the choice of definition has no effect on classification of a statement offered to show its effect on the hearer or reader. When the out-of-court statement “Do it or I’ll kill you,” is offered to show that the hearer acted under duress, or “Dr. S is incompetent” is offered merely to show that the reader was warned of incompetency, the statement is not hearsay under either definition. When used for the stated purpose, it is not offered to prove the truth of any assertion it contains, nor does it depend for value on the declarant’s credibility.

The two definitions can lead to different results, however,

20. Some commentators treat the definitions as functionally identical across the board; others recognize differences. See R. LEMPERT & S. SALZBURG, supra note 15, at 358-59 (illustrating a version of the declarant definition as a guide to interpreting the definition of Rule 801(c)); Graham, supra note 15, at 906-22 (arguing that the “truth of the matter asserted” definition should be construed to treat all utterances involving hearsay dangers as hearsay; Professor Graham recognizes that the definition might be construed otherwise and proposes a clarifying amendment); see also MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 246, at 584 (E. Cleary 2d ed. 1972) (stating that assertions that are not offered for the truth of the matter asserted do not rest for value upon credibility). The current edition of McCormick abandons this position and states that “if the policy underlying the hearsay rule is stretched to include all situations where the evidentiary value of a statement depends on the credibility of an out-of-court declarant, in however slight a degree or without regard to offsetting factors, there exists the possibility of conflict between the rule’s underlying policy and the definition.” MCCORMICK ON EVIDENCE § 246, at 730 (E. Cleary 3d ed. 1984); cf. id. at 740 (indicating that the letters in Wright v. Tatham would not be hearsay under Rule 801(c) because they were not offered to prove the truth of the matter stated; surely the use of those letters to show the addressee's competency involves more than slight hearsay dangers). Other commentators see a difference between the two definitions. See Wellborn, supra note 7, at 76-77, 91-93 (arguing that the Federal Rules of Evidence abandon the Wright v. Tatham approach to verbal hearsay, and that the rules should be amended to restore this aspect of Wright v. Tatham by defining as hearsay statements offered as evidence of the declarant's belief in a matter, to prove the matter believed). Much of the most interesting and imaginative work on the definition of hearsay has been heuristic, designed to aid students in recognizing hearsay dangers and in analyzing hearsay problems. See R. ALLEN & R. KUHNS, supra note 15, at 311-13; R. LEMPERT & S. SALZBURG, supra note 15, at 357-59; Friedman, supra note 15, at 669-79; Graham, supra note 15, at 891-99; Tribe, Triangulating Hearsay, supra note 13, at 958-61. Although some of these works suggest an identity of declarant and assertion definitions, the authors' focus was upon other objectives and I do not mean to imply that they have misunderstood the implied assertion problem.


when an utterance is offered to prove an implied assertion. The term “implied assertion” has become a term of art for hearsay writers, who tend to give it a meaning somewhat broader than what it may connote to many readers. To say that an utterance is offered as an “implied assertion” is not to say that the declarant intended to insinuate the fact the proponent is trying to prove. It merely means that the trier is being asked to infer that fact from the declarant’s utterance. The utterance containing the implied assertion does not directly assert the proposition it is offered to prove. The trier must infer the proposition by using the utterance as indirect evidence of a belief or state of mind of the declarant. Implied assertions are hearsay under the declarant definition because they depend for value on the declarant’s credibility. Whether the federal definition of hearsay is different from the declarant definition depends on whether implied assertions are hearsay under Rule 801(c).

A good starting point for any discussion of implied assertions is the durable case of Wright v. Tatham. The case illustrates how verbal and nonverbal conduct can contain implied assertions and how a declarant’s implied assertions can pose hearsay dangers when used as evidence.

Wright v. Tatham involved a contest over the will of John Marsden, an English gentleman who left his estate to his steward. Marsden’s relative, Admiral Tatham, contested the will, claiming that Marsden was mentally incompetent. The stew-

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23. See supra notes 5-6 and accompanying text (defining “implied assertion”).
24. Compare WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1135 (1986) (unabridged), offering as one definition of “imply” the following: “to indicate or call for recognition of as existent, present, or related not by express statement but by logical inference or association or necessary consequence. . . . The philosophy of nature which is implied in Chinese art’ — Lawrence Bin-yon.”
26. See infra notes 46-49 and accompanying text (explaining Rule 801(c) hearsay definition).
28. 5 Cl. & Fin. at 670, 47 Rev. Rep, at 136.
art, in support of Marsden's competency, offered into evidence several letters that third persons had written to Marsden. Two were from a cousin living in America. The first letter from the cousin described the cousin's sea voyage and his arrival in Alexandria, Virginia, where the cousin reported that he was concerned to find the town in a most shocking condition, with five or ten people a day dying of putrid fever. The second letter from the cousin, written three years later, acknowledged receipt of a letter and map from Marsden, briefly reported on news about mutual acquaintances, and closed with expressions of regard and kinship.

Two other letters were from clergymen. One was an abrupt one-paragraph letter from the local vicar, telling Marsden to have his lawyer do something about settling a dispute between Marsden and the parish. The other was from the departing curate of a local chapel, whom Marsden had appointed. It contained fulsome thanks for past favors, a grandiloquent blessing to Marsden for his goodness, and the entreaty that "[I]t will afford me pleasure to continue my services during the vacancy, if agreeable to you."

These letters were written in language suggesting the writers believed Marsden mentally competent, and the steward offered them to show that Marsden was in fact mentally competent. The steward wanted the trier to infer the writers' belief in Marsden's competence from the letters, and to infer from the belief that the fact believed was true. The probative value of the letters depended on suppositions about the declarants' credibility. The Privy Council held them to be hearsay.

Wright v. Tatham is perhaps as well known for its dicta about nonverbal conduct as for its holding about admissibility of the verbal statements before it. In the course of holding that the verbal statements in the letters were hearsay, the opinions in Wright v. Tatham gave several examples of nonverbal conduct that the judges considered hearsay because it rested for value on a belief of the actor. One is the famous example of "the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked

29. Id. at 673-74, 47 Rev. Rep. at 138-39.
30. Id. at 674-75, 47 Rev. Rep. at 139-40.
31. Id. at 676, 47 Rev. Rep. at 141 (1786 letter).
32. Id. at 678, 47 Rev. Rep. at 142 (1799 letter).
33. Id. at 676-79, 47 Rev. Rep. at 140-43.
34. Id. at 773-75, 47 Rev. Rep. at 169-71.
Both the nonverbal conduct dicta and the verbal conduct holding of *Wright v. Tatham* have been debated extensively in the hearsay literature.\(^3\) I will start with the debate about nonverbal conduct. In favor of treating nonverbal conduct offered to show the actor’s belief as hearsay, one can argue that the risks are similar to those present when verbal hearsay is received. When using a ship captain’s conduct to infer seaworthiness, the trier of fact must rely on the captain’s memory and perception to reach the desired inference. Moreover, absent cross-examination, the trier might infer the wrong belief from the conduct. For example, the trier might infer that the captain boarded the ship believing it safe when in fact the captain believed the ship to be dangerous but was willing to take a chance in order to escape.\(^3\)

On the other hand, an actor’s nonverbal conduct frequently involves reliance by the actor on the belief implied by the conduct. Thus, when the captain sails with the ship the captain risks drowning if it sinks, so the captain’s nonverbal manifestation of belief is more reliable than would be the mere statement that the ship was safe. Reliance may not always be present, but it usually is.\(^3\) The need for a simple, adminis-


\(^{37}\) See generally R. Lempert & S. Saltzburg, *supra* note 18, at 366-69 (arguing that excluding nonassertive conduct from the definition of hearsay is “probably wise” because “the four hearsay dangers will generally pose a far greater threat to the credibility of intended assertions than they will to the credibility of assertions implied from conduct”); McCORMICK ON EVIDENCE § 250, at 737-39 (E. Cleary 3d ed. 1984) (arguing for inclusion of implied assertions on grounds that hearsay dangers of conduct are credibility issues for the jury, not grounds for exclusion); Falknor, *supra* note 8, at 134-36 (arguing that implied assertions involve fewer hearsay dangers because “[a] man does not lie to himself” with his conduct); Finman, *supra* note 7, at 688-91; McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 504 (1930) (arguing that exclusion of implied assertions results in banning evidence with “the strongest circumstantial guarantees of reliability”); Seidelson, *supra* note 7, at 754-58 (rejecting Advisory Committee’s distinction between implied and intended assertions and noting that in *Wright v. Tatham* “the sincerity of each author should be pretty much the same whether or not each had intended to assert a belief in Marsden’s competence”; Wellborn, *supra* note 7, at 76-77, 91-93 (arguing that Rule 801 should be amended to incorporate the holding of *Wright v. Tatham*).

\(^{38}\) See Finman, *supra* note 7, at 689 n.18.

\(^{39}\) See McCormick, *supra* note 37, at 504 (concluding that conduct, when offered to show actor’s belief, should be admissible if judge finds that action “so vouched the belief as to give reasonable assurance of trustworthiness”). But see Finman, *supra* note 7, at 692-93 (agreeing partially with McCormick’s
trable rule may justify accepting some rough edges.

Moreover, the danger of insincerity is absent when the nonverbal conduct is not intended as an assertion. Admittedly, the belief that there was no intent to assert, on which the lack of this danger is premised, may be wrong, and cross-examination could illuminate the question of intent to assert. For example, when inferring seaworthiness from the conduct of the sea captain, the trier might believe that the captain boarded the ship assuming it safe, when in fact the captain boarded intending to show false confidence in the ship. The literature, however, lacks any compelling evidence of injustice done by receiving nonverbal conduct containing concealed assertions. The opponents of nonverbal conduct have not found their Sir Walter Raleigh.

Finally, lawyers seldom recognize that a hearsay problem might exist when nonverbal conduct is offered into evidence. Rules excluding nonverbal conduct would be applied sporadically and arbitrarily. This abiding practical obstacle may be the strongest reason for not seeking doctrinal refinement.

Wright v. Tatham also illustrates how implied assertions derived from verbal conduct can involve hearsay dangers. The use of the letters to Marsden requires an inference from the declarant’s statement to the declarant’s belief to the truth of the belief, so use involves reliance on the declarant’s credibility.

One can argue that implied assertions derived from verbal conduct should be classified as nonhearsay because dangers of insincerity are reduced by the indirect nature of the inference drawn. Thus, it does not matter much whether the cousin in

“trustworthiness” criterion, noting that “only in some instances is the actor’s conduct sufficiently important to justify reliance on his uncross-examined memory and perception”).

40. See Finman, supra note 7, at 684-91.
41. See, e.g., Falknor, supra note 8, at 137.
42. The cousin who wrote about the trip to America, for example, had not seen Marsden for years, and might have been mistaken in his apparent belief that Marsden was competent. The other writers also may have misperceived Marsden’s mental condition or they may have forgotten incidents that tended to show Marsden to be incompetent.
43. The Advisory Committee Note to Rule 801(a) justifies treating nonassertive nonverbal conduct as nonhearsay on the ground that “[t]he situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity,” and then states that “[s]imilar considerations [concerning reliability] 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).” Fed. R. Evid. 801(a) Advisory Committee Note; see also MC-
Wright v. Tatham accurately described the plague in Alexandria, or whether he exaggerated to make the letter more interesting. In either case, the letter is probative on the issue of Marsden's mental state because it was written as if to a person of normal understanding.

Nonetheless, the proposition that insincerity dangers are reduced by the way the trier will use the utterance is highly debatable, especially in the factual situation of Wright v. Tatham. Suppose the vicar had told a colleague, “Marsden is the smartest and sanest man in the parish.” This direct assertion of Marsden’s competency would be hearsay under the Federal Rules, although it has no greater danger of being insincere than the utterance the vicar actually wrote to Marsden. The vicar would worry about his reputation (and his conscience) if he directly lied about Marsden. On the other hand, indirectly giving a false impression is sometimes the proper thing to do. The vicar, for example, may have thought Marsden was mentally incompetent, considered this in framing his letter, but ultimately decided that it would be convenient and polite to pretend Marsden was competent and write to him as if he were, knowing that, in any event, the letter would find its way to responsible hands.

The facts of Wright v. Tatham illustrate one possible drawback of classifying implied assertions as nonhearsay — the danger of reliance on the declarant’s untested credibility. Another possible danger arises if a formalistic treatment of the differences between implied and direct assertions means that trivial differences in the wording of an assertion can yield different results. The in-court witness might be coached to report the

CORMICK ON EVIDENCE § 250, at 740 (E. Cleary 3d ed. 1984) (stating that likelihood of purposeful deception is lessened when an assertion is offered as proof of something other than the matter asserted). For criticisms of these positions, see Graham, supra note 15, at 908-09; Wellborn, supra note 7, at 66-67; cf. Imwinkelried, The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt — And Quickly Forgotten, 41 FLA. L. REV. 215, 219-30 (1989) (arguing that courts have paid too much attention to sincerity dangers and not enough to memory dangers).

For example, McCormick suggested that a declarant’s statement “Harold is the finest of my sons” would not be hearsay when offered to show the declarant’s fondness for Harold, while “I care more for Harold than for any of my children” would be hearsay when offered to show fondness. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 466 (1st ed. 1954). Under modern law, this difference in classification, even if accepted, probably would not lead to a difference in admissibility because “I care more for Harold” would be admissible as a statement of present state of mind. FED. R. EVID. 803(3). One can imagine situations, however, in which this type of hyperformal analysis
statement in such a way as to make it an implied assertion, a type of false testimony that could be difficult to detect on cross-examination when the witness was the only one reporting the statement.\footnote{45}

The implied assertions contained in the letters in \textit{Wright v. Tatham} do not seem any more reliable than a direct assertion. That does not mean, however, that a hearsay definition that treated implied assertions as more reliable than direct assertions would be wrong. Any definition that seeks to constrain trial discretion necessarily will be wrong in some situations. The question is not whether any possible situation exists in which the definition would allow dubious evidence to be received, but whether in everyday operation it does a capable job of sorting. Judges apply most rules instantly in the heat of the courtroom. Moreover, even if unreliable evidence does slip through a gap in the exclusionary rule, the trier always can reject it.

We have no way of knowing through conventional legal research how the rule operates in everyday use, but the evidence from published opinions is a better basis than pure speculation for deciding how it works. Later in this Article, I examine modern caselaw. First, however, I will consider whether the Federal Rules really differentiate between the declarant definition and the assertion definition — that is, whether evidence involving reliance on the declarant’s credibility sometimes will fall outside the truth-of-the-matter-asserted definition endorsed by Rule 801(c).

\section{Implied Assertions Under the Two Definitions: The Language of the Federal Rules and the Advisory Committee’s Note}

The Advisory Committee drafted Rule 801 to exclude nonassertive nonverbal conduct from the definition of hearsay.\footnote{46} Rule 801(c) defines hearsay as an out-of-court “state-
ment” that is “offered in evidence to prove the truth of the matter asserted.”47 Rule 801(a) defines “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended . . . as an assertion.”48 Thus, nonverbal conduct is not hearsay unless “intended” as an assertion. The Advisory Committee’s Note explains, moreover, that the burden of proving conduct is intended as an assertion will rest on the party opposing admission of the evidence.49

The Federal Rules also deal, perhaps less clearly, with the hearsay status of implied assertions derived from verbal conduct. The Advisory Committee’s Note describes two categories of verbal conduct that are excluded from the definition of hearsay by Rule 801(c).50 These two categories are “nonassertive verbal conduct” and “verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted.”51 I will consider these two categories in turn and discuss whether the language of Rule 801(c) necessarily means that evidence involving hearsay dangers sometimes will be admissible under one category or the other.52

1. Nonassertive Verbal Conduct

No authoritative single definition of the distinction between assertive and nonassertive verbal conduct exists. Scholars have used the term “nonassertive” to refer to several different types of verbal conduct.

First, scholars use the concept of nonassertive verbal conduct to classify legally operative language as nonhearsay.53 Legally operative language is language that creates or extinguishes legal rights, powers, or duties.54 An example is the use of the words “I accept your offer” to show acceptance of a contract offer. Wigmore wrote that such utterances are not offered for the truth of the matter asserted because they “are

47. FED. R. EVID. 801(c).
48. FED. R. EVID. 801(a).
49. Id. Advisory Committee’s Note.
50. Id.
51. Id.
52. Part II of this Article examines more closely federal caselaw since adoption of Rule 801(c), and determines what position courts have taken on the issue.
53. See infra notes 55-56 and accompanying text.
54. Id.
not offered as assertions." McCormick's *Handbook of the Law of Evidence* takes a similar approach, stating that words of offer and acceptance are "not evidence of assertions offered testimonially." The utterances fall within the class of utterances that J.L. Austin described as "performatives" — words that do not describe or report anything and are not true or false.

Second, hearsay writers sometimes have placed all utterances that give orders or ask questions in the "nonassertive" category. Under this construction, only declarative sentences are assertions. An imperative ("Put $10 on Native Dancer") or a question ("Is Hector home?") is nonassertive.

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56. MCCORMICK ON EVIDENCE § 249, at 732-33 (E. Cleary 3d ed. 1984). Others have phrased it differently, not directly in terms of the "assertion" language in the hearsay definition, but in terms of the concept of offering something to prove its truth. Lilly states that words of offer and acceptance are not hearsay because the "proponent only need establish that the operative words forming the contract were spoken, not that these words were, in any sense, true." G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 6.2, at 184 (2d ed. 1987). Morgan stated that a contract offer "is offered, not for the purpose of proving its truth, but merely for the purpose of showing that it was made." Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 YALE L.J. 229, 231 (1922).
57. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 5-11 (2d ed. 1975). In fact, Austin observed that:

[In the American law of evidence, a report of what someone else said is admitted as evidence if what he said is an utterance of our performative kind: because this is regarded as a report not so much of something he said, as which it would be hearsay and not admissible as evidence, but rather as something he did, an action of his.]

Id. at 13 (emphasis added).
58. United States v. Lewis, 902 F.2d 1176 (5th Cir. 1990) (holding intercepted call to alleged drug dealer, in which caller asked "Did you get the stuff?" admissible because a question is not an assertion); United States v. Zenni, 492 F. Supp. 464, 466 n.7 (E.D. Ky. 1980) (stating that "the utterance, 'Put $2 to win on Paul Revere in the third at Pimlico,' is a direction and not an assertion of any kind, and therefore can be neither true nor false"); S. GOODE, O.G. WELDBORN III & M.M. SHARLOT, 33 TEXAS PRACTICE, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 801.2, at 551-52 (1988) (stating that the utterance "Don't let Dave come in here" is nonassertive, because it does not state any fact); E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, CRIMINAL EVIDENCE 128 (1979) (noting that "[b]ecause most assertive statements are declarative sentences, many trial judges use a rule of thumb that imperative, interrogative, and exclamatory sentences are not hearsay"; the authors would not follow the "rule of thumb" in all situations); Wellborn, supra note 7, at 71-72 (describing this as the "most plausible" though "most unattractive" interpretation of Rule 801(c) and its commentary; Professor Wellborn would amend the rule to change this result, id. at 91-93); see also MCCORMICK ON EVIDENCE § 246, at 729-30 (E. Cleary 3d ed. 1984) (stating that "[t]he contemporary dictionary meaning of 'assert' is to state positively or
This second use of the concept is highly questionable. When offered to show that the addressee was speeding, the question “Why did you go so fast?” poses the same dangers as a direct declarative sentence. Moreover, questions containing information always can be broken down into interrogative and declaratory components. It would be capricious to treat “You were going so fast. Why?” differently than “Why were you going so fast?” The same can be said of an imperative sentence such as “Throw that thief out of here!” when offered to show that the person referred to was a thief. The rulemakers could not have intended such an arbitrary distinction.

Third, scholars sometimes use the term “nonassertive” as a shorthand expression for “not offered to prove the truth of the matter asserted.” Both McCormick and Falknor thus describe the letters written to Marsden in *Wright v. Tatham* as “nonassertive.” This description imposes on the word “nonassertive” strongly, and accordingly a person may be described as being assertive. However, in the world of evidence, the word ‘assert’ carries no connotation of being positive or strong. A favorite of writers in the field for at least a century and a half, the word simply means to say that something is so, e.g. that an event happened or that a condition existed.” (emphasis in original)). cf. Muncie Aviation Corp. v. PartyDoll Fleet, Inc., 519 F.2d 1178, 1180, 1182, 1184 (5th Cir. 1975) (dictum suggesting that FAA recommendations about how to land at uncontrolled airports might not be “assertions” when offered to show the standard of care a pilot should use when landing; court ultimately uses residual exception of Rule 803(24)); 4 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE § 801(a)[02], at 801-63 (1988) (describing verbal conduct of boys in making fun of testatrix, to show that testatrix lacked mental capacity, as nonassertive; not clear from description what words were used by the boys). Compare the colloquy at trial in *United States v. Figueroa*, 750 F.2d 232, 236 (2d Cir. 1984):

MR. SACHS: I object to what Mike asked him. That is hearsay once again.

MR. CHERTOFF: A question can’t possibly be hearsay.


59. See Falknor, supra note 8, at 136 (asserting that if the vicar wrote to the testator for the purpose of settling the dispute with the latter, rather than with any idea of expressing his opinion of the testator’s sanity, then the vicar’s conduct was “nonassertive”); McCormick, supra note 37, at 502-03 (referring to the letters in *Wright v. Tatham* as “words not of assertion, but of action.” (emphasis in original)); see also United States v. Layton, 549 F. Supp. 903, 911, 915 (N.D. Cal. 1982) (using “nonassertive” to refer to assertions offered inferentially), aff’d in part, rev’d in part, on other grounds, 720 F.2d 548 (9th Cir. 1983): McCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 249, at 591 (E. Cleary 2d ed. 1972) (stating that use of a statement to show the declarant’s knowledge that brakes were defective is an example of “circumstantial nonassertive use of utterances to show state of mind”; yet a statement such as “the
a meaning that would be better borne by the Advisory Committee's other concept of "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted."  

Hearsay writers also use the word "nonassertive", confusingly, to refer to transactions that are being described in a way that expunges assertions that were part of the transaction. This occurs when the original transaction involved an assertion, but a witness at trial later describes the transaction without specifically setting forth the assertion. The trier learns of the assertion by a process of inference. The inference is necessary not because the original declarant said nothing or stated the matter indirectly, but because the later reporter simply has expunged the declarant's assertion. Suppose, for example, a party offers evidence that P hired W to collect money from D, for the purpose of showing that D owed the money; or offers evidence that John's license was revoked, to show that John was unfit for employment. Some hearsay writers would call these brake cards bad" clearly would be an assertion if offered to show that the brakes were bad; hence the cited text seems to embrace a concept of utterances that are assertions but that are used nonassertively); cf. United States v. Wilson, 532 F.2d 641, 645-46 (8th Cir. 1976) (dictum that notebooks containing entries about sales of heroin might be considered "nonassertive conduct" when used to show drug activities were taking place on the premises); MCCORMICK'S ON EVIDENCE § 250, at 740 (E. Cleary 3d ed. 1984) (stating that "Wright v. Tatham . . . did not . . . involve nonassertive conduct; it involved conduct that was, in a measure at least, assertive"); See generally R. ALLEN & R. KUHNS, supra note 15, at 321-22 (stating that "[w]e use the term nonassertive to describe the verbal conduct in Wright both because it is a convenient shorthand and because the term is frequently used to describe the evidence in Wright and similar cases," but noting perceptively that "the term is technically inaccurate and potentially misleading. Almost every verbalization is a manifestation of an intent to assert something . . . .").  

60. Consider the utterances set forth in the Wright v. Tatham letters. The cousin wrote of a plague in Alexandria, that he had received the map of America, and that his aunt was sick. The vicar said that disagreeable things would happen if Marsden did not settle. Had the letters been offered to prove the truth of the factual propositions set forth in their text, any court would have considered them assertions. It seems more consistent with ordinary usage to speak of the letters in Wright v. Tatham as assertions used to prove something other than the matter asserted, instead of characterizing them as "nonassertive" because of the use to which they were being put.  

61. See infra notes 62-64 and accompanying text.  


63. McCormick, supra note 37, at 491. For a case in which the court successfully saw through an expunged assertion, see United States v. Brown, 548 F.2d 1194, 1204-06 (5th Cir. 1977). Brown was a tax return preparer charged
The person who hired the bill collector, however, must have told the collector that money was owed, and the license revocation must have been accompanied by some sort of verbal utterance. Some uses of the concept of nonassertive verbal conduct described above involve giving the assertion definition of hearsay a different meaning than the declarant definition. Yet none of these uses is dictated by anything inherent in the concept of “assertive.” Certainly the concept of nonassertive verbal conduct could be restricted, consistent with Rule 801(a)-(c), to instances in which the conduct was offered as legally operative language — to show what it did, not what it said. If restricted in this way, the fact that Rule 801(a)-(c) creates a

with tax fraud. At trial, the government offered, and the district court received, testimony by an Internal Revenue Service agent who had audited a number of returns prepared by the defendant. She testified that 90% to 95% of these returns overstated itemized deductions. Citing Morgan, supra note 15, and noting the presence of hearsay dangers, the Fifth Circuit reversed. Brown, 548 F.2d at 1205-06 & n.19. The court stated that the agent's testimony inescapably implied that the agent had gotten information from talking to others, probably the taxpayers whose returns had been prepared. Id. at 1205 n.20. It should be noted that although the testimony in a case like Brown might be characterized as containing an “implied assertion,” the implied assertion problem is not the same as the one addressed in this Article. In Brown, the form of the witness's testimony created an implied assertion, not the form of the declarant's original statement. This Article concerns only the latter type of implied assertion. In the author's opinion, Brown should have been decided the same way whatever view one takes of the implied assertion problem or of the desirability of an assertion or declarant definition.

64. See MCCORMICK ON EVIDENCE § 250, at 740 (E. Cleary 3d ed. 1984).
65. As Professors Allen and Kuhns have written,
It may well be that the person who engaged in the paperwork that officially revoked John's license was not trying to assert anything about how John drives. Nonetheless, the revocation is occurring only because somebody — presumably the judge who found John guilty of a traffic offense — asserted that John engaged in some illegal driving activity.
The utterances described involve legally operative language (hiring and revoking), but the legally operative language is offered for what it says, not for what it does. When legally operative language is offered to show something other than the legal relationship it creates, it is hearsay. For example, allegations in pleadings are legally operative; they define the controversy. Pleadings are hearsay, however, when offered to prove the truth of the assertions contained in them. The license revocation and hiring utterances described in the text are comparable to judgments offered to prove a fact essential to the judgment. When offered for this purpose, the judgment is hearsay, and it needs the aid of an exception to find its way into evidence. See FED. R. EVID. 803(22) (hearsay exception for judgment of previous conviction when specified requirements are met).
66. See supra text accompanying notes 55-65.
category of nonhearsay called nonassertive verbal conduct would not lead to a functional difference between the declarant and assertion definitions of hearsay.

2. Verbal conduct that is assertive but offered as a basis for inferring something other than the matter asserted

Whatever the definition of assertion, the rules clearly treat some assertions as nonhearsay. The Advisory Committee's category of "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" leads to this result. The language of Rule 801(c) about "offered in evidence to prove the truth of the matter asserted" would be superfluous if all assertions were hearsay.

The category of assertions that are offered to prove a matter other than the proposition that they assert, or "assertion[s] used inferentially," would be arbitrary if one used a purely formal approach to deciding whether an assertion is offered to prove the truth of what it asserts. The concept should be interpreted in a way that at least leaves some chance that the utterances classified as hearsay and nonhearsay under the concept will be different functionally, that is, different in the dangers they present. Assertions made metaphorically, sarcastically, or in some other non-literal form, therefore, should be considered hearsay. For example, "Well, I never forged a kinsman's will!" would be hearsay when offered to show that the addressee was a forger, if the context indicated that the declarant intended accusation. Similarly, "The sky is on fire" would be hearsay if offered to show that the declarant had seen a sunset, and "Your hands are dirty" would be hearsay when offered as a metaphorical accusation of guilt. When use of the utterance in court requires that the trier assume the declarant intended to assert the proposition that the utterance is being offered to prove, then the utterance must be treated as hearsay, even if its surface form is different because the statement is sarcastic,

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67. FED. R. EVID. 801 (a) Advisory Committee Note.
68. FED. R. EVID. 801(c). If all assertions were hearsay, then Rule 801(c) should read merely that "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing." The word "statement" is defined in Rule 801(a) in a fashion that covers only assertions. FED. R. EVID. 801(a).
69. The useful term "assertions used inferentially" was coined in Wellborn, supra note 7, at 65.
70. The example comes from Morgan, supra note 15, at 189.
71. The example is from Comment, Hearsay: The Threshold Question, 9 U.C. DAVIS L. REV. 1, 14 n.48 (1976).
metaphorical, or veiled. Similarly, "It will stop raining in an hour" is hearsay not only when used for the assertion that it will stop raining, but also when used to show that it is currently raining.\textsuperscript{72}

A number of scholars have advocated using the declarant's intent, or some objective manifestation of it, in determining what the declarant's statement asserts.\textsuperscript{73} Some version of an intent test seems necessary to keep the assertion definition from being wholly arbitrary. Use of such a test will narrow the difference between the assertion definition and the declarant definition.

An intent-based approach will not force the trial judge to decide a difficult or unguided preliminary question of fact, because the trial judge need not determine actual intent. Instead, the trial judge would determine what inferences the trier would need to draw from the declarant's statement for the statement to help its proponent. If helpfulness depends on the trier's belief that the declarant intended to assert a fact that supports the proponent's case, then the court should consider the statement hearsay under the truth-of-the-matter-asserted definition. Under this approach, the statement "At least I didn't forge a will," offered on the theory that the declarant intended to accuse someone else of forging a will, is hearsay if the accusation helped the proponent's case. This result makes sense because no difference in hearsay dangers exists between a direct and an indirect accusation.\textsuperscript{74} Under this approach, therefore, the court does not determine actual intent. Instead, it traces the path the trier would take in drawing inferences favorable to the proponent.

Under an intent-based approach the assertion definition still differs from the declarant definition. The concept of "intended assertion" should not be interpreted to give the words "truth of the matter asserted" a bizarre meaning. For example, it would violate ordinary conventions of language to say that

\begin{itemize}
  \item \textsuperscript{72} The example is from Seligman, An Exception to the Hearsay Rule, 26 Harv. L. Rev. 146, 150 n.13 (1912).
  \item \textsuperscript{73} See, e.g., Ball, The Changing Shape of the Hearsay Rule, 38 Ala. Law 502, 506-07 (1977) (arguing that the declarant's intent determines what words assert and that whenever individuals realize the implications of their words, they intend to assert those implications).
  \item \textsuperscript{74} In contrast, the statement "Robert was home with me all day Saturday," offered as a falsehood to show the declarant's consciousness of Robert's guilt, would not be hearsay under the suggested approach. The trier is not asked to infer that the declarant intended to assert the matter the proponent seeks to establish (that Robert was guilty).
\end{itemize}
the letters in *Wright v. Tatham* are offered to prove the truth of what they assert. When the cousin’s statement of a plague in Alexandria is offered to prove that Marsden is competent to make a will, the proposition asserted is so different from the proposition to be proven that it should be considered nonhearsay under the assertion definition. Even if the definition is glossed with an intent-based test, the statement is nonhearsay. One need not assume that the declarants intended to say anything about Marsden’s competency to use their letters as evidence of competency.

An even more dramatic example is the utterance offered as a falsehood to show the declarant’s consciousness of guilt. For example, suppose a suspect denies knowing another suspect. The prosecution can prove the suspects have known each other for years, and offers the false denial against both suspects as evidence of the declarant’s consciousness of their joint guilt. To say the utterance is offered “to prove the truth of the matter asserted” is to give those words a meaning they will not bear. Use of the utterances in evidence, however, even to prove the falsity of what they assert, involves relying on declarant’s credibility and accepting some hearsay dangers.

A final basis for recognizing a difference between the two definitions is the Advisory Committee’s Note, which contemplates that verbal conduct sometimes will be nonhearsay even though it involves hearsay dangers. Respect for language conventions and for the intent of the Advisory Committee both point toward accepting the proposition that, under the Federal Rules, some verbal conduct will be accepted as nonhearsay even though it depends for value on the credibility of the declarant.

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76. See *infra* text accompanying notes 96-102.
77. See text accompanying *infra* notes 106-07.
78. See text accompanying *supra* notes 50-51.
79. For a carefully considered view that differs from mine, see Graham, *supra* note 15, at 887. Professor Graham maintains that Rule 801(c) can, and should, be interpreted to reach the same result as *Wright v. Tatham* in its treatment of verbal implied assertions. As Professor Graham skillfully demonstrates, in many cases in which the declarant has expressed an idea indirectly, one can reach this result by treating an idea that the declarant intended to assert as part of the “matter asserted” within the meaning of Rule 801(c). See *id.* at 921 n.75 (offering three illustrations of this argument). This reliance on the declarant’s intent, however, does not make Rule 801(c) consistent with the declarant definition in all situations. For example, when an utterance is offered as a falsehood to show consciousness of guilt, the declarant had no in-
II. JUDICIAL TREATMENT OF IMPLIED ASSERTIONS UNDER THE FEDERAL RULES OF EVIDENCE

I have argued, primarily on the basis of the language of Rule 801(c) and the Advisory Committee Note, that the declarant definition of hearsay differs from the assertion definition, and that the assertion definition can lead to classification as nonhearsay of statements that depend for value on the credibility of the declarant. I will now test these claims by reviewing Rule 801(c) caselaw.

My research focused on two types of cases. First, I sought cases in which verbal conduct involving hearsay dangers was classified as nonhearsay because it was nonassertive or was not offered to prove the truth of the matter asserted. Second, I looked for cases taking the opposite approach, in which a plausible argument could be made that verbal conduct was nonassertive or was not offered to prove the truth of the matter asserted, but in which the court nevertheless classified the conduct as hearsay. An examination of these two types of implied assertion cases should demonstrate the effect of using the truth-of-the-matter-asserted definition of hearsay.

The implied assertion problem has not been nearly as important to judges as it has been to hearsay scholars. Courts rarely write expressly about whether implied assertions are hearsay, whether the doctrine of Wright v. Tatham survived adoption of the Federal Rules, or whether a statement that depends for value on the declarant's credibility should be treated as hearsay even when offered to prove a matter other than what the statement directly asserts.

80. See supra text accompanying notes 46-79.
81. See infra text accompanying notes 142-220.
82. See infra text accompanying notes 85-141.
83. I searched only for cases dealing with implied assertions drawn from verbal conduct, not for cases involving nonverbal conduct. My goal was to examine implied assertion issues in areas the Federal Rules left open. The question whether nonassertive nonverbal conduct is hearsay was definitively settled by the rulemakers in favor of treating the conduct as nonhearsay. FED. R. EVID. 801(a).
84. Scholars familiar with hearsay literature have remarked on courts' lack of attention to the definitional issue this Article addresses. See, e.g., J. WEINSTEIN & M. BERGER, supra note 58, § 801(a)[01], at 801-56 (noting that Wright v. Tatham is the exception to the dearth of judicial attention).

Moreover, a computer-aided caselaw search reveals that courts hardly ever use the phrases that virtually always would be associated with a full discussion of that issue. Consider Wright v. Tatham, the case that presents the
The caselaw did throw some light, however, on what judges have done with implied assertions. I will describe the caselaw, and then comment on how the Rule 801(c) definition has influenced treatment of implied assertions.

A. CASES TREATING IMPLIED ASSERTIONS AS HEARSAY

In the work product of the few federal courts that have core example of the implied assertion problem, that sometimes is used as a name for the problem itself, and that is considered an indispensable starting point for treatises, casebooks, and articles discussing the problem. I know of no casebook on evidence that does not at least cite Wright v. Tatham. See J. FRIEDENTHAL & M. SINGER, THE LAW OF EVIDENCE 84-85 (1985); E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 286 (1983); J. KAPLAN & J. WALL, supra note 62, at 105-07; P. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 4.01, at 224-28 (1987); P. ROTHSTEIN, EVIDENCE: CASES, MATERIALS AND PROBLEMS § 2.02, at 19-22 (1986); J. WEINSTEIN, J. MANSFIELD & M. BERGER, CASES AND MATERIALS ON EVIDENCE 613-17 (8th ed. 1988). For examples of treatise and hornbook treatments, see MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 250, at 737-38 (E. Cleary 3d ed. 1984); G. LILLY, supra note 56, § 6.3, at 195 (2d ed. 1987); 4 J. WEINSTEIN & M. BERGER, supra note 58, 01(a) [01], at 801-56 to -57; 2 J. WIGMORE, supra note 13, § 267, at 93.

Since 1945, the words “Wright v. Tatham” appear in only five of the 12,876 federal cases that refer to hearsay. This figure comes from a WESTLAW search of the ALLFEDS file performed August 21, 1989. Only two of the cases retrieved were decided after enactment of the Federal Rules of Evidence in 1975.

The phrase “implied assertion(s)” has appeared as part of a hearsay discussion in only 14 federal cases in the years 1945-89, and usually the reference is cursory. It appears within 100 words of “hearsay” in 14 cases in the WESTLAW ALLFEDS library, which contains 12,876 cases referring to hearsay (search of August 21, 1989). “Implied assertion(s)” appears within 100 words of the word “hearsay” in 11 cases in the LEXIS CTAPP library, which contains 8,853 cases referring to hearsay (search of August 20, 1989). It is possible, but in my view unlikely, that some implied assertion hearsay cases in the relevant library were missed by the proximity restrictions on these searches; I inserted the restrictions because “implied assertion” sometimes appears in a nonhearsay context.

The figures for “nonassertive” and “hearsay dangers” also are low, and most occurrences of those phrases appear in cases that do not discuss the implied assertion problem. The phrase “hearsay dangers” appears in 49 cases in the WESTLAW ALLFEDS library; the overwhelming majority concern something other than the implied assertion problem (search of August 21, 1989). The phrase “triangulating hearsay” appears in five cases in the LEXIS CTAPP file (search of August 20, 1989); none involve discussions of the problem now under consideration.

I am not sure why courts so rarely discuss implied assertions. Perhaps judges are reluctant to lose themselves in this evidence teachers’ briar patch, and would rather spend energy on the great issues of the day. Perhaps judges and lawyers trying to get good evidence past hearsay barriers find it easier to go through one of the familiar exceptions than to navigate the territory of implied assertions.
carefully considered the implied assertion controversy, four opinions interpret the definition set forth in Rule 801(c) to be consistent with the treatment of verbal conduct in *Wright v. Tatham*. Two of these cases were decided after enactment of the Federal Rules of Evidence.

In *United States v. Reynolds*, the Third Circuit expressly endorsed the *Wright v. Tatham* position. When postal inspectors arrested Reynolds on the street, Parran, who was nearby, then approached the group. Reynolds then said to Parran, "I didn't tell them anything about you." The trial judge admitted the statement against Parran as evidence of Parran's guilt of the crime charged. On appeal, the government argued that the evidence was admissible against Parran because the statement "I didn't tell them anything about you" was not offered to prove the truth of the matter asserted. In a thoughtful opinion, Judge Leon Higginbotham rejected this position, holding admission of the statement reversible error. The court's interpretation of Rule 801(c) seems to require classification as hearsay of all statements that depend for value on credibility.

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86. 715 F.2d at 99.

87. Id. at 103.

88. Id. at 101.

89. Id.

90. Id.

91. Id. at 100.

92. Id. at 102-03.

93. Id. at 104.

94. See id. at 103. The court noted that "statements containing express assertions also may contain implied assertions qualifying as hearsay" and indicated that implied assertions can be hearsay even when "the matter which the declarant intends to assert is different from the matter to be proven." (quoting 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 415, at 94 n.84 (1980)). On the facts before it, the court states:

As the government uses it, the statement's probative value depends
If, as Reynolds suggests, the assertion definition classifies a statement as hearsay whenever the statement’s relevance depends on assuming the truth of a fact the statement implies, then the assertion definition would be functionally identical to the declarant definition,\textsuperscript{95} at least in situations in which the verbal conduct is deemed a “statement.”

In \textit{Lyle v. Koehler},\textsuperscript{96} the Sixth Circuit reached a similar conclusion.\textsuperscript{97} The case arose from the joint murder trial of Lyle and Kemp in state court. While in pretrial detention, Kemp wrote two letters to friends asking them to testify to an alibi. He gave the letters to his sister for delivery, but law enforcement officials intercepted them.\textsuperscript{98} The letters instructed the addressees in great detail about the alibi testimony Kemp wanted them to give.\textsuperscript{99} The addressees also were instructed to destroy the letters so that they would not fall into the wrong hands.\textsuperscript{100} One letter asked the addressee to say that both Kemp (the declarant) and Lyle (Kemp’s codefendant) were at the addressee’s house at the time of the murder.\textsuperscript{101} Both letters asked the addressees to tell investigators that neither Lyle nor Kemp knew a third suspect.\textsuperscript{102} The letters were clearly an attempt to get the addressees to testify to a false alibi that would exonerate both Kemp and Lyle.

\textit{Id.} (citation omitted).

\textsuperscript{95} The result might be different if the word “implied” in \textit{Reynolds} were read to mean “intentionally implied” as opposed to “giving rise to an inference.” The \textit{Reynolds} opinion, however, in discussing the utterance, apparently assumed that the declarant did not intend to assert guilt with the utterance. \textit{See id.} at 103 (quoting commentator to effect that when “the matter which the declarant intends to assert is different from the matter to be proved,” the hearsay objection still applies (quoting 4 D. LOUISELL & C. MUELLER, \textit{supra} note 94, at 94 n.84)).

\textsuperscript{96} 720 F.2d 426 (6th Cir. 1983) (Merritt, J.).
\textsuperscript{97} \textit{Id.} at 433.
\textsuperscript{98} \textit{Id.} at 429.
\textsuperscript{99} \textit{Id.} at 429-31.
\textsuperscript{100} \textit{Id.} at 430-31.
\textsuperscript{101} \textit{Id.} at 429.
\textsuperscript{102} \textit{Id.} at 430.
The prosecution offered the letters into evidence at trial, on the theory that the attempt to set up a false alibi showed consciousness of guilt. On habeas petition to federal court, Lyle claimed violation of the right to confrontation. The federal court analyzed whether the evidence was hearsay, assuming that if it was not hearsay, no confrontation issue would arise. The court adopted Morgan's 1948 view of the dimensions of hearsay, stating that "[u]nder Morgan's view, the inference of Kemp's guilty mind, as reflected in the letters, is not severable from Kemp's raw statements; the letters accordingly present a hearsay problem." The court noted that the jury would treat the letters as incriminating Lyle as well as Kemp because of the close association between Lyle and Kemp as shown by their simultaneous arrest shortly after the murders. The court viewed this use of hearsay as a violation of the right to confrontation.

Two cases decided before enactment of the Federal Rules also deserve description. They are likely to remain influential, to the degree any implied assertion case is influential, because few courts seem to believe Rule 801(c) changed the common law definition of hearsay. This conclusion is understandable because the rule's familiar truth-of-the-matter-asserted language often was used at common law. The cases are:

103. Id. at 432.
104. Id. at 431.
105. Id. at 431-33.
107. Lyle, 720 F.2d at 431-35 (citation omitted).
108. Id. at 434.
109. Id. at 433. For a case that seems to reach a different result from Lyle, but without nearly the degree of discussion and consideration, see United States v. Perholtz, 842 F.2d 345 (D.C. Cir.) (per curiam), cert. denied, 109 S. Ct. 65 (1988). Perholtz involved a dispute over the evidentiary status of a "script" that a co-conspirator gave another co-conspirator to memorize. The "script" gave an exculpatory explanation of the role the co-conspirator had played in various transactions. Id. at 351. The appellate court stated that the "script" was produced during the course and in furtherance of the conspiracy, and therefore was admissible as a statement of a co-conspirator. Id. at 357. The court, however, gave as an "additional reason" for admission the theory that "the script is not hearsay because it is not being 'offered in evidence to prove the truth of the matter asserted.'" Id. at 357.
111. See, e.g., Continental Oil Co. v. United States, 184 F.2d 802, 813 (9th Cir. 1950); Terry v. United States, 51 F.2d 49, 52 (4th Cir. 1931); Wheaton, What is Hearsay?, 46 IOWA L. REV. 210, 211 (1961).
came from panels of the Second and Fifth Circuits, and both reached results consistent with *Wright v. Tatham*.

In *United States v. Pacelli*, Pacelli was accused of killing Patsy Parks, a potential witness against Pacelli. The government offered testimony of an informant who had been at a gathering of some of Pacelli's friends and relatives. The informant testified about statements Pacelli's friends and family members made shortly after Pacelli's arrest. The statements indicated indirectly that the declarants believed Pacelli had committed the murder. For example, the informer testified that Pacelli's wife told him that Parks's body had been found and that Pacelli was in custody, and also testified that one of the people at the gathering said "that there is a million places to put a body and you don't have to . . . burn it up and leave it laying right out in the middle of nowhere for people to find." The informant's testimony was offered as evidence that the persons present believed Pacelli to be guilty, for the further inference that he was in fact guilty.

The argument that the statement was not hearsay is at least plausible. The government was not trying to prove that there are a million places to put a body, so one could argue that the statement was not offered for its truth. The court classified the evidence as hearsay, however, citing and adopting the arguments of Finman and Morgan.

Judge Wisdom reached a similar result in *Park v. Huff*.

112. 491 F.2d at 1108.
113. *Id.* at 1110-11.
114. *Id.*
115. *Id.* at 1111.
116. *Id.*
117. *Id.*
118. The prosecution argued on appeal that the fact that Pacelli's wife, uncle, and close friends were discussing at that meeting that the murder had been bungled by leaving the body where it could easily be found — rather than that Pacelli had been remanded for something he had not done — is strongly indicative that they knew that Pacelli caused Patsy Parks' death. *Id.* at 1115.
119. See *Id.* at 1116 (citing Finman, *supra* note 7, at 684).
120. *Id.* (citing Morgan, *supra* note 15, at 215). In reasoning that will be familiar to those who have read the scholarly literature on implied assertions, the court stated, "[w]hile the danger of insincerity may be reduced where implied rather than express assertions of the third parties are involved, . . . there is the added danger of misinterpretation of the declarant's belief. Moreover, the declarant's opportunity and capacity for accurate perception or his sources of information remain of crucial importance." *Id.* at 1117 (citations omitted).
121. 493 F.2d at 923 (1979), *rev'd on other grounds*, 506 F.2d 849 (5th Cir.)
The prosecution in Park offered in evidence certain statements by Park's associates indicating that Park was the financial angel behind a conspiracy to murder a state prosecutor. Judge Wisdom declared the statements hearsay, citing with approval Wright v. Tatham, Finman, Morgan and the recently decided Pacelli case.

Although Park v. Huff can be interpreted as accepting the declarant definition, the opinion suggests a middle position between the declarant and assertion definitions. According to Park, statements relying on credibility are hearsay when there is a "possibility that the declarant intended to leave a particular impression." Such statements are not hearsay, however, when the declarant did not intend to convey the message the trier is asked to draw from the statement.

(122) Id. at 927-28.
(123) Id. at 928 (citing Wright v. Tatham).
(124) Id. at 927 (citing Finman, supra note 7, at 686).
(125) Id. (citing Morgan, supra note 15, at 218). Judge Wisdom wrote:

Twenty-five years ago, Professor Morgan analyzed the hearsay rule and identified its rationale as based on the untrustworthiness of hearsay statements: "[S]hould we not recognize that the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration, memory, and perception?"

(126) Id. (citing Morgan, supra note 15, at 218).
(127) Id. (citing Pacelli, 491 F.2d at 1116). Judge Wisdom said:

Implied assertions may in certain circumstances carry less danger of insincerity or untrustworthiness than direct assertions . . . but not always. The danger of insincerity or untrustworthiness is decreased only where there is no possibility that the declarant intended to leave a particular impression.

(128) Id. When the possibility is real that an out-of-court statement which implies the existence of the ultimate fact in issue was made with assertive intent, it is essential that the statement be treated as hearsay if a direct declaration of that fact would be so treated.

(129) Id. at 928 (citing Park, 493 F.2d at 927-28).
(127) Id. at 927.

(128) Id. Also, the statements involved in Park easily could have been seen as direct assertions of Park's involvement. At the least, they were so close to being direct assertions that any analysis taking into account what the declarant apparently intended to assert, as well as the declarant's literal words, would classify the statements as hearsay even under the assertion definition. For example, one of Park's lieutenants stated that "the old man" (Park) would not "go up any more" — that is, would not pay anything more to have the murder committed. Id. at 926. Although the assertion was not offered to show that in fact Park would not have paid more, it was offered to prove the
A number of other cases, without expressly discussing the implied assertion controversy, silently support the proposition that implied assertions are hearsay. These are cases in which a reasonable argument could have been made, based on the form of the utterance, that the utterance was not offered to prove the truth of the matter asserted. The most important cases in this category are two from the Supreme Court: *Dutton v. Evans* and *Krulewitch v. United States*.

In *Dutton v. Evans*, the Supreme Court dealt with a confrontation clause challenge to a statement admitted under Georgia's co-conspirator exception. An arrested co-conspirator allegedly told a jailhouse informer: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." The statement was offered as evidence of Evans's guilt. The Supreme Court indicated the statement was hearsay, but held that receiving the hearsay evidence did not violate the confrontation clause. The *Reynolds* court later concluded that "*Dutton* is a clear instance of the Supreme Court recognizing that a statement's implied assertion can constitute hearsay."

In *Krulewitch*, the defendant was accused of transporting a woman across state lines for immoral purposes. The prosecution offered into evidence the post-arrest statement of an alleged co-conspirator, whose conversation with the victim, according to the victim's testimony, went as follows:

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129. See, e.g., United States v. Check, 582 F.2d 668, 678 (2d Cir. 1978) (rejecting agent's testimony about instructions he gave to informer as hearsay because it indirectly revealed what defendant had said to informer); United States v. Figueroa, 750 F.2d 232, 258 (2d Cir. 1984) (same). But see United States v. Perez, 658 F.2d 654, 659 (9th Cir. 1981) (holding verbal conduct of X — talking on the telephone in a manner indicating that Y was on other end of the line — admissible as "nonassertive" nonhearsay evidence of Y's participation in drug conspiracy); infra note 158 and accompanying text (discussing Perez).

132. 400 U.S. at 74.
133. Id. at 77.
134. Id. at 88.
135. Id.
136. 715 F.2d at 104 (reasoning that "[a]lthough the express assertion of the co-conspirator's statement in *Dutton* is that the co-conspirator would not be in this situation but for Alex Evans, the statement was offered as circumstantial evidence to prove that Evans committed the murder").
137. 336 U.S. at 441.
She [the co-conspirator] asked me, she says, "You didn't talk yet?" And I says, "No." And she says, "Well, don't," she says, "until we get you a lawyer." And then she says, "Be very careful what you say." And I can't put it in exact words. But she said, "It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it."  

A plausible argument could be made that the statements were not assertions offered for their truth. "He couldn't stand to take it" could be viewed as an assertion offered inferentially; "You didn't talk yet?" and "Well, don't" might be classed as nonassertive on the ground that questions and directions are not assertions. The Court made no reference to these possible arguments. It based its analysis on the co-conspirator exception, which it found inapplicable in this case because the conspiracy had terminated.  

Although Krulewitch is suggestive at most, and although it was decided before the Federal Rules of Evidence were adopted, it has been influential in later cases that expressly adopt the Wright v. Tatham position on implied assertions.  

B. Cases treating implied assertions as nonhearsay  
1. Explicit Cases  

A few courts have expressly recognized the implied assertion controversy that scholars debate, and have reached a position opposing Wright v. Tatham. They have assigned a nonhearsay label to evidence that depends for value on accepting an unstated belief of the declarant, and that therefore raises hearsay dangers because it depends for value on the declarant's credibility. United States v. Zenni is the leading case taking this position.  

In Zenni, government agents, while searching the premises of a suspected bookmaker, answered calls from unknown persons who gave directions for placing bets. The intercepted
calls were offered in evidence as proof that the occupant of the premises was a bookmaker. Unlike most opinions admitting implied assertions, Zenni fully discusses the issue. The court described Wright v. Tatham and the implied assertions controversy, stating the two opposing positions. It based its nonhearsay classification on the language of Rule 801(c), stating that "assertion," although undefined in the Rules, means a "positive declaration" as opposed to a "direction." Thus, a statement such as "Put $2 to win on Paul Revere in the third at Pimlico" is not hearsay because it is "a direction and not an assertion of any kind, and therefore can be neither true nor false."

Zenni stands as a landmark for any court wishing to conclude that the Federal Rules assertion definition leads to a different result from Wright v. Tatham and the declarant definition. Although Zenni is unusual in the length and depth of its discussion of the hearsay definition problem, it is not at all unusual in its disposition of the particular situation before it. It heads a long line of cases holding that intercepted calls are admissible as nonhearsay when offered to show that the person the caller sought to reach was engaged in illegal activity.

145. Id.
146. Id. at 466-67.
147. Id. 468.
148. Id. at 466 n.7.
149. Id. The court also relied on language in the Advisory Committee Note indicating that "nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" is not hearsay, even though these varieties of verbal conduct might involve some (reduced) hearsay dangers. Id. at 469.
150. Zenni is also a case in which the hearsay dangers were minimal, see Morgan, supra note 15, at 198, so the court had a strong a priori inclination to admit the evidence. It is of course possible that the callers were engaged in a plot to frame the defendant, or that they all had the wrong number, or that they were speaking in code about some other kind of transaction, but the chances are comfortably small, especially because the agent intercepted multiple calls. Zenni, 492 F. Supp. at 465.
151. See United States v. Giraldo, 822 F.2d 205, 208, 212-13 (2d Cir.), cert. denied, 484 U.S. 969 (1989) (holding that taped messages from third persons on accused cocaine dealer's answering machine, containing orders for "pita bread" and "chicken" were not hearsay when offered to show that accused was engaged in distributing cocaine; the coded messages were "not offered to prove the truth of the matters asserted therein and were admissible to prove that the statements were in fact made, in order to show that it was more likely than not that the cocaine possessed by Giraldo was possessed for purposes of distribution"); State v. Tolisano, 136 Conn. 210, 214-15, 70 A.2d 118, 120 (1949) (holding calls attempting to place bets not hearsay); Chacon v. State, 102 So. 2d
Another case recognizing the implied assertion controversy, at least to the point of saying that "today, even implied assertions are admissible,"\textsuperscript{152} arguing that implied assertions lack sincerity dangers,\textsuperscript{153} and citing Zenni,\textsuperscript{154} is United States v. Groce.\textsuperscript{155} Just as Wright v. Tatham illustrates that sometimes reception of implied assertions involves serious hearsay risks, so Groce shows forcefully that sometimes the lack of sincerity dangers makes admission of the evidence irresistibly attractive.

In Groce, the government offered into evidence pencil markings of nautical "fixes" on a marijuana ship's chart, for the purpose of showing that the ship, which had been boarded in international waters, was headed for the United States.\textsuperscript{156} The use of the evidence required reliance on the belief of the person making the chart, so hearsay dangers were present to some degree. But the chance that someone on board prepared a chart with intent to show that the ship was headed for the United States when it was not seems so farfetched as to be negligible, and so does any other insincerity danger one can imagine under the circumstances.\textsuperscript{157}

\textsuperscript{578, 591} (Fla. 1958) (holding admissible testimony of telephone conversations between sheriff and callers who wished to place bets "as evidence of a 'verbal fact' going to prove the nature of the illegal business" as opposed to the "truth of any alleged fact" that might have been discussed in the conversation; noting that such conversations consistently have been admitted by other courts); Courtney v. State, 187 Md. 1, 5-6, 48 A.2d 430, 432 (1946)(evidence of telephone calls attempting to place bets during raid held admissible on "res gestae" theory); State v. White, 107 R. I. 306, 309, 267 A.2d 414, 416-17 (1970) (holding testimony of telephone calls received during raid not hearsay because not admitted to prove the truth of the assertion that the caller desired to place a bet, but "rather to prove that the telephone located in the raided premises was used for the purpose of recording bets"); Herndon v. State, 543 S.W.2d 109, 119 (Tex. Crim. App. 1976) (holding admissible testimony as to telephone calls received by officer during raid because issue is whether the calls were made, and not their truth or falsity); see also Annotation, Admissibility of Evidence of Fact of Making or Receiving Telephone Calls, 13 A.L.R.2d 1409 (1950 & supp. 1988) (reviewing cases). But see People v. Scalzi, 126 Cal. App. 3d 901, 905-06, 179 Cal. Rptr. 61, 62-64 (1981) (finding error in admitting telephone conversation intercepted by police officer after arresting drug defendant). The most important practical difference between Scalzi and the cases cited above is that in Scalzi only one telephone call was received, so the hearsay statements did not corroborate each other.

\textsuperscript{152.} United States v. Groce, 682 F.2d 1359, 1364 (11th Cir. 1982).
\textsuperscript{153.} \textit{Id.}
\textsuperscript{154.} \textit{Id.} (citing Zenni, 492 F. Supp. at 464).
\textsuperscript{155.} 682 F.2d 1359 (11th Cir. 1982).
\textsuperscript{156.} \textit{Id.} at 1363.
\textsuperscript{157.} Other cases that seem to show awareness of the implied assertion controversy and that choose to admit implied assertions include State v. Carrillo, 156 Ariz. 120, 124, 750 F.2d 878, 882 (Ct. App. 1987) (holding statement by mur-
The court in *United States v. Perez* also expressly admitted implied assertions. At least, the court's opinion expressly stated that implied assertions are not hearsay quoted the portion of the Advisory Committee's Note that explains the rationale for admitting them, and quoted language about implied assertions from a scholarly article on hearsay. The court's treatment of the problem, however, was cursory — perhaps because of the unimportance of the evidence involved.

The statement in *Perez* was offered to prove that defendant R was a member of a conspiracy, for purposes of invoking the co-conspirator exception to the hearsay rule. At that time, the Ninth Circuit required "independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant with it," which meant that these facts had to be proven with nonhearsay evidence. One of the items of evidence offered to show R's membership in the conspiracy was the fact that R called P during the course of a drug transaction. P, who did not testify, told an agent that he had spoken to R, and the agent so testified at trial. Plenty of other evidence showed that R was part of the conspiracy, so the court may not have regarded analysis of this particular phone call as critical.
2. Implicit Cases

Many other courts, without expressly demonstrating familiarity with the scholarly literature on implied assertions, have approved classification of statements involving hearsay dangers as nonhearsay. These courts have used the language of the assertion definition to justify the classification, either by characterizing the utterances as "nonassertive" or by saying that they were not offered to prove the truth of the matter asserted.

Before describing these cases, I wish to make clear that by pointing out that a statement involves hearsay dangers, I am not saying the court should have excluded the evidence. Few appellate opinions on the definition of hearsay readily appear to reach unjust results. Appellate judges rarely admit patently unreliable evidence by definitional manipulation, or if they do, they do not describe the underlying facts in their opinions in a way that makes the injustice manifest. This Part of the Article is an attempt to determine from the caselaw what the operational definition of hearsay is, not a condemnation of the result in any particular case.

a. Statements offered to show an assertion's falsity

Courts have applied the assertion definition to admit evidence that relies on the declarant's credibility when the evidence was offered not to show that a statement was true, but to show that it was false, on the way to some further inference that depends on the declarant's credibility. I am not referring to cases in which a false utterance is offered as legally operative language to establish slander or perjury; those cases

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168. See infra notes 173-220 and accompanying text.
169. One could say that there are two opposing lines of cases, one accepting implied assertions and one rejecting them, but that might suggest more order than actually exists. The opposing cases do not acknowledge each other. In fact, most of the cases that let in evidence raising dangers of reliance on declarant credibility do not show awareness of that reliance. Even if the declarant definition of hearsay were adopted, therefore, these courts might reach the same result they now reach under the assertion definition.
170. See infra notes 173-80 and accompanying text.
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involve no reliance on credibility and no difference between the two definitions. The cases in which the two definitions could lead to different results are those in which the falsehood is offered for an inference about the declarant's state of mind. Typically, the falsehood is offered for an inference that the declarant was conscious of the joint guilt of the declarant and another person. The value of the inference depends on the declarant's narration, perception, and memory. For example, the declarant might have a false conception of the other's guilt because of a misunderstanding about something the other told the declarant.

The Supreme Court used the truth-of-the-matter-asserted definition to admit a statement of this nature in Anderson v. United States, in which evidence of cover-up statements was received against an accomplice to show consciousness of joint guilt. The precedential value of Anderson is somewhat diminished, however, by the obscure way the Court stated the facts and by the Court's apparent belief that it was using the statement in a way that involved no reliance on credibility and hence no need for cross-examination.

171. Id.
172. Of course, the evidence must be offered against someone other than the declarant for the issue of hearsay classification to have impact; otherwise, the admissions rule would provide a simple avenue for receiving the evidence.
174. Id. at 219-20.
175. Anderson involved a dispute about the admissibility of prior testimony that codefendants had given in an election fraud contest. Id. at 214-17. The prosecution offered this testimony on the theory that it was false, and that the jury could draw an inference of guilty knowledge from the fact that the codefendants had given false testimony. Id. at 220.

The defendants in Anderson allegedly caused fraudulent votes to be cast both for federal and state candidates. Id. at 214. They argued that the applicable statute, 18 U.S.C § 241 (1968), applied only to punish federal vote fraud, and that the federal conspiracy ended when the federal election was certified, so that statements made by co-conspirators afterwards were not admissible. Anderson, 417 U.S. at 217-18. The prosecution maintained that the purpose of the conspiracy was to secure the election of a local official, but that it was necessary to cast false federal votes on the same ballot because otherwise the number of votes received by the local official would be suspicious. Id. at 222. The fact that the codefendants gave demonstrably false testimony during the inquiry into the state contest reflected on what happened in the federal contest.

The Supreme Court avoided the question whether § 241 applied to purely state contests by holding that the evidence of false testimony during the inquiry into the state contest was admissible even if the federal statute under which the defendants were charged covered only federal contests, since the evidence was not offered to prove the truth of the matter asserted. Id. at 219-20. The Court assumed for purposes of argument that the conspiracy had ended.
United States v. Hackett presents a more straightforward example of the use of falsehoods to show consciousness of guilt. A codefendant, while standing on defendant's lawn, made demonstrably false statements that he did not know who lived in the defendant's house and that he had come from the yacht club, not the house. The prosecution offered these statements, along with the evidence proving they were false, to show that the codefendant thought linkage with the defendant would be incriminating. The court held the statements admissible against both defendants, because they "were admitted not for their truth, but merely for the fact that the statements were made." Several other cases involving demonstrably false statements by codefendants have arisen since the Federal Rules were enacted, and have been resolved the same way.

by the time the testimony was given, and it specifically noted that it was not relying on the co-conspirators' exception. Id. at 218-22. Nor was the perjured testimony admitted as legally operative language that did not depend for value on credibility; it was not used to prove the crime of perjury, but to show a cover-up for purposes of proving the commission of the pre-perjury federal election fraud. Id. at 220. Thus, this case appears to be one in which evidence was defined as not hearsay under the assertion definition even though the evidence required reliance on the credibility (memory, perception, and narration) of the declarants. The facts are complicated, however, and it is not clear that the Court itself considered that it was using evidence that involved dangers of reliance on credibility. In fact, at one point it stated that the rationale of the hearsay rule did not require exclusion; the government was not offering the statements to prove the truth of anything asserted in them, and therefore "the other defendants had no interest in cross-examining them so as to put their credibility in issue." Id. This passage suggests that the Court did not believe that any hearsay dangers were involved, and did not conceive of the case as one in which the use of the evidence involved reliance on credibility.

177. Id. at 1186.
178. Id. at 1186-87.
179. Id at 1186.
180. White v. Lewis, 874 F.2d 599, 603-04 (9th Cir. 1989) (defendant and a companion were found at scene of attempted robbery; companion gave false address; use of false address, to show guilty knowledge of companion; held not hearsay and admissible to show defendant and companion not innocent bystanders); United States v. Candoli, 870 F.2d 496, 507-08 (9th Cir. 1989) (holding that statement by codefendant to police claiming that he and codefendant were in an alley "to meet two girls named 'Maria' and 'Christina'" not hearsay when offered as false exculpatory statement intended to conceal arsonous purpose for being in alley); United States v. Munson, 819 F.2d 337, 339-40 (1st Cir. 1987) (holding co-conspirators' false explanations to agent of movements earlier in day and falsehoods about ownership of suitcase not hearsay when offered to show conspiracy); United States v. McPartlin, 595 F.2d 1321, 1353-54 (7th Cir.) (defense theory in prosecution for bribing public officials was that defendant's brother's conduct in negotiating letter of credit in Liechtenstein was innocent; evidence about brother's false testimony before grand jury, claiming he did not visit Liechtenstein on trip to Europe, held admissible be-
b. **Statements offered to show linkage or association**

Another class of cases involves a verbal utterance offered to show contact or association between two people, or between a person and a thing. The typical example occurs when the police, while searching a person in custody, find the name and telephone number of another person. The evidence is offered to show that the two are acquainted. Applying the assertion definition, the court is likely to say either that the name and number were not offered to prove what they were asserting (that a certain person had a certain number) or that they were not offered assertively at all, but rather as circumstantial evidence of association.

For an interesting case in which truth-telling was deemed nonhearsay when used to show lack of guilty knowledge, see United States v. Webster, 750 F.2d 307, 330-33 (5th Cir.1984) (defendant told agents that aircraft was on defendant’s property, and in fact it was; offered by defendant to show lack of guilty knowledge concerning aircraft; hearsay dangers are manifest but court deems statement nonhearsay because not offered for truth), cert. denied, 471 U.S. 1106 (1985). But see Lyle v. Koehler, 720 F.2d 426 (6th Cir. 1983) (discussed supra notes 96-105), which comes close to reaching the opposite result. It is not exactly the same type of case, however, because the out-of-court statement involved was not a falsehood, but a solicitation of a falsehood. Id. at 429-30. No policy seems to distinguish the two, but perhaps a court can declare more easily that a statement is not offered to prove the truth of the matter asserted when the statement is offered as a falsehood, rather than as a request that another person say something false.

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181. See, e.g., cases cited infra note 183.
182. See id.
183. See United States v. Ashby, 864 F.2d 690, 693 (10th Cir. 1988) (holding car title papers found in car admissible to show tie between person named in papers and car, and were not hearsay because not offered to show truth of assertion of ownership; repair papers containing name of another person admissible to tie that other person to car for time and distance derived from papers; likewise not hearsay because not offered to show truth); United States v. Triplett, 835 F.2d 864 (9th Cir. 1988) (table entry for unpublished opinion) (WESTLAW, ALLFEDS) (admitting check, money order, and receipt bearing defendant’s name found in trailer as evidence that defendant occupied trailer;
In such cases, use of the utterances as evidence involves court reasons that writings are nonhearsay because not offered to prove matters asserted — that defendant paid for the item for which the receipt was given; United States v. Singer, 687 F.2d 1135, 1147 (8th Cir. 1982) (holding envelope addressed by landlord to defendant and another person admissible to show defendant lived in apartment; court reasoned that envelope was not offered for the “implied truth of its written contents” but for implications to be drawn from the landlord’s “behavior”), on rehearing, 710 F.2d 431, on remand, 575 F. Supp. 63 (1983); United States v. Saint Prix, 672 F.2d 1077, 1083 (2d Cir.) (admitting sales slip bearing defendant’s name to show connection between defendant and van that was subject of sales slip; “the sales slips were not admitted to prove that Hutchison bought the vans. They were admitted to prove that someone using Hutchison’s name bought the vans, from which the jury could infer that the person using Hutchison’s name was Hutchison himself. Admission for this purpose is permissible so long as other evidence connected Hutchison with the person using his name.”), cert. denied, 456 U.S. 922 (1982); United States v. Mazyak, 650 F.2d 788, 792 (5th Cir. 1981) (holding letter addressed to four defendants arrested on boat carrying marijuana, saying, inter alia, “On precious cargo my thoughts are with you,” not hearsay when offered to show linkage), cert. denied, 455 U.S. 922 (1981); United States v. Mejias, 552 F.2d 435, 446 (2d Cir.) (holding receipt from motel and similar documents not offered to show that defendant paid his motel bill, and hence not offered for truth of matter asserted, when offered merely to show a connection between defendant and the motel), cert. denied, 434 U.S. 849 (1977); United States v. Woods, 544 F.2d 242, 267 (6th Cir. 1976) (holding names mentioned in telephone conversation not hearsay when used to show association), cert. denied, 430 U.S. 969 (1979); United States v. Ruiz, 477 F.2d 918, 919 (2d Cir.) (holding slip of paper bearing defendant’s nickname seized from alleged co-conspirator not hearsay because “not introduced to show the truth or falsity of its contents” but merely to show that the bearer knew the defendant and expected to call him on the telephone), cert. denied, 414 U.S. 1004 (1973); United States v. Ellis, 461 F.2d 962, 970 (2d Cir. 1972) (holding address book admissible as not offered for truth when offered merely to show link with person named in book), cert. denied, 409 U.S. 866 (1972); Brown v. United States, 403 F.2d 489, 491 (5th Cir. 1968) (holding note with name and telephone number admissible to show link); United States v. Armone, 363 F.2d 385, 404 (2d Cir.) (holding address book not hearsay when used to show link between person named in book and possessor of book), cert. denied, 385 U.S. 959 (1966); United States v. Mishkin, 317 F.2d 634, 637 (2d Cir. holding evidence that person who picked up obscene books from locker had defendant’s telephone number and other information about defendant in pocket at time of arrest admissible as nonhearsay evidence of link between defendant and courier; the court reasoned that the evidence was offered to show the link, not to show what the defendant’s telephone number was), cert. denied, 375 U.S. 827 (1963); cf. United States v. Hensel, 699 F.2d 18, 33-35 (1st Cir.) (finding lists containing names and tasks for members of drug conspiracy not hearsay when offered to show membership in conspiracy of those named; possession of list by co-conspirator deemed nonassertive nonverbal conduct), cert. denied, 461 U.S. 958 (1983); United States v. May, 622 F.2d 1000, 1007 (9th Cir.) (holding name labels on photographs not hearsay when offered to show who had been photographed (dicta)), cert. denied, 449 U.S. 984 (1980). But see United States v. Watkins, 519 F.2d 294, 298-97 (D.C. Cir. 1975) (holding rent receipts bearing defendant’s name hearsay and not admissible to show that defendant resided in apartment; receipts were offered for the truth of the matter asserted therein; court did not
hearsay dangers. Take the case of the found slip of paper: “John T. 929-0955.” The paper is offered to show a link between the possessor and John T. The declarant who wrote the name and number might have mistaken the name, and then looked up a number under the wrong name. The writer even may have had some reason rooted in deception, such as wanting to appear to know someone who was respected or feared, for writing down a number without knowing the person. Similarly, a person who makes out a receipt may have misheard the name, or may have been given the wrong name. Absent knowledge that the information might be used in litigation, however, the dangers are remote and one can understand the inclination of many courts to admit the evidence.

Wigmore\textsuperscript{184} and McCormick\textsuperscript{185} would admit linkage evidence by deeming it circumstantial evidence, analogous to fingerprints or other “traces.” The analogy is sound in some situations. Showing that a person possessed a distinctive wri-

deal with possible argument that receipts were not offered to show defendant paid the amount, hence not offered for truth); \textit{cf.} United States v. Garcia-Duarte, 718 F.2d 42, 46 (2d Cir. 1983) (holding murder victim’s drug transaction book not admissible to show drug transactions between victim and defendant).

For a linkage case in which hearsay dangers were either absent or infinitesimally diminished, see United States v. Canieso, 470 F.2d 1224 (2d Cir. 1972) (Friendly, J.). Chou had traveled from Asia with a drug courier named Canieso. Chou objected to the introduction of a letter found in the courier’s wallet. \textit{Id.} at 1232. The letter gave instructions about what to do on arrival in New York. \textit{Id.} It said that the two men should take a taxi to the hotel, that they should stay together, that “the man follow you he cannot speak English.” \textit{Id.} These instructions dovetailed with instructions in Chinese found in Chou’s wallet. \textit{Id.} The court approved admission on grounds that the letters linked the two men circumstantially. \textit{Id.; see also} United States v. Muscato, 534 F. Supp. 969, 973-80 (E.D.N.Y. 1982) (Weinstein, J.) (involving witness’s pretrial statement showing knowledge of unique characteristic of pistol, offered to link witness with pistol; opinion provides extensive and thoughtful discussions of theory that evidence admissible as nonhearsay evidence of a “trace” in the witness’s mind; court expresses doubt about theory but advances it as one possible basis for receiving the evidence).

The assertion definition provides a door for admission of utterances to show association when none of the standard exceptions applies. In the cases cited above, the utterances were not statements of a party opponent offered against that party, and the utterances were not made during the course of and in furtherance of a conspiracy.

\textsuperscript{184} \textit{See} 1A J. \textsc{Wigmore}, \textit{supra} note 13, §§ 148-151a, at 1744-59 (stating that "mechanical traces," including name tags, are admissible to show origin, among other things); \textit{id.} § 150a, at 1756 n.1 (criticizing People v. Hill, 198 N.Y. 64, 70, 91 N.E. 272, 274 (1910), for expressing doubt about the admissibility of keys with tag bearing defendant’s name found at place of murder).

\textsuperscript{185} \textit{See} McCormick’s \textsc{Handbook of the Law of Evidence} § 249, at 592 (E. Cleary 2d ed. 1972).
ing that can be traced by its physical characteristics to a given source is like showing that the person possessed any other distinctive object. For example, when attempting to show a connection between a defendant and a hotel, evidence that the defendant possessed a receipt with the hotel’s logo, or a matchbox or towel with the hotel’s name on it, poses no hearsay dangers when the writing is authenticated as coming from the hotel. Such evidence stands on the same basis, so far as the hearsay rule is concerned, as evidence that the defendant’s shoes had carpet fibers from the hotel.

Many writings admitted as “circumstantial evidence,” however, do involve hearsay dangers. A key chain labeled with Hill’s name is good evidence that Hill owns the keychain, but use of the label in evidence involves hearsay dangers, assuming no witness can identify the label as having the same physical appearance as one shown to belong to Hill. The label is, in effect, a statement that “this key chain belongs to Hill,” and cross-examination of the person who made the statement might reveal defects of sincerity, perception, narration, or memory.

The allure of the phrase “circumstantial evidence,” and the authority of Wigmore and McCormick sometimes have caused even direct assertions, offered to prove the truth of what they assert, to be admitted to show connection or linkage. For example, in United States v. Snow, the court admitted a name label on a briefcase to show that the person named on the label possessed a weapon found in the briefcase. The court noted the quite reasonable argument that the label was an assertion that the briefcase belonged to Snow, offered to prove the truth of the assertion, but declared the evidence nonhearsay on the authority of Wigmore.

187. See 1A J. Wigmore, supra note 13, § 150 n.3, at 1756 n.3 (criticizing People v. Hill, 198 N.Y. 64, 70, 91 N.E. 272, 274 (1910): “[T]his case shows how different a man a judge is when reasoning about his own affairs at home as opposed to reasoning in the judicial straitjacket; suppose he had forbidden a certain young man to court his daughter and then one morning found on the parlor floor by the sofa a bunch of keys with the tabooed young man’s name; would he hold that ‘there was some doubt whether the evidence was properly admitted’?”).
188. 1A J. Wigmore, supra note 13, § 24, at 944-52.
190. 517 F.2d 441 (9th Cir. 1975).
191. Id. at 443-45.
192. Id. at 443-44. Some evidence suggested that the defendant had been seen with a briefcase bearing a name tape, but the witness who gave this evi-
Like the other cases involving association, linkage, or activities on the premises, the evidence in *Snow* seems trustworthy because it is unlikely the declarant would foresee the statement’s use in litigation, or would tailor a fabrication to mislead the trier of fact.\textsuperscript{193}

Similar issues have arisen when the prosecution seeks to use a hotel registration card to trace a defendant to a hotel. Suppose the prosecution wishes to prove that the defendant occupied a certain hotel room at a certain time, and it offers into evidence a hotel registration card bearing the defendant’s name and purported signature. Here, some courts have been more cautious than the *Snow* court.\textsuperscript{194} Perhaps they have envisioned a real danger that someone registering at a hotel might give someone else’s name, or perhaps the presence of a signature in evidence alerted them to a method through which the linkage evidence could be corroborated. At any rate, at least two courts have held that the evidence is not admissible to prove the defendant was registered at the hotel, although it may be used to show that someone using the defendant’s name was registered.\textsuperscript{195} That the person using the defendant’s name was actually the defendant must be proven by other evidence, which may include exemplars of defendant’s handwriting so that the jury can compare them with the hotel registration signature.\textsuperscript{196}

dence also testified that the briefcase sought to be introduced at trial was not the one she had seen in the defendant’s possession. *Id.* at 442. It is not clear that the court attached any importance to this testimony. Had the witness affirmatively testified that she had seen the defendant with the briefcase with the “*Snow*” tag, then the evidence would not be hearsay any more than any other evidence of physical characteristics of the briefcase.

\textsuperscript{193} By contrast, in a case in which the use of a label in litigation was readily foreseeable, the court had no trouble classifying it hearsay. In *Payne v. Janasz*, 711 F.2d 1305, 1313-14 (6th Cir.), *cert. denied*, 464 U.S. 1019 (1983), a tag saying “10001 Cedar Avenue” had been affixed not by an unknown declarant, but by someone in the police evidence room. The court held that testimony about the tag was hearsay. *Id.*

In an interesting case that did not seem to involve the danger that the label was prepared for litigation, but that did involve the affixing of a label with a conscious purpose to show source, the court found a postmark to be hearsay when offered to show the source of a letter. *See United States v. Cowley*, 720 F.2d 1037, 1044-45 (9th Cir. 1983) (holding postmark hearsay when offered to show origin of letter; would be admissible under residual exception but for lack of notice).


\textsuperscript{195} *Bell*, 833 F.2d at 276; *Lieberman*, 637 F.2d at 99-101.

\textsuperscript{196} *Bell*, 833 F.2d at 276; *Lieberman*, 637 F.2d at 99-101. Both courts suggested an alternative route of admission: laying a foundation for admission.
Even this use of the evidence involves some hearsay dangers. The clerk might have heard the wrong name, or the registrant might have made a mistake in filling out the card. The dangers seem trifling, however, compared to those encountered with evidence routinely admitted under hearsay exceptions.197

*United States v. Day*198 probably also belongs in the category of “association” cases, although it has some unusual features that set it off from run-of-the-mill association cases. *Day* involved statements made by a murder victim, Williams, shortly before the killing.199 Williams described a fight with “Beanny” (Day) and indicated that he was afraid of being harmed.200 Williams gave a friend Beanny’s name and telephone number with instructions to call the police, give them the number, and tell them the story if Williams did not return the next day.201 On appeal, Judge MacKinnon held that although the statements accompanying the delivery of the slip of paper were inadmissible, the paper itself was not hearsay because “[t]he words themselves do not assert anything except that Beanny and/or Eric might have a particular telephone number.”202 In addition, Judge MacKinnon allowed the witness to testify “that sometime in the hour before the shooting Williams gave him the slip of paper, that he telephoned the police after witnessing the shooting, and that he gave the police the information on the slip.”203

This result seems wrong even under the assertion definition, because the jury could infer from the evidence described under the business records exception by showing that the hotel verified the identity of the person registering. The court did not explain exactly how the business records exception would be satisfied. Even if the person registering showed the hotel clerk a driver’s license, the record still would include hearsay furnished by a person not under a business duty. Perhaps the driver’s license or other verification, however, sufficiently justifies a finding by the judge, under FED. R. EVID. 104(a), that the registrant’s statement was an admission of a party (assuming that the hotel record was offered against the person named in it). The verification would, of course, make the evidence more reliable as a commonsense matter, which seems to have been the primary focus of these courts, rather than the technical requirements of the business records exception or the hearsay definition.

197. *MODEL CODE OF EVIDENCE* 38-47 (1942) (discussing the dubious rationales supporting many categories of statements routinely admitted under hearsay exceptions).
199. Id. at 879-87.
200. Id. at 879.
201. Id. at 879-80.
202. Id. at 883.
203. Id.
that the victim also must have said that Day was after him.\textsuperscript{204} One does not solve the hearsay problem under either definition by expunging the statement itself, leaving clues of its existence, and inviting the trier to guess what it was. \textit{Day} is not a case in which the proponent can argue that a declarant’s indirect statement was being offered inferentially. It is a case in which a direct assertion has been slipped in the back door by expunging the actual assertion but admitting evidence that will lead the jury to infer the existence of a direct assertion.\textsuperscript{205}

c. \textit{Statements offered to show knowledge of a fact proven by other evidence}

The “association” cases, in which evidence is offered to show linkage between two people or a person and a thing, resemble another class of cases involving implied assertions offered merely to show the declarant’s knowledge of a fact, when the fact itself is proven in some other fashion.\textsuperscript{206} For example, a declarant’s assertion that his brakes were bad could be deemed nonhearsay, under the assertion definition, when offered to show that if the brakes were bad the declarant knew of it.\textsuperscript{207} Similarly, statements by children about sexual matters could be considered nonhearsay when offered merely to show knowledge of sexual facts.\textsuperscript{208} Such statements involve hearsay dangers, but sometimes the dangers are minimal. It is just

\textsuperscript{204} Cf. United States v. Ariza-Ibarra, 605 F.2d 1216 (1st Cir. 1979), cert. denied, 484 U.S. 895 (1981). The trial court in \textit{Ariza-Ibarra} was reversed for allowing the government to introduce into evidence testimony about a drug informant’s reliability during the guilt or innocence phase of a criminal trial. \textit{Id.} at 1222-23. The evidence was relevant only if one assumed the informant had implicated the defendant. The jury therefore was invited to infer that the informant-declarant had made a direct assertion of the defendant’s guilt. Thus this is a case of what I have elsewhere called an expunged assertion, not a case involving an implied assertion. \textit{See supra} notes 60-65 and accompanying text. The trial witness did not testify to the declarant’s assertion in so many words, but did give testimony that invited the jury to infer that the declarant had asserted that the defendant was a drug dealer. \textit{Ariza-Ibarra}, 605 F.2d at 1222-23. This type of testimony should be regarded as hearsay regardless of the definition chosen or the treatment given to implied assertions. Graham, \textit{supra} note 15, at 911 & n.51; \textit{see supra} notes 62-65 and accompanying text.

The evidence in \textit{Day} was not needed to show association between the defendant and the victim; there was ample other evidence of that undisputed fact. \textit{See} 591 F.2d at 894 (Robinson, J., dissenting).

\textsuperscript{205} For a discussion of other expunged assertion cases, see \textit{supra} notes 60-65 and accompanying text.

\textsuperscript{206} \textit{McCORMICK} ON \textit{EVIDENCE} § 250, at 741-42 (E. Cleary 3d ed. 1984).

\textsuperscript{207} \textit{Id.} § 249, at 591 & n.98.

\textsuperscript{208} \textit{See, e.g., In re Dependency of Penelope B.}, 104 Wash. 2d 643, 654, 709 P.2d 1185, 1190-92 (1985) (en banc).
barely possible that the declarant who states that the brakes are bad is merely trying to scare a passenger, without actually knowing the brakes are bad.

Occasionally the dangers are more substantial, as was the case in United States v. Parry. The defendant in Parry was charged with conspiracy to distribute a controlled substance. Undercover agents testified that he had acted as an intermediary in three drug transactions. He did not deny participating in the transactions, but claimed he participated in the good faith belief that he was cooperating with the agents in helping them locate local drug dealers. He testified that he had known one of the agents was an agent before participating in any of the transactions, and offered into evidence his mother's testimony about statements he had made to her. She testified that he had told her the person who frequently called the mother's home asking for him was a narcotics agent with whom he had been working, and that she, the mother, was “not to worry.”

The district court excluded the evidence, but the Fifth Circuit reversed, holding that the evidence was not hearsay. The court reasoned that the evidence was not offered for the truth of the matter asserted because “this statement was not offered to prove that the caller was a narcotics agent or that Parry was working with the agent, but to establish that Parry had knowledge of the agent's identity when he spoke.” Although the court asserted that the statement's value did not rest on the declarant's credibility, it seems not at all far-fetched to suppose that Parry might have lied to his mother by saying that his caller, who may have acted like a drug dealer, was in fact a narcotics agent. The evidence therefore posed hearsay dangers.

209. 649 F.2d 292 (5th Cir. 1981).
210. Id. at 294.
211. Id.
212. Id.
213. Id.
214. Id.
215. Id.
216. Id. at 295 (alternative holding). The court also noted that the statement could have been admitted as a prior consistent statement under Rule 801(d)(1)(B), an argument that was apparently not presented to the trial judge. Id.
217. Id.
d. **Statements offered to show illegal activity at a given location**

Another line of cases classifying utterances as nonhearsay even though they threaten some hearsay dangers involves statements offered as indirect evidence that illegal activities are taking place at a given location. Cases like *United States v. Zenni* \(^{218}\) that allow introduction of intercepted telephone calls to the premises are one example.\(^{219}\) Other cases involve records or documents found on the premises. Some cases have allowed records of drug sales or of gambling transactions, found on sites of suspected illegal activity, to be received as nonhearsay on grounds that they are not offered to show the truth of any specific statement contained in them, but rather to show in general that illegal activity was taking place on the premises.\(^{220}\)

I have described the principal types of "implied assertion" cases, although some defy classification.\(^{221}\) I hope that I have

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\(^{218}\) 492 F. Supp. 464 (E.D. Ky. 1980); *see supra* notes 143-51 and accompanying text.

\(^{219}\) *Id.* at 469; *see also supra* note 151 (discussing other cases classifying utterances as nonhearsay even though they present some hearsay dangers).

\(^{220}\) *See United States v. Southard, 700 F.2d* 1, 13 (1st Cir.) (holding documents containing records of bets admissible only to show the scope of gambling operations and "not for the truth of the specific statements contained in the various documents"), *cert. denied,* 464 U.S. 823 (1983); *United States v. Wilson,* 532 F.2d 641, 643-47 (8th Cir.) (finding records of drug sales found in apartment admissible because "not offered to prove the truth of the facts asserted therein"; rather, they were "utterances, used circumstantially, giving rise to the indirect inference that the apartment was the scene of drug sales and drug related activity"), *cert. denied,* 429 U.S. 846 (1976). *But cf.* United States v. Garcia, 718 F.2d 42 (2d Cir. 1983) (holding it was reversible error to receive the "customer book" of cocaine dealer into evidence against alleged customer based on co-conspirator exception to hearsay).

\(^{221}\) For example, one is not likely to encounter another case like United States v. Detrich, 865 F.2d 17 (2d Cir. 1988). In *Detrich,* the defendant claimed he had been duped into bringing a man's suit with heroin in the shoulder pads through customs. *Id.* at 18. The defendant told police that an acquaintance in India asked him to bring it the suit to the United States and deliver it to someone about to be married (the suit was to be a wedding suit). *Id.* at 19. The court held admissible testimony that the person who met defendant at the airport told police, after arrest, that he was soon getting married, when offered in favor of the defendant. *Id.* at 20-21. In another 1988 case, United States v. Benton, 852 F.2d 1456 (6th Cir.), *cert. denied,* 109 S. Ct. 555 (1988), the court allowed a law enforcement official on trial on drug conspiracy charges to introduce into evidence, over a codefendant's objection, the official's purported "confidential file" on the drug activities to support the official's defense that the official was investigating, not participating in conspiracy; the file was not offered to prove the truth of any statements contained therein. *Id.* at 1468. (The codefendant objected because the file named him as a target of a drug investigation.) Quite possibly the declarant simply fabricated the statements.
given a fair idea of the types of situations in which modern federal courts treat evidence involving hearsay dangers as nonhearsay.

3. What does the caselaw show about judicial acceptance of implied assertions?

The caselaw discussed above shows first that the Supreme Court has not written about the implied assertion problem. Two of its decisions are suggestive because they pass up opportunities to use the implied assertion theory to admit evidence. One cannot say, however, that these cases show conscious Supreme Court support for the declarant definition of hearsay, because no evidence suggests the Court has given any thought to the issue. The two decisions merely suggest that the opportunity to seize upon a distinction based on minor differences in the wording of an assertion was not attractive to the Justices sitting when those decisions were issued, or at least not so tantalizing as to cause the lawyers to argue it or the Court to employ it spontaneously. The two decisions provide ammunition for those favoring the declarant definition, but the ammunition was never very explosive, and time has dampened it because both decisions predate the Federal Rules of Evidence.

Scattered lower court cases do specifically consider the implied assertion issue. Since enactment of the Federal Rules in 1975, a handful of courts have expressly adopted or rejected the position that implied assertions are hearsay. Many other fed-

in the file, but I find it hard not to agree with the court of appeals that the evidence should have been admitted, especially because the defendant testified and was subject to cross-examination. A possible alternative ground for admission would be as a prior consistent statement, because the defendant likely was charged with fabricating his defense. See Fed. R. Evid. 801(d)(1)(B).

222. See supra notes 130-41 and accompanying text.

223. See notes 132-40 and accompanying text.

224. Another decision of the Supreme Court, United States v. Anderson, 417 U.S. 211 (1974), suggests that the Court would be receptive to the view that assertions offered as falsehoods, for purposes of showing consciousness of guilt, are not hearsay because they are not offered to prove the truth of the matter asserted. Id. at 219-20. This decision departs from a strict declarant definition, because the assertions do depend for value upon credibility. Again, however, it does not appear that the Court thought about the difference between the assertion and the declarant definitions when reaching this result. See supra notes 173-75 and accompanying text.

225. Cases adopting the position that implied assertions are hearsay include: Lyle, 720 F.2d at 433; Reynolds, 715 F.2d at 103; Park, 493 F.2d at 357; Pacelli, 491 F.2d at 1111-12, 1115-17. Cases in which implied assertions have
eral decisions reflect a possible difference between the two definitions. These decisions classify verbal conduct as nonhearsay on the ground that it is not assertive, or not offered to prove the truth of an assertion, despite the existence of hearsay dangers. These opinions do not discuss the implied assertion controversy expressly or speak of hearsay dangers. Under a strict interpretation of the declarant definition, however, the utterances involved in these cases would be classified as hearsay. It therefore is fair to say that a declarant definition, if rigorously followed, often would lead to a different hearsay classification than the assertion definition. That conclusion does not mean results would differ at the admissibility level. It simply means that evidence now classified as nonhearsay would be classified as hearsay, and would need the help of an exception to find its way into evidence.

Although many cases classify as nonhearsay statements involving hearsay dangers, these cases generally have arisen in situations in which the dangers are minimal. Many of them have involved intercepted declarations. The declarants could not have foreseen the purpose for which the statements ultimately were used at trial, unless one assumes bizarre facts. Sincerity dangers therefore are reduced.

Moreover, courts generally have avoided making results turn on niceties in the way the declarant phrased an utterance. Judge Wisdom's fear that if the rule about implied assertions were otherwise, "the hearsay rule could easily be circumvented through clever questioning and coaching of witnesses, so that answers were framed as implied rather than as direct assertions," seems not to have been realized. The decisions in which courts have classified utterances as nonhearsay despite the existence of hearsay dangers rarely have involved any real danger that an utterance originally in direct form was recast,

been held not hearsay include: Perholz, 842 F.2d at 357; Zenni, F. Supp. at 466 n.7, 468.

226. See supra notes 168-220 and accompanying text.

227. I am referring to the cases involving, for example, utterances offered as falsehoods to show consciousness of guilt, utterances used to show association, and utterances used to show illegal activities on the premises. See supra notes 170-80 and accompanying text (cases involving utterances offered as falsehoods); supra notes 182-205 and accompanying text (cases involving utterances used to show assertions); supra notes 218-20 and accompanying text (cases involving utterances used to show illegal activities on the premises).

228. See supra note 183 and accompanying text.

229. E.g., a caller to a bookie knows police are there monitoring telephone calls and still proceeds to place bets.

230. Park, 493 F.2d at 928.
for trial purposes, as an indirect utterance. Indeed, the utterances classed as nonhearsay despite hearsay dangers seem to be made in situations in which it would have been strange or unnatural to assert directly the matter sought to be proven. Consider the character-of-establishment and association cases. People do not call their bookies and say “Hello, you are a bookmaker;” nor do they carry around slips of paper saying “I am associated with Arnold Jones.” When the danger Judge Wisdom described has existed, courts either have adopted a declarant approach or have passed over the possibility of using an implied assertion theory.

Perhaps utterances offered as falsehoods are an exception to this generalization. In that situation, one easily can imagine a direct assertion of the fact to be proven. For example, after arrest, one co-conspirator might make a statement directly incriminating another co-conspirator. Offsetting considerations, however, may make it easier to accept routine admission of such evidence. It is unlikely that the declarant was engaged in some intricate lie that involved incriminating another by making a statement that would have an incriminating effect only if believed to be false.

In short, the decisions classifying implied assertions as nonhearsay generally arise from factual situations in which the circumstances reduce dangers of fabrication by either the de-

231. See, e.g., United States v. Barbati, 284 F. Supp. 409, 412-13 (E.D.N.Y. 1968) (holding officer's testimony that barmaid had identified defendant and his companions as persons passing counterfeit bills admissible as highly probative and reliable); State v. Tolisana, 136 Conn. 210, 214-16, 70 A.2d 118, 119-20 (1949) (admitting as nonhearsay telephone conversation of alleged bettors based on finding of intention to place bets and finding that alleged bettors had reason to know they were dealing with bookie, despite hearsay dangers of credibility); Annotation, Admissibility of Evidence of Fact of Making or Receiving Telephone Calls, 13 A.L.R.2d 1409, 1411-26.

232. See supra note 231.

233. See supra notes 86-128 and accompanying text.

234. See supra notes 129-41 and accompanying text. But see United States v. Postal, 589 F.2d 862, 888 (5th Cir.) (holding post-arrest statements by occupants of drug-carrying boat, that “We made a mistake by throwing the papers overboard and not laying offshore until a pickup” and “It was to be an $80,000 — one-time shot for $80,000,” admissible against all occupants of boat, whether or not present at the time, because the statements were not offered for the truth of what they asserted), cert. denied, 444 U.S. 832 (1979); Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513, 522 n.5 (10th Cir. 1987) (regarding product confusion survey; court distinguishes between saying a reel is a Zebco (not hearsay when offered to show confusion of another reel with a Zebco) and saying the reel looks like a Zebco (hearsay); distinction has no functional significance in case because court holds entire survey admissible).

235. See supra notes 170-80 and accompanying text.
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clarant or the trial witness. Although it may be worthwhile pedagogically to discuss whether the assertion definition could lead to ridiculous results based on minor differences in phrasing that have no conceivable effect on reliability, the published cases do not indicate that courts are reaching these results.

I will turn now to the question whether, in light of the body of caselaw just examined, codifiers should revise the federal definition of hearsay so that implied assertions are excluded from the definition.

III. SHOULD THE FEDERAL RULES BE CHANGED TO DEFINE IMPLIED ASSERTIONS AS HEARSAY?

The caselaw suggests that the definition of hearsay in Rule 801(c) sometimes has led courts to classify utterances as nonhearsay despite the presence of hearsay dangers. One could attempt to avoid this result by changing a few words in the rule. This change could be made without altering the federal rulemakers' widely accepted and wise decision to exclude nonverbal nonassertive conduct from the definition of hearsay. One way of making the change would be to amend Rule 801(c) to provide that all verbal expressions whose probative value depends on the declarant's credibility are hearsay. Another way would be to amend Rule 801(c) to define as hearsay any verbal expression offered as evidence of the declarant's belief in a matter, to prove the matter believed. Either form of

236. See supra notes 142-70 and accompanying text.
237. See supra notes 46-49, 17-19 and accompanying text.
238. Professor Wellborn's proposed revision, from which the language in the text is derived, would change Rules 801(a)-(c) as follows:
   (a) STATEMENT. A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by him as a communication.
   (b) DECLARANT. A "declarant" is a person who makes a statement.
   (c) HEARSAY. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered as evidence of declarant's belief in a matter, to prove the matter believed.

Wellborn, supra note 7, at 92.

Texas subsequently has adopted a rule similar to the one proposed by Professor Wellborn, who served as Reporter of the State Bar of Texas Liaison Committee on the Federal Rules of Evidence. The Texas rule is meant to have the same effect as the Wellborn proposal, but to retain the familiar phrase "truth of the matter asserted." It does so by separately defining "matter asserted" so that it "includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief in the matter." See Tex. R. Crim. Evid. 801(c) and Tex. R. Civ. Evid. 801(c).

Professor Michael Graham has offered a similar proposal. Although Pro-
revision would codify the doctrine of *Wright v. Tatham* as it applies to verbal conduct. The first approach perhaps would make the nature of the change more obvious on the face of the codification, because of the degree of departure from traditional language. The second, however, would emphasize that the purpose for which the evidence is being offered is crucial to the hearsay determination.

The case for changing Rule 801(c) is based principally on two arguments. The first is that the assertion definition of the Federal Rules is vague and confusing. The second is that the distinction between direct assertions and implied assertions is arbitrary. Proponents of revision have argued that, at least in regard to verbal conduct, hearsay dangers are as great in the case of implied assertions as in the case of direct assertions.

The arguments for change have been made with logic, force, and clarity. The arguments in favor of the status quo are more diffuse and less easily stated, but are more persuasive. The Rules have been in place for almost fifteen years; courts have used the truth-of-the-matter-asserted definition for a far longer period. Change would eliminate a formula familiar to Professor Graham believes that existing Rule 801(c) should be interpreted to reach the same result as *Wright v. Tatham*, he has suggested that clarity would be fostered by revising the definition of hearsay to read as follows:

(c) Hearsay: "Hearsay" is a statement offered in evidence, other than one made by the declarant while testifying at the trial or hearing, to the extent relevance depends upon (1) the truth of the matter asserted or (2) the declarant's belief in the truth or falsity of the matter asserted.


239. See supra notes 27-34 and accompanying text.

240. See Graham, supra note 15, at 909 (deploring "analytical confusion" that arises from use of concept of assertions used to infer something other than the truth of the matter directly asserted); Wellborn, supra note 7, at 68 (stating that Rule 801 is "fraught with ambiguity and complexity"); id. at 92 (finding that "[o]ne of the worst features of the rule is its susceptibility to various interpretations").

241. Wellborn and Graham view verbal and nonverbal conduct as presenting different problems. Graham favors treating nonassertive nonverbal conduct as nonhearsay on policy grounds. See Graham, supra note 15, at 909. Wellborn at least cedes sufficient merit to this position to propose hearsay classification only for "statements." He would define a "statement" as "an oral or written verbal expression" or "nonverbal conduct of a person, if it is intended by him as a communication." Wellborn, supra note 7, at 92.

242. See Graham, supra note 15, at 909 (finding that, although the Advisory Committee was correct in finding less of a credibility risk associated with nonverbal conduct that is not intended as an assertion, the Committee failed to fully grasp the consequences of extending this concept to cases that involve verbal statements offered as implied assertions).
lawyers and judges that provides good guidance in most situations. Moreover, no revision of Rule 801(c) would achieve universal acceptance. The amendment would be adopted in some states, rejected in others, and perhaps adopted in compromise form in others. Revision of Rule 801(c) therefore would undermine uniformity. In view of these problems, the proponents of change ought to bear the burden of showing that the present rule has caused injustice or inconvenience.

One criticism of Rule 801(c)'s definition is its obscurity and indeterminacy. Probably everyone familiar with the puzzles arising from the hearsay rule feels the force of this criticism, but that does not make the criticism easy to evaluate. The Rule 801(c) definition does work quite well in some contexts. For example, Rule 801(c) makes it easy to identify as nonhearsay utterances offered to show their effect on the hearer or reader. For this large category of nonhearsay utterances, the truth-of-the-matter-asserted formula focuses attention on the purpose for which the utterance is offered, and provides guidance that is quicker and easier to follow than declarant definitions.

For another category of nonhearsay utterances, those offered as legally operative language, the Rule 801(c) definition occasionally causes confusion. It is not clear, however, that adopting the declarant definition would lessen the confusion. The assertion definition causes confusion because of congruence between the utterance and the matter sought to be proven. For example, the utterance "this is a gift" seems to many hearsay novices to be offered to prove the truth of what it asserts when offered to show the giving of a gift. Under the assertion definition, the nonhearsay classification of such utterances can be justified on the ground that they are nonassertive; they are performative utterances that cannot be true or false, only effective or ineffective. Although they sometimes depend for their legal effect on the declarant's state of mind, that does not affect the assertiveness or truth or falsity of the utterance. Instead, it relates to the effectiveness of the utterance, just as the question whether the utterance was made contemporaneously with a property transfer might relate to effectiveness. Under a declarant definition, one is tempted to explain the nonhearsay status of legally operative language on the ground that it does not depend for value on memory, perception, sincerity, or nar-

244. Cf. J.L. AUSTRIN, HOW TO DO THINGS WITH WORDS 12-24 (2d ed. 1962).
Uterances such as "this is a gift," however, do depend for value on sincerity and narrative ability when subjective intent governs the legal effect of the utterance. If we assume that utterances such as "this is a gift" should continue to be classified as nonhearsay even if they depend for effectiveness on a belief of the declarant, then the declarant definition does not provide the user better guidance than the assertion definition.\footnote{245}

The assertion definition also has been criticized on the ground that it might require the judge to make a difficult determination about the actual intent of the declarant.\footnote{246} That need not be the case, however, because the interpretation of the assertion definition advanced in Part I of this Article would remove the need for any determination of actual intent.\footnote{247}

Across the universe of nonhearsay utterances, the effect of switching to a declarant definition is hard to assess. It is easy to point out that an existing definition often operates in fog, but it is difficult to predict that another one would bring sunlight. The fog may be generated by the complexity of the hearsay problem, and by uncertainty about the evils the rule is designed

\footnote{245. The version of the declarant definition set forth in R. LEMPERT & S. SALTZBURG, supra note 18, avoids this problem. Lempert & Saltzburg create a testimonial triangle that would treat as nonhearsay utterances that require only an inference from the making of the statement to the belief of the declarant, without a further inference that the belief reflects external reality, that is, when the inference depends only on suppositions about sincerity and lack of ambiguity, and not on suppositions about memory and perception. See \textit{id}. at 358-39 (illustrating the hearsay dangers with a triangle whose left leg represents dangers of insincerity and ambiguity, and whose right leg represents dangers of faulty memory and misperception, and concluding that "it makes sense to classify statements used so as to eliminate right leg dangers entirely as not hearsay;") see also \textit{id}. at 360 (recognizing that the statement "this is a loan," when offered to show a loan, is "relevant because it negates donative intent" and that "[t]his inference about donative intent seems to require the jury to reason from the making of the statement to the donor's belief about the transaction," but indicating that under their definition of hearsay the utterance would not be hearsay; there is no (right-legged) reliance on memory and perception; see also \textit{id}. at 363 (arguing that both direct and indirect statements of state of mind should be considered not hearsay). A codification based on this definition would avoid the misguidance problem described in the text. The other problems of adopting a declarant definition remain, however, and one of the reasons for changing definitions, to create an analytically pure definition that only treats evidence as nonhearsay when hearsay dangers are absent, would not be applicable.}

\footnote{246. \textit{See}, e.g., Wellborn, \textit{supra} note 7, at 79 (criticizing a subjective intent test). Professor Wellborn also describes an objective intent test, which he considers unambiguous but arbitrary. \textit{Id}. at 80-81.}

\footnote{247. \textit{See supra} notes 73-79 and accompanying text.}
to combat, rather than by the definition. The revisions discussed in this Article would retain the distinction between action and communication, and as long as that distinction is maintained an obscure twilight zone will exist. Maintaining the distinction probably will mean that the term "verbal act" will continue to live a life in the caselaw, luring some judges to dispose of assertive verbal conduct as if it were nonassertive nonverbal conduct.

Courts and commentators sometimes use the term "verbal act" unobjectionably to label legally operative language. Some hearsay writers, however, have defined it more broadly. For example, Wigmore's generous concept of "verbal act" leaves open the possibility of labeling verbal conduct a "verbal act" even when the conduct involves hearsay dangers and is not legally operative. Courts sometimes have used "verbal act"

248. Nonassertive nonverbal conduct still would be excluded from the hearsay definition, even if offered to show a belief of the actor, under the two definitions discussed supra notes 237-39. Any definition that attempted to go further, and reinstate Wright v. Tatham insofar as it applies to nonverbal conduct, would run into problems of its own, not the least of which is that the hearsay nature of nonverbal conduct generally would be ignored. See supra note 41 and accompanying text.


250. Wigmore describes four "simple limitations" that can be used to determine whether an utterance is not hearsay because it forms a "verbal act": (1) the conduct characterized by the words must be "independently material to the issue," (2) the conduct must be "equivocal," (3) the utterance must "aid in giving legal significance to the conduct"); and (4) the utterance must "accompany the conduct." 6 Wigmore's Handbook of the Law of Evidence § 1772, at 268 (J. Chadbourn rev. 1976). Sometimes Wigmore uses the phrase "verbal part of an act," e.g. id., § 1772 at 267, and sometimes, as in the passage used above, he uses the more common "verbal act" in describing this type of evidence.

251. The "simple limitations" quoted in the preceding footnote would seem to permit a declarant's contemporaneous explanation of his or her own conduct to be treated as a nonhearsay verbal act, even if the explanation depends for value on credibility and is not legally operative. For example, the declarant's statement "I'm going to fire a warning shot" when shooting at an escaping thief apparently would be a "verbal act" when used to show absence of intent to kill. Although the evidence should be admitted under an exception, it is wrong to classify it as nonhearsay under either a declarant or an assertion definition, because it is offered to prove the truth of what it asserts and because it depends for value on credibility. In discussing "verbal acts," Wigmore does give some examples similar to the one just stated. Wigmore would admit as nonhearsay the statements of a defendant found in recent possession of stolen goods, id. § 1781, at 307, so evidently the defendant's explanation that he or she bought a watch in a flea market would be admissible on the issue of good faith, even though it depends for value on credibility and is offered for its
Another likely survivor of any rule change is the phrase "circumstantial evidence," which also has been applied to verbal conduct with hearsay dangers in a way connoting nonverbal conduct. By facile use of the label, a writing identifying the owner of an object can be treated as if it were some other circumstance, such as a fingerprint on the object, that allowed the object to be traced. This use of the phrase is likely to survive any rule change.

Moreover, a rule change might add new terms to dazzle and confuse. It would be tedious to explore all the interpretive problems that different variations of a new hearsay definition might create. I will offer only one example.

Suppose the mysterious concept of "assertion" were abandoned, and instead hearsay was defined as any verbal conduct that depended for value on the declarant's credibility. The concept of reliance on credibility also could be mysterious. Consider *Bridges v. State.* In *Bridges,* a young girl described an apartment in which she had been sexually abused, and a suspect later was found who inhabited an apartment matching the description. The girl's out-of-court statements were offered at trial to show that she had been in the apartment. Morgan argued that use of these statements involves hearsay dangers. Others, including the revisers of *McCormick on Evidence,* have said that it does not. I believe that use of the evidence does involve some reliance on the declarant's memory, perception, narration, and sincerity. For example, if the trier believed the girl was insincere, that belief would diminish to some extent the probative value of her out-of-court statement. The girl could have learned the contents of the apartment without having been there, or her description could have matched truth. See id.; see also id. § 1777, at 281 (indicating that statements in connection with taking of property, offered to negate larcenous intent, are nonhearsay verbal acts); id. § 1778, at 283 n.9 (noting with approval a case in which subsequent utterance of testator about reason for closing house admissible as nonhearsay).

253. See supra notes 190-92 and accompanying text.
254. 247 Wis. 350, 19 N.W.2d 529 (1945).
255. Id. at 355-58, 19 N.W.2d at 531-32.
256. Id. at 364, 19 N.W.2d at 535.
259. Of course, if we assume that the girl's description was detailed, the
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260. Bridges illustrates that the concept of reliance on credibility will have some gray areas. A definition treating as hearsay all utterances that to any degree depend for value on credibility would push many innocuous utterances into the residual exceptions, causing inconvenience or injustice if the requirements of notice and superior probative value were enforced. 261. Credibility, therefore, might become a complex term of art.

One of the perceived advantages of revision is precision in identifying the reasons courts exclude hearsay. That precision could be achieved if the definition of hearsay excluded from the concept of hearsay all statements whose reception into evidence did not incur any of the risks the hearsay rule prevents. The hearsay exceptions then could deal with statements that raise some risks, but that nevertheless ought to be admitted for prudential reasons. A definition of hearsay that makes all statements hearsay whose value depends on credibility holds the allure of neatness. Such neatness, however, may be unattainable. First, the assumptions behind the credibility-based definition would be reductionist. Avoiding the danger of reliance on an untested declarant is not the only reason for excluding hearsay. In some contexts, the danger that an in-court witness fabricated a statement, or that reception of evidence will encourage abuse of police power, seems to have played as large a role as the four traditional "hearsay dangers" in excluding cer-

chances that she was able to describe the apartment without having been present are very low, even if we assume that her character for truthfulness was also poor. See Friedman, supra note 15, at 681-683. That does not mean that the hearsay dangers are nonexistent, merely that they are very low. Under a strict interpretation of the declarant definition of hearsay, her statement still would have to be treated as hearsay, although it might come in as a prior consistent statement or under the residual exception. Of course, one could seek to modify the declarant definition to accommodate Bridges by saying that it applies only when there has been substantial reliance on credibility. This course of action, however, would turn the hearsay definition into another general residual exception, under which testimony deemed reliable would be admitted without the requirement that notice be given and that the method of proof be superior to others.

260. Although the use of the girl's statements in evidence involves some degree of reliance on her credibility, her statements nevertheless should have been received in evidence. For a fuller statement of my view of Bridges and of the grounds on which the girl's statements could have been received, see Park, supra note 252, at 439-40.

261. The residual exceptions, Fed. R. Evid. 803(24) and 804(b)(5), set forth prehearing notice requirements and a requirement that the evidence be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Fed. R. Evid. 803(24), 804(b)(5).
tain types of hearsay.\footnote{262} Further, the Federal Rules could not achieve complete analytic precision without also eliminating the mishmash of other categories established by Rule 801(d)\footnote{263} Moreover, a definition that classified as hearsay all utterances depending to any degree on memory, perception, narration, or sincerity would yield surprising and unwanted results in the classification of certain types of utterances that traditionally have been labeled nonhearsay as verbal acts or legally operative language. Yet, seeking to modify the declarant definition to classify as nonhearsay utterances that involve some hearsay dangers sacrifices the definition's analytic purity. Finally, some of the confusion in the hearsay definition appears to result from use of vague terms like "verbal act" and "circumstantial evidence" as substitutes for the hearsay definition, and no reformulation likely would stamp out this tendency.

The second main argument against the truth-of-the-matter-asserted definition is that it could produce anomalous results, because there is no distinction rooted in policy between implied assertions and direct assertions. This argument, to the extent it differs from an argument based on the clarity of the definition, must derive from a perceived danger of injustice.

A review of the published caselaw does not reveal any obvious signs of injustice. There are no anguished judicial cries for change, or complaints about being bound by an inflexible code that only Congress can change. Nor are there glaring examples of obviously unreliable hearsay that has been admitted because of lacunae in the assertion definition. Courts applying the definition seem to have accomplished good results in almost every published case. Although one can hypothesize utterances involving implied assertions that raise great hearsay dangers, these utterances are not the ones courts have admitted as implied assertions under the modern caselaw.

Indeed, courts seem to have used the concepts of nonassertive conduct, and of assertive conduct offered to prove something other than the matter asserted, in a manner consistent with the Advisory Committee's theory that sincerity dangers are lessened.\footnote{264} The cases generally involve utterances classed as nonhearsay that raise no real insincerity dangers affecting

\footnotetext{262} See Park, supra note 13, at 62-65, 79-80, 83-84, 102-04.

\footnotetext{263} Fed. R. Evid. 801(d) (classifying certain prior statements by witness and admissions of party-opponent as nonhearsay).

\footnotetext{264} See supra notes 225-36 and accompanying text.
the purpose for which they are being used. The persons who made the intercepted calls to bookmakers are very unlikely to have been consciously plotting to incriminate the bookmakers. It is unlikely that codefendants who made false statements exculpating their accomplices were hoping to incriminate their accomplices. The makers of secret records of drug dealing and gambling are unlikely to have manufactured them and left them on the premises so they later would be used to incriminate those on the premises. This sort of frame-up possibly could occur, just as someone might frame a defendant by planting drug paraphernalia on the premises. The need for cross-examination, however, is no greater in the case of drug books than in the case of drug paraphernalia, when the only purpose of the evidence is to show the use of the premises. Nor, finally, are declarants who create documents that later are used as indirect evidence to show association or linkage likely to have done so for purposes of falsely showing association. The person carrying another’s name and phone number on a slip of paper in his or her pocket possibly might foresee that someone later could find the paper and infer that the person in possession knew the person named on the paper. The chance of this being done deliberately to create that false impression is trifling.

Revising the hearsay definition would have some inconvenient consequences. First, the reviser must decide what to do with utterances that now slip past the hearsay rule as nonassertive verbal conduct or as assertions offered inferentially. One option would be to codify, along with a change in the hearsay definition, a set of exceptions to cover these utterances. Then, even if changing the definition of hearsay simplified it, the larger code would be complicated by the added set of exceptions for utterances offered as falsehoods, utterances that indirectly characterize an establishment, and utterances used to show association. I do not think the additional exceptions would be worth the candle.

It is tempting to say that these classes of utterances should be handled under the residual exceptions. That approach, however, also has its costs. The residual exceptions are hedged about with restrictions that courts either must follow or ignore. Consider, for example, evidence that one person mentioned another’s name, offered solely to show association. This sort of

265. See supra notes 187-205 and accompanying text.
266. See id.
evidence is not the type that invariably should be subject to the requirements of the residual exceptions — that pretrial notice be given, and that the 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 fact that the mention of the name, or the entry in the address book, is not more probative in showing association than other evidence that reasonably could be offered does not mean it should be excluded. To push relatively innocuous evidence of this nature into the residual exceptions is to invite courts to ignore the requirements of the residual exceptions. This process already is partly underway, and threatens to weaken the limits of the residual exceptions in cases involving dangerous evidence. Perhaps we need not fear so much the distortion of the hearsay definition as we should fear the distortion of the residual exceptions.

Adopting a declarant definition would not eliminate ambiguities from the classification of hearsay. Although no policy behind the assertion definition distinguishes implied assertions from direct assertions, courts applying the definition have reached fair results.

CONCLUSION

The declarant and assertion definitions of hearsay often yield the same results, but they can differ in classifying implied assertions. This review of modern caselaw suggests that federal courts are reaching fair results in resolving implied assertion problems under the existing assertion definition. To change to a declarant definition would eliminate a familiar rule that works well in most situations. Change also would cause new interpretive problems and probably would entail creation of new hearsay exceptions. The existing definition of hearsay has worked tolerably well and should be retained.

267. FED. R. EVID. 803(24), 804(b)(5).