

YOU CAN SAY THAT IF YOU WANT—THE REDEFINITION OF HEARSAY IN RULE 801 OF THE PROPOSED FEDERAL RULES OF EVIDENCE

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“You can say that if you want . . .”

Charles C. Callahan

I remember my first classes at the Ohio State University College of Law with a great deal of pleasure because I was fortunate enough to be introduced to the study of law by five able teachers whose approaches to law were so different that between them they opened up an amazing number of ways of thinking about law. One of the courses with which my law school education began was a property course taught by Charles C. Callahan. Professor Callahan was a man of enormous mental force. His usual teaching device was to lead the class through questions, suggestions, and short lectures in a straightforward analysis of the problems presented by the law of property. Frequently this analysis cut through or ignored the more complex and roundabout analysis we found in the cases in the text. We quickly learned to approach those cases with at least some of the critical spirit with which our instructor dealt with them but we were nevertheless likely to bring up in class some elaborate piece of doctrine which we had found in a case. I remember that Professor Callahan had a characteristic way of responding to those efforts which were likely to complicate rather than assist our discussions. He would begin by saying “You can say that if you want” or “You can talk that way if you want to” and then proceed to suggest what seemed to him a more straightforward way of dealing with the question.¹

It therefore seems appropriate in an issue of this Journal devoted to his memory to analyze the definition of hearsay contained in rule 801 of the proposed Federal Rules of Evidence and to suggest that the definition raises a number of problems which can be better dealt with if we can clarify what we are doing when we say that certain categories of evidence are or are not hearsay.

The proposed Federal Rules of Evidence are now embodied in a bill making its way through Congress.² This bill was adopted by the House of Representatives on February 6, 1974.³ The proposed rules were orig-

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¹ I wish to thank fellow Callahan students William G. Batchelder III, Alan L. Briggs, Susan E. Brown, and M. Andrew Ross for their assistance in reconstructing the methods and the language of Professor Callahan's classes.

² H. R. 5463, 93d Cong., 1st Sess. (1973).

³ 120 CONG. REC. H570 (daily ed. Feb. 6, 1974).

inally drafted by a distinguished Advisory Committee to the Judicial Conference of the United States⁴ with the expectation that they would be promulgated by the Supreme Court of the United States under the rule-making authority given to the Supreme Court under the Rules of Court Act.⁵ The proposed rules were in fact so promulgated by the Supreme Court on November 20, 1972,⁶ and transmitted to Congress by the Chief Justice on February 5, 1973.⁷ A combination of doubts as to whether the Supreme Court actually had authority to promulgate evidence rules⁸ and opposition to particular rules⁹ led Congress to pass legislation preventing the rules from going into effect.¹⁰ A subcommittee of the House Judiciary Committee chaired by Congressman William L. Hungate undertook to rewrite the rules as legislation to be adopted by the Congress.¹¹ Hearings were held,¹² a Committee Print with substantial changes was circulated,¹³ and a bill with further changes was reported out¹⁴ and passed by the House¹⁵ with a few more changes.¹⁶

One section of rule 801 was amended when the Committee Print was prepared,¹⁷ and again in the reported bill,¹⁸ but the structure of the rule remains the same as in the version approved by the Supreme Court.¹⁹ It well may be that the complexity of the rule resisted further analysis and amendment. The proposed Federal Rules of Evidence are the fourth attempt in recent years to improve the law of evidence by creating an evidence code. This federal code has incorporated or adopted ideas about hearsay developed in the 1942 Model Code of Evidence of the American Law Institute, the 1953 Uniform Rules of Evidence of the

⁴ See Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 *Geo. L. J.* 125 n.3 (1974).

⁵ 28 U.S.C. § 2072 (1970).

⁶ 56 *F.R.D.* 183, 184 (1972).

⁷ *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., Ser. 2, at 1 (1973) (remarks of Rep. Hungate), [hereinafter cited as *1973 Hearings*].

⁸ 119 *CONG. REC.* H1722-1727 (daily ed. March 14, 1973).

⁹ 119 *CONG. REC.* H1721-1727 (daily ed. March 14, 1973).

¹⁰ *Pub. L. No. 93-12*, 87 *Stat.* 9 (Mar. 30, 1973).

¹¹ *H. R. REP. No. 650*, 93d Cong., 1st Sess., at 4 (1973); *1973 Hearings*, *supra* note 7.

¹² *Id.*

¹³ *Proposed Changes to the Rules of Evidence Subcomm. on Criminal Justice, House Comm. on the Judiciary*, 93d Cong., 1st Sess., (1973). The Committee Print is reproduced in *1973 Hearings*, *supra* note 7, Supplement at 145-184.

¹⁴ *H. R. REP. No. 650*, *supra* note 11, at 1.

¹⁵ 120 *CONG. REC.* H570 (daily ed. Feb. 6, 1974).

¹⁶ 120 *CONG. REC.* H543-H570 (daily ed. Feb. 6, 1974).

¹⁷ See text accompanying note 120 *infra*.

¹⁸ See text accompanying note 121 *infra*.

¹⁹ 56 *F.R.D.* 183, 293 (1972).

National Conference of Commissioners on Uniform State Laws, and the 1965 California Evidence Code.²⁰

The definition of hearsay contained in rule 801 is complex. Persons who are already somewhat acquainted with the idea of hearsay and the common exceptions to the hearsay rule, such as lawyers, judges, and law professors, are likely to find that the rule can most easily be read by dividing it into three apparently unrelated parts: subdivisions (a), (b), and (c), subdivision (d) (1), and subdivision (d) (2). Persons who do attempt to relate the three parts, such as students who want to find out what hearsay is, are likely to become confused and frustrated. There are several theories and compromises between theories that explain the complex definition of hearsay in rule 801,²¹ but before we consider them and attempt to evaluate their worth we need to do what Professor Callahan so frequently did—clear some ground upon which to base our analysis.

Let us begin by looking at five facts about the concept of hearsay on which there is general agreement. The first fact is that despite disagreements as to the outer limits of the concept, everyone would agree that the concept of hearsay includes at least all situations in which a party to a trial attempts to prove during the trial how an event occurred by offering as evidence a statement made outside the trial which describes how the event occurred²² and the person who made the statement is not pres-

²⁰ Rule 801 (a), (b), and (c) follows MODEL CODE OF EVIDENCE rule 501(1) and (2) (hereinafter cited as MODEL CODE), UNIFORM RULES OF EVIDENCE 62(1), 63 (hereinafter cited as UNIFORM RULES), and CAL. EVID. CODE §§ 225, 1200 (West 1966) (hereinafter cited as CAL. EVID. CODE). Rule 801(d) (1) follows CAL. EVID. CODE §§ 1235, 1236, 1238.

²¹ See text accompanying notes 62-64, 89-98, 103-12.

²² The most common definition of hearsay is the one set forth in 29 AM. JUR. 2d. *Evidence* § 493 (1967). Hearsay is defined there as "evidence which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person." This writer believes that this is an excellent and practical definition but that it fails to deal with several refinements supported by many scholars and reformers. The text sets forth a description of the minimum that is clearly hearsay regardless of our decisions on the refinements.

The draftsmen of the Model Code, the Uniform Rules, the California Evidence Code, and proposed rule 801 restrict hearsay to situations in which an out-of-court statement is offered into evidence to prove the truth of a matter asserted in the statement, MODEL CODE rule 501(1), 501(2); UNIFORM RULES 62(1), 63; CAL. EVID. CODE §§ 225, 1200; Proposed Federal Rule of Evidence 801(a), (b), and (c), 56 F.R.D. 183, 293 (1972) (hereinafter cited as Proposed Rule). This restriction on the definition of hearsay will permit the admission of evidence of nonassertive conduct and implied assertions by out-of-court persons. Such evidence does derive its value in part from the veracity and competency of the out-of-court persons but the advocates of the admission of nonassertive conduct and implied assertions argue that this evidence is more trustworthy than ordinary hearsay. McCormick, *The Borderland of Hearsay*, 39 YALE L. J. 489 (1930); Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MT. L. REV. 133 (1961). But see Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. R. 682 (1962) and Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192 (1940). The minimal description describes an assertion offered to prove the truth of its own contents

ent at the trial.²³ There are many, including this writer, who would argue that the concept is much broader in several ways than this minimal description but everyone will accept at least this minimal description²⁴ and that is enough for our present purposes.

The second fact on which there would be general agreement is that the danger involved in this situation is that the finder of fact in the court will have difficulty adequately evaluating the worth of the statement made out of court.²⁵

This agreed danger may require some further explanation since each of us manages everyday to evaluate adequately a great deal of what is clearly hearsay.²⁶ Almost all of what we know in this world comes to us in the form of hearsay. If we were to refuse to consider what we think we know because of what we have been told by our parents, our friends, our teachers, our textbooks, and our newspapers, there would be very little left that we could say we do know. What we do with hearsay in everyday life explains, however, why it is a courtroom problem and why it is a courtroom problem we have never been able to satisfactorily resolve. In everyday life we evaluate hearsay on the basis of everything we already know. We consider the source, whether the story sounds likely, and how the story fits with everything else we know. In considering an ordinary piece of hearsay we are likely to give some slight attention to dozens of facts. In dealing with all the items of hearsay that

which would be hearsay even if the definition of hearsay were to be restricted to permit the admission of nonassertive conduct and implied assertions.

²³ The minimal description also states (in order to avoid conflict with another proposed reform) that the person who made the out-of-court statement is not present. Wigmore and Maguire both argue that an out-of-court statement should not be considered hearsay if the out-of-court declarant is present at the trial to be cross-examined. 3A J. WIGMORE, EVIDENCE § 1018 (Chadbourn rev. 1970); Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 767-68 (1961). There is little authority, however, for such a restriction on the definition of hearsay. MODEL CODE rule 503(b) and UNIFORM RULE 63(1) both create an exception based on the availability of the out-of-court declarant for a in-court cross-examination which would have the same result, and the California Evidence Code provides that three narrow classes of evidence are admissible in those circumstances. Proposed rule 801 provides that three classes of evidence are "not hearsay" in those circumstances.

²⁴ The minimal description of hearsay in the text would need one further refinement in order not to conflict with proposed rule 801. The minimal rule should also say "the statement is not an admission by a party-opponent." It seems wiser, however, to ignore this confusing and unprofitable small problem for as long as possible. See text accompanying notes 90 to 98 *infra*.

²⁵ 5 J. WIGMORE, EVIDENCE § 1362 (3d ed. 1940); C. McCORMICK, LAW OF EVIDENCE § 245 (E. Cleary 2d ed. 1972) [hereinafter cited as McCORMICK]; E. MORGAN, BASIC PROBLEMS OF EVIDENCE 248 (1962); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 486 (1937); Maguire, *supra* note 23, at 747-48; Falknor, *The "Hear-Say" Rule as a "See-Do" Rule*, *supra* note 22, at 136; Falknor, *Silence*, *supra* note 22, at 194. Finman, *supra* note 22, at 684.

²⁶ FALKNOR, *Hearsay*, 1969 LAW AND THE SOCIAL ORDER 591, 591-92.

we are treating as true at any one moment we are likely to have used thousands of facts.

When we are called into court to act as fact-finders, however, a great deal of care is usually taken to ensure that we are judging a strange dispute between strangers. This greatly reduces (although it does not by any means end) the usefulness of judging the evidence presented by comparing it to what we already know.

We have developed strong devices to enable judges and jurors to evaluate the worth of testimony offered in court but they are not very useful for evaluating out-of-court statements.²⁷ The strongest of these devices for evaluating in-court testimony is usually cross-examination²⁸ and it can hardly be applied at all when an out-of-court statement is repeated by a witness who does not even claim any personal knowledge of the facts he is repeating. It is therefore usually said that the defect in hearsay is that it has not been subjected to cross-examination.²⁹ Wigmore has demonstrated that lack of cross-examination is a fatal defect which will prevent admission even of out-of-court statements which have been taken under oath and reduced to writing.³⁰ In the normal courtroom situation, however, the right to cross-examination is accompanied by the right to other courtroom procedures. The witness is placed under oath and he is required to make his statement during direct examination. These may also be very valuable rights for the party against whom the statement is offered.³¹ We will be coming back to this point because the definition of hearsay in rule 801 defines certain out-of-court statements as "not hearsay" on the basis of the existence of an opportunity for in-court cross-examination without any direct examination.³²

The third generally agreed fact is that extremely large numbers of items of hearsay testimony are admitted into evidence under numerous exceptions to the hearsay rule, which create categories of evidence which are admitted despite the hearsay rule.³³ These categories are not based upon satisfaction of the kind of elaborate analysis of the possible worth of a particular piece of hearsay which we make outside of court. Instead each category permits the introduction of all of a certain kind of evidence that falls within the definition of each category. The categories developed historically and there is much about them that is simply acci-

²⁷ Strahorn, *supra* note 25, at 484-86.

²⁸ 5 J. WIGMORE, EVIDENCE §§ 1362, 1367 (3d ed. 1940); McCORMICK § 245.

²⁹ *Id.*, Maguire, *supra* note 23, at 748.

³⁰ 5 J. WIGMORE, EVIDENCE § 1362 (3d ed. 1940).

³¹ Strahorn, *supra* note 25, at 485.

³² Proposed Rule 801(d) (1), 56 F.R.D. 183, 293 (1972).

³³ 5 & 6 J. WIGMORE, EVIDENCE §§ 1420-1764 (3d ed. 1940); McCORMICK §§ 254-324.

dent.³⁴ In only two cases—that of depositions and of testimony at previous trials³⁵—do the categories deal with evidence that satisfies the requirement of an opportunity for cross-examination. Instead the justifications for the creation of the categories have been either a feeling of unusual need for a certain type of evidence³⁶ (such as a dying declaration by the victim in a murder case)³⁷ or a hope that certain kinds of statements were more likely to be true³⁸ (regular business records³⁹ or statements against one's own financial interest at the time they were made).⁴⁰

The existence of these numerous exceptions raises the question whether the definition of hearsay is really very important. The definition is important because the exceptions, although numerous, are limited and will continue to be limited. Even if some bold new category of exception were to be created—such as the Massachusetts rule permitting the admission of any statement made by a deceased person in good faith and upon personal knowledge⁴¹—we would still be concerned with the definition of hearsay for all cases that did not fall into such a category.

But the proposed Federal Rules of Evidence do not create any new categories. They do continue the good work of recent years that has done much "to rationalize the rules and to improve their practical workability, more along evolutionary lines than revolutionary."⁴² The bill passed by the House of Representatives removed the only change in the exceptions included in the Supreme Court version of the Rules which appeared to be of major importance. The exceptions to the hearsay rule are stated in rules 803 and 804 of the proposed rules.⁴³ In the version of the Rules promulgated by the Supreme Court both of these rules ended with the following final exceptions:

Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.⁴⁴

These exceptions—803 (24) and 804 (b)(6)—have been called the "catch-all" exceptions and they excited many attacks from those who

³⁴ Morgan, *supra* note 25, at 253; 5 J. WIGMORE, EVIDENCE § 1423 (3d ed. 1940).

³⁵ MCCORMICK § 254.

³⁶ 5 J. WIGMORE, EVIDENCE § 1421 (3d ed. 1940).

³⁷ *Id.* § 1431.

³⁸ *Id.* § 1422.

³⁹ MCCORMICK § 306.

⁴⁰ 5 J. WIGMORE, EVIDENCE § 1457 (3d ed. 1940).

⁴¹ MCCORMICK § 326 at 752; 5 J. WIGMORE, EVIDENCE § 1576 at 440-441 (3d ed. 1940).

⁴² MCCORMICK § 325 at 752.

⁴³ 56 F.R.D. 183 at 300-328 (1972).

⁴⁴ Proposed Rule 803 (24), 56 F.R.D. 183, 303 (1972) and Proposed Rule 804 (b)(6), *Id.* at 322.

feared they might be used liberally and create enormous uncertainty as to what was admissible.⁴⁵ The House subcommittee removed these "catch-all" exceptions in both its print⁴⁶ and its reported bill,⁴⁷ and the bill passed by the House does not include them.⁴⁸ The effect of this is to take away from the federal courts their existing but seldom exercised powers to create new exceptions to the hearsay rule⁴⁹ and to freeze the exceptions into their present shape.⁵⁰

It may be that Congress and the critics of the "catch-all" exceptions feared that "a power appearing in a codification is more likely to be liberally used than one implicit in antiquity."⁵¹ And the standard for admission under the "catch-all" exceptions which requires only that statements have "circumstantial guarantees of trustworthiness" comparable to those of the existing exceptions⁵² would not reassure anyone who was worried by these sections. The other exceptions are too varied to give any clear meaning to such a standard. The defeat of the "catch-all" exceptions may also be explained, however, as the product of a general hostility to admitted hearsay which the provisions of rule 801 largely (but not entirely) avoided by never admitting that they were (or might be) hearsay.

The fourth and fifth generally agreed facts about hearsay which we need to point out before looking at proposed rule 801 are complementary: hearsay includes physical acts as well as words but it does not include all words spoken out of court. Hearsay clearly includes acts which are used as substitutes for speech such as the act of a person who nods his head "yes" in response to a question or the act of a person who points her finger at one suspect in a lineup.⁵³ Whether hearsay also includes acts that were not intended as speech but which may enable us to guess the thoughts and beliefs of the actors is a harder question and one which proposed rule 801 attempts to settle by excluding such acts from its definition of hearsay.⁵⁴

⁴⁵ 1973 *Hearings*, *supra* note 7, at 202, 216, 252, 264 and 499, Supplement at 68, 91, 82, 290, 291, 305, 308, 387 and 389.

⁴⁶ *Supra* note 13.

⁴⁷ *Supra* note 11.

⁴⁸ *Supra* note 15.

⁴⁹ Rothstein, *supra* note 4, at 156 and n. 162.

⁵⁰ Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 973-74 (1974). The California Evidence Code does leave open the possibility that additional exceptions may be created by the courts. See CAL. EVID. CODE §§ 1200(b), 160 and last paragraph of comment to § 200.

⁵¹ Rothstein, *supra* note 4, at 156.

⁵² *Supra* note 44.

⁵³ MCCORMICK § 250 at 596.

⁵⁴ *Supra* note 19.

Conversely, just as out-of-court acts that are used to make assertions are hearsay, out-of-court statements that are offered in evidence for some purpose other than to prove assertions contained in them are not hearsay.⁵⁵ The familiar formula used to offer such evidence goes: "We are not offering this statement to prove the truth of its contents but merely to prove that it was made." Of course such an out-of-court statement can be used in this way only if there is a nontestimonial purpose for which it is relevant, but there are a great many situations in which the mere fact that a statement was made is relevant. Thus, in a lawsuit based on an oral contract, we need to prove that the parties said the words that formed the oral contract,⁵⁶ and in a slander lawsuit we need to prove that slanderous words were spoken.⁵⁷

Matters get a little more difficult when we deal with out-of-court statements that could be offered for either a testimonial use or a nontestimonial use. An example of this would be an out-of-court warning to a driver: "The brakes aren't working on this car." If offered to prove that the brakes were bad it would be hearsay, but if it were offered only for the purpose of proving that the driver was warned it would be nonhearsay.⁵⁸ We will let such a statement come in for the nonhearsay use only and instruct the jury that they are not to consider the hearsay assertion contained in it.⁵⁹

There is considerable disagreement as to whether such limiting instructions keep the jury from actually considering the hearsay assertion, but the jury will not be able to disobey their instructions and apply the hearsay assertion as evidence of the fact asserted unless there is additional evidence of that fact in the case. The limited admission at least keeps the party offering the hearsay statement for some other purpose from making his or her case with the hearsay statement and unless that party introduces some other evidence of the fact asserted by the hearsay a verdict will be directed against him or her.

Does hearsay include the situation in which a party offers to prove that an out-of-court statement was made merely in order to support an inference that the declarant must have believed or felt some fact that is relevant? Since a direct statement of the fact by the out-of-court declarant would seem clearly to be hearsay, these statements of belief or feeling at least come very close to hearsay.

We have dealt with this problem of whether out-of-court statements

⁵⁵ MCCORMICK § 249; 6 J. WIGMORE, EVIDENCE § 1770 (3d ed. 1940).

⁵⁶ 6 J. WIGMORE, EVIDENCE § 1770 (3d ed. 1940).

⁵⁷ *Id.* at 189.

⁵⁸ MCCORMICK § 249 at 591.

⁵⁹ *Id.* § 59.

used as circumstantial evidence are hearsay in two different ways. When the belief or feeling sought to be proven concerned the state of mind of the out-of-court declarant, we have created an exception for declarations of a present state of mind or feelings.⁶⁰ In cases in which the declarant's state of mind was relevant, we could not hope for any better evidence than the declarations and actions of the person involved and the need for the exception was clear regardless of whether we called those declarations hearsay or not.⁶¹ This exception appears in the proposed Federal Rules of Evidence in rule 803(3).

Attempts to use out-of-court statements which show circumstantially the speaker's beliefs about facts other than his own state of mind present a different problem. The only decided case in which the problem received any adequate discussion,"⁶² *Wright v. Doe d. Tatham*,⁶³ excluded statements offered as circumstantial evidence of the declarant's beliefs about another person as hearsay, but a great many writers have argued that such evidence be admitted by excluding it from the definition of hearsay.⁶⁴ This type of evidence is frequently called an implied assertion, although the problem is essentially the same as that of evidence of nonassertive conduct and that title is sometimes applied to both statements and nonverbal conduct offered as circumstantial evidence of beliefs. Proposed rule 801 excludes both nonverbal conduct that is not intended as an assertion and statements used to prove an implied assertion.

We are now ready to consider proposed rule 801. It reads:

The following definitions apply under this article:

(a) Statement.—A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant.—A "declarant" is a person who makes a statement.

(c) Hearsay.—"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony and was given under oath subject to cross-examination, and subject to

⁶⁰ 6 J. WIGMORE, EVIDENCE § 1714 (3d ed. 1940).

⁶¹ MCCORMICK § 249 at 590-591.

⁶² McCormick, *The Borderland*, *supra* note 22, at 492.

⁶³ 5 Cl. & Fin. 670 (H.L. 1838); 7 A & E 313 (Ex. 1837).

⁶⁴ McCormick, *The Borderland*, *supra* note 22; Falknor, *The "Hear-Say" Rule as a "See-also" Rule*, *supra* note 22; Falknor, *Hearsay*, *supra* note 26; Morgan, *Hearsay*, 25 MISS. L. J. 1, 8 (1953).

the penalty of perjury at a trial or hearing or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.⁶⁵

This rule can be most conveniently read by breaking it into three rules. Subdivisions (a), (b), and (c) restate the definition of hearsay used in the Model Code, the Uniform Rules, and the California Evidence Code. Subdivision (d)(2) restates with some improvements conventional doctrine concerning the admissibility of admissions of a party-opponent. Its most surprising feature is that it describes admissions of a party-opponent as "not hearsay." Although some scholars have argued for such a description of admissions of a party-opponent,⁶⁶ such admissions have usually been described as an exception to the hearsay rule.⁶⁷ Subdivision (d)(1) follows the California Evidence Code⁶⁸ in describing three very limited categories of evidence as "not hearsay" if the out-of-court declarant is present in court to be cross-examined.

SUBDIVISIONS (a) (b) AND (c)

Since subdivisions (a), (b), and (c) merely restate a conventional definition of hearsay,⁶⁹ the only problems created by these subsections involve the continuing issue of nonassertive conduct and implied assertions. There are two questions we need to ask with respect to implied assertions and nonassertive conduct. The first question is how well does the definition exempt this kind of evidence from the ban of the hearsay rule. The second question is whether this kind of evidence should be exempted from the hearsay ban.

In the definition a "statement," and therefore a hearsay statement in-

⁶⁵ 120 CONG. REC. H558, H559 (daily ed. Feb. 6, 1974).

⁶⁶ See MODEL CODE rule 501, UNIFORM RULES 62, 63, and CAL. EVID. CODE §§ 225, 1200. See text accompanying notes 91 and 92 *infra*.

⁶⁷ See text accompanying note 89 *infra*, and MCCORMICK § 262 at 628-29.

⁶⁸ See CAL. EVID. CODE §§ 1235, 1236, 1238.

⁶⁹ See note 66, *supra*, and Falknor, *Hearsay*, *supra* note 26 at 59-95.

cludes "nonverbal conduct of a person, if it is intended by him as an assertion." The definition thereby excludes from hearsay nonverbal conduct of a person if it is not intended by him as an assertion. The difficulty with this is that it does not tell us how to decide if an out-of-court declarant meant to make an assertion or not.⁷⁰ It is not likely that we would know very much about the motives of the out-of-court declarant in any situation in which we would resort to this kind of evidence. (This is a point to which we will be coming back when we discuss whether this kind of evidence should be exempted from the hearsay ban.) The Advisory Committee suggests in its comment that the rule will work because the burden of proof will be on any party who claims that conduct should be excluded as hearsay to show that it was intended as an assertion.⁷¹ That would appear to mean, however, that conduct will be allowed into evidence because it cannot be shown to have been intended as an assertion and not that the conduct which is allowed into evidence will in fact be conduct that was not intended as an assertion.

The definition includes in hearsay only statements "offered in evidence to prove the truth of the matter asserted" and the Advisory Committee note tells us that this will exclude from hearsay statements which are offered in evidence to prove an inference as to the declarant's beliefs which can be made from the fact that the declarant made the statement.⁷² It would appear to this writer that the words of the rule themselves actually leave some room for an argument that in those situations in which the proponent of an implied inference offers a statement which must be found to be a true assertion before any inference can logically be drawn from it, such a statement falls within this definition of hearsay. However, the interpretation to which the Advisory Committee adds its authority is one that has been consistently given for this definition of hearsay,⁷³ and I would expect that interpretation to be used by the federal courts.

The remaining question is whether nonassertive conduct and implied assertions should be exempted from the hearsay ban. The actual question is whether our interpretation of what an out-of-court witness believes about a fact we want to know but which he does not tell us is more trustworthy than an out-of-court statement of that fact by that witness.

⁷⁰ See Finman, *supra* note 22, at 695-96.

⁷¹ *Advisory Committee's Note to Proposed Federal Evidence Rule 801(a)*, 56 F.R.D. 183, 293-94 (1972).

⁷² *Id.*

⁷³ 6 J. WIGMORE, EVIDENCE § 1790 (3d ed. 1940); McCORMICK § 250; Comment (b.) to MODEL CODE rule 501; Comment to CAL. EVID. CODE § 1200. *But see*, McCORMICK § 246 at 586.

There are two arguments to support the contention that what the witness did not say is more trustworthy. The first of these applies only to evidence of conduct. This is the argument that a person who acts upon a belief shows a great deal more confidence in that belief than a person who merely states the belief.⁷⁴ This is not in fact true of all actions for many will involve little or no reliance on a belief,⁷⁵ but even when actions involve substantial reliance we must weigh this against our uncertainty as to just what unspoken belief the actor is relying upon. Let us consider the actual case in *Wright v. Doe d. Tatham*.⁷⁶ The question in that case was whether the testator had been competent to make a will. The defendant offered several letters written to the testator. One was from the Vicar of the parish asking the testator to have his attorney meet with an attorney for the parish. The argument is that the Vicar must have believed the testator to be competent or he would not have written such a letter, but this is only the possibility that suited the party offering the letter. Two other reasonable possibilities are (1) that the Vicar considered the testator incompetent but since the testator went on managing his affairs the Vicar had to try to deal with him as politely as he could, or (2) that the incompetent testator's affairs were being quietly managed by the attorney whose action the letter requested and although the letter was in form addressed to the testator the Vicar did not expect him to read it. If we acknowledge those possibilities we will see that the Vicar's reliance upon his belief tells us less than we thought, for until we know what he really believed we cannot know in what way he was relying upon that belief.

The second argument commonly advanced to support the contention that nonassertive conduct and implied assertions are more trustworthy than direct statements from the same person is based upon an elaborate analysis of hearsay dangers.⁷⁷

The analytical tools which we have available to evaluate hearsay, possible hearsay, and potential exceptions are inadequate. The analysis of hearsay dangers actually heard in courtrooms (when any is heard) frequently consists of nothing more than two conflicting characterizations of the evidence. The out-of-court statement may either be described as a valuable piece of evidence which in-court examination would not have

⁷⁴ Comment to CAL. EVID. CODE § 1200; Falknor, *The "Hear-Say" Rule as a "See-Do" Rule*, *supra* note 22, at 136-37.

⁷⁵ Finman, *supra* note 22 at 691-93; Falknor, *The "Hear-Say" Rule as a "See-Do" Rule*, *supra* note 22, text accompanying n.14.

⁷⁶ *Supra* note 63.

⁷⁷ Falknor, *The "Hear-Say" Rule as a "See-Do" Rule*, *supra* note 22; Morgan, *Hearsay*, *supra* note 64; *Proposed Federal Evidence Rule 801(a)*, 56 F.R.D. 183 at 293-94 (1972), also set forth in part in text accompanying note 80 *infra*.

affected or as a doubtful story that might well have been destroyed by the in-court examination to which it was not exposed. Either characterization can be applied to any out-of-court statement since the test is entirely hypothetical. Of course that means that all hearsay evidence should be characterized as something in between good and worthless, but we do not know what to do with such a characterization. The evidence either comes in or it does not, and the fact-finders either believe it or they do not.

American scholars have attempted to create a system to assist in the evaluation of hearsay and hearsay exceptions by identifying four areas of danger which would go untested by in-court examination if ordinary hearsay were admitted.⁷⁸ These areas of danger are narration, sincerity, memory, and perception. Professor Finman described these methods of analyzing dangers as follows:

When a fact finder relies on an express assertion, he must make four assumptions, any one of which, if erroneous, will lead to an invalid conclusion: (1) Narration—it must be assumed that the fact finder's understanding of the speaker's words is the one the speaker intended to convey. (2) Perception—it must be assumed that the speaker accurately perceived the matter reported in his statement. (3) Memory—it must be assumed that the speaker accurately remembered his past perception. (4) Sincerity—it must be assumed that the speaker is attempting to tell the truth. When the speaker is present in court, all these sources of potential error can be probed through cross-examination. If, however, the assertion is conveyed to the fact finder by W, who testifies that "X said that *f* (the fact to be proved) is true," X cannot be cross-examined on whether, when he made his statement, he was using language in the usual manner, whether he accurately observed *f* and correctly remembered his observation, and whether he was attempting to tell the truth about *f*.⁷⁹

This system of analysis is also inadequate, however. It can be used to illustrate problems but not to find solutions to them. Each of these areas of danger actually includes dozens of possible factors but the system of analysis may easily lead the user to treat each area of danger as a single problem or to give equal weight to each area of danger.

The Advisory Committee used this four-areas-of-danger analysis in justifying the exclusion of nonassertive conduct and implied assertions from the definition of hearsay in proposed rule 801. The Advisory Committee stated:

Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor,

⁷⁸ Finman, *supra* note 22, at n.12.

⁷⁹ *Id.* at 684-85.

but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 Rocky Mt. L. Rev. 133 (1961). Similar considerations govern non-assertive 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).⁸⁰

Even if it were true that we could virtually "eliminate questions of sincerity" with respect to these kinds of evidence we would not know whether that increased the trustworthiness of these kinds of evidence unless we could determine whether questions of sincerity were a major part of the dangers involved with this evidence.

The four-areas-of-danger analysis tends to suggest that questions of sincerity are 25% of the dangers. It may be that the question of how many dangers are involved in the use of a particular piece of evidence is too complex for us to answer. Professor Finman suggests, however, that questions of sincerity are *not* a major part of the dangers with which we should be concerned. Finman suggests we should be looking at the dangers which cross-examination might eliminate⁸¹ and cites Morgan's statement that courtroom experience shows that the principal utility of cross-examination in the vast majority of lawsuits "will be in limiting or eliminating the danger of deception through faults in memory and perception."⁸²

Furthermore it does not appear that nonassertive acts and implied assertions are free from questions of sincerity. It has frequently been argued that the danger of insincerity disappears when a person is not attempting to make an assertion because he cannot intend to lie about an assertion he does not intend to make.⁸³ The problem with this analysis

⁸⁰ 56 F.R.D. 183, 294 (1972).

⁸¹ Finman, *supra* note 22, at 690.

⁸² Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 178, 188 (1948), *quoted in* Finman, *supra* note 22, at 691.

⁸³ *E.g.*, Falknor, *The "Hear-Say" Rule as a "See-Do" Rule*, *supra* note 22, states at 136:

On this assumption, it is clear that evidence of conduct must be taken as freed from at least one of the hearsay dangers, i.e., mendacity. A man does not lie to himself. Put otherwise, if in doing what he does a man has no intention of asserting the existence or non-existence of a fact, it would appear that the trustworthiness of evidence of this conduct is the same whether he is an egregious liar or a paragon of

is that it assumes that there is only one lie which this person can desire to tell. Actually there are a great many lies or half-truths which this person might desire to tell which would affect the conduct we are trying to interpret. Consider again the problem of the Vicar of the parish in *Wright v. Doe d. Tatham*. I have suggested two explanations for the Vicar's letter in addition to the one suggested by the defendant who attempted to introduce the Vicar's letter. If either of these explanations were true the Vicar would have had excellent honorable reasons to make statements on which we cannot rely even though he had no intention to make any statement, true or false, about the testator's competency. If the Vicar were compelled to deal with a person he thought incompetent but who still purported to run his own affairs the Vicar would have to avoid insulting the testator by not giving any indication of his real opinion. On the other hand, if the Vicar were really dealing with the attorney who was to take the action and knew that the attorney felt it necessary to maintain a fiction that the testator himself was controlling the matter, the Vicar would have had reason to write his letter in whatever form the attorney indicated was necessary.

We could, but will not, go on multiplying examples of situations in which the Vicar might not tell the truth, but there is one more situation that must be pointed out: the Vicar could write a letter falsely treating the testator as competent because he wanted to create false evidence that the testator was competent. Advocates of nonhearsay treatment of non-assertive acts and implied assertions concede that this can happen but do not tell us how to recognize it.⁸⁴ Under the proposed rule 801 doubtful nonassertive acts will be treated as nonassertive acts and be admitted into evidence.⁸⁵

This brings us back again to the major reason nonassertive acts and implied assertions should not be given nonhearsay treatment: we cannot know either the reasons for nonassertive conduct or what assertions were actually implied by a person who made a statement with sufficient certainty to justify the use of this class of evidence in a court of law. It does not appear that there is actually any greater trustworthiness in this class of evidence either with respect to sincerity or with respect to the dangers which cross-examination might eliminate, but if there were, it would be overcome by the ambiguity of this class of evidence.

veracity. Accordingly, the lack of opportunity for cross-examination in relation to his veracity or lack of it, would seem to be of no substantial importance.

⁸⁴ Falknor, *The "Hear-Say" Rule as a "See-Do" Rule*, *supra* note 22, at n.13; Maguire, *supra* note 23, at 165-66; MCCORMICK § 250, text accompanying nn. 47-48; Advisory Committee's Note, *supra* note 71.

⁸⁵ See text accompanying note 71 *supra*.

A recent California case applying the California Evidence Code provisions treating nonassertive conduct as nonhearsay demonstrates this problem. In *People v. Clark*,⁸⁶ the State was permitted to prove that the defendant's wife fainted when the defendant was asked if he owned a coat with a fur-lined collar and turned to his wife and stated "I don't have one like that, do I dear?"⁸⁷ The most that can be said for this case is that it is to be hoped the jury realized how irrelevant this was. But the vice of such ambiguous evidence is that it is very easy to suggest an extremely relevant interpretation and in the context of a trial it is very easy for us to think we know what interpretation is the correct one.⁸⁸

The problems of nonassertive acts and implied assertions have appeared in more articles than cases. Perhaps this may be because the lawyers who tried the cases in which these problems might have appeared did not recognize the hearsay problems. But *Clark* demonstrates that these are real problems that need real solutions. It would appear on the basis of the preceding analysis that the proper solution would be to treat nonassertive acts and implied assertions as hearsay and exclude them.

SUBDIVISION (d) (2)

The most interesting feature of subdivision 801(d)(2) is the provision that an admission by a party-opponent as defined in 801(d)(2) is "not hearsay." This is surprising but it will apparently have only one small effect on what actually happens in the courtroom, as will be shown later.

Admissions by a party-opponent have usually been described as an exception to the hearsay rule. The Model Code, the Uniform Rules, and the California Evidence Code all describe them as an exception.⁸⁹ They will be equally admissible under either description, however, and the party who offers admissions as evidence will not lose anything by the change of description.

The Advisory Committee explains this portion of its hearsay definition by pointing out that admissions by a party-opponent are admitted in evidence as an aspect of the adversary system rather than on the basis

⁸⁶ 6 Cal. App. 3d 658, 86 Cal. Rptr. 106 (5th Dist. Ct. App., 1970).

⁸⁷ *Id.* at 668, 86 Cal. Rptr. at 112.

⁸⁸ Of course there will be some factual situations in which a convincing interpretation will be possible such as the cases in which police officers who raided betting establishments answered the telephones and talked to persons who tried to place bets, e.g., *People v. Carella*, 191 Cal. App. 2d 115, 12 Cal. Rptr. 446 (4th Dist. Ct. App., 1961). But the question is not whether some of this evidence would be worthwhile but rather does the entire category contain evidence that is more valuable than ordinary hearsay.

⁸⁹ MODEL CODE rule 506, UNIFORM RULES 63(7), 63(8), and CAL. EVID. CODE §§ 1220, 1221, 1222.

of any guarantee of trustworthiness. The Advisory Committee suggests that this makes admissions by a party-opponent very different from the other exceptions.⁹⁰ This theory is supported by arguments by Strahorn⁹¹ and Wigmore⁹² that the other exceptions can be placed on a sounder logical basis if admissions by a party-opponent are recognized as being something different with an entirely different justification. The theory that admissions by a party-opponent are admitted because of the adversary system is certainly supported by overwhelming historical evidence,⁹³ and there are features of our present day rules concerning admissions that can be explained on no other basis.⁹⁴ Thus the lack of any requirement of personal knowledge for an admission would not make sense if we were seeking assurances of trustworthiness, but it does make sense if it is enough that one's adversary has somehow become responsible for a statement that is embarrassing to him. Despite the fact that the adversary theory is adequate to explain the admissibility of admissions of a party-opponent, there are frequently present in particular admissions facts that do give assurances of their trustworthiness because they do involve statements that were against the obvious interests of the persons who made them. We have not reorganized our theories about admissions of a party-opponent to require these facts that do give assurances of trustworthiness, but their presence probably explains the frequency and success with which admissions of a party-opponent are used as evidence in courts. Mere embarrassing circumstances would not be so convincing.

The developing law of admissions with respect to whether an admission by an employee concerning his employment is evidence against his employer can better be explained on a trustworthiness theory than on a theory that the employer was actually responsible for the admission. The employer who hires a truck driver to drive for him is clearly responsible if the truck driver negligently injured someone while in the scope of his employment. But all that the employer has hired the truck driver to do is to drive and on a traditional agency theory the employer is not responsible for what the driver says. He hired him to drive and not to talk. Therefore the driver's admissions could not be used in an action against the employer. But the driver's admissions concerning his own

⁹⁰ *Advisory Committee's Note to Proposed Federal Evidence Rule 801(d)(2)*, 56 F.R.D. 183, 297 (1972).

⁹¹ *Supra* note 25, at 488-90, 493; Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. Pa. L. Rev. 564, 569-88 (1937).

⁹² 4 J. WIGMORE, EVIDENCE § 1048 (Chadbourn rev. 1972).

⁹³ *Id.*, §§ 1048, 1053; but see MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 146-148 (1956).

⁹⁴ 4 J. WIGMORE, EVIDENCE § 1053 (Chadbourn rev. 1972); MCCORMICK §§ 263 and 264.

work are likely to be reliable⁹⁵ and there has been a trend towards allowing such statements to come in as admissions in actions against the employer.⁹⁶ The Advisory Committee recognized that the employee's statements were "valuable and helpful evidence"⁹⁷ and wisely wrote two rules—801(d)(2)(C) and 801(d)(2)(D). 801(d)(2)(C) sets forth a rule for statements actually authorized and 801(d)(2)(D) defines "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship" as an admission which may be offered against the employer without any showing that the employee was given authority to talk.

Regardless of the reasons why admissions of a party-opponent come in, the way in which we use them when they come in—as testimonial evidence of their contents—makes it hard to think of them as something other than hearsay. As Professor Morgan states:

Whether an admission is an exception to the hearsay rule depends upon one's definition of hearsay. If we define hearsay as an extrajudicial statement offered as tending to prove the truth of the matter stated, an admission clearly falls within it, and most commentators so regard it.⁹⁸

It is hard to think of a way to define hearsay so as to exclude admissions—except to say "But this does not include admissions of a party-opponent" which is the way in which proposed rule 801(d)(2) does exclude them.

The one consequence that does flow from the fact that admissions by a party-opponent are defined as not hearsay is that parties against whom admissions are offered will not be able to claim any rights under rule 806.⁹⁹ The first two sentences of 806 state a rule permitting a party to impeach a hearsay declarant. This rule follows similar provisions in the California Evidence Code, the Uniform Rules, and the Model Code.¹⁰⁰ In each of the earlier evidence codes this provision is broad enough to permit an employer to impeach an employee or an alleged conspirator to impeach a co-conspirator when their out-of-court statements are admitted against the employer or alleged conspirator. The change in the definition of hearsay has the effect of denying this right to employers and al-

⁹⁵ MCCORMICK § 267 at 641.

⁹⁶ *Id.*

⁹⁷ *Advisory Committee's Note to Proposed Federal Evidence Rule 801(d)(2)*, 56 F.R.D. 183 298 (1972).

⁹⁸ E. MORGAN, *supra* note 25, at 265-66.

⁹⁹ 56 F.R.D. 183, 329 (1972).

¹⁰⁰ MODEL CODE rule 531, UNIFORM RULE 65, and CAL. EVID. CODE § 1207.

leged conspirators.¹⁰¹ There is no justification for this denial and it should be corrected.¹⁰²

SUBDIVISION (d) (1)

This is the most complex subdivision of proposed rule 801 because it is a combination of four theories. The first of these theories is that an out-of-court statement is not hearsay if the out-of-court declarant is present in the court and available for cross-examination. This is based upon an argument that the major defect of an out-of-court statement is the lack of opportunity for cross-examination and that this defect has been cured by the opportunity to cross-examine the declarant during the trial itself.¹⁰³

The second theory applies only to subdivisions 801(d)(1)(A) and 801(d)(1)(B). This is the well-established rule that out-of-court statements that are inconsistent with the testimony of a witness may be used to attack the credibility of that witness by showing that he or she made inconsistent statements and that out-of-court statements that are consistent with the testimony may be used to defend against an attack on the credibility of that witness by showing that the witness did not recently fabricate the testimony he or she has given at the trial. There is no violation of the hearsay rule when out-of-court statements are introduced for these limited purposes because those statements are merely being introduced to prove that they were made. This is a circumstance that tends

¹⁰¹ 1973 *Hearings*, *supra* note 7, at 204 (Letter from Professor Kenneth W. Graham, Jr.).

¹⁰² A party against whom nonassertive conduct or an implied assertion has been admitted will also be denied any right to use this section with respect to the out-of-court actor or declarant because those categories of evidence are also defined as "not hearsay." This discrimination was also present in the Model Code, the Uniform Rules, and the California Evidence Code since they also defined nonassertive conduct and implied assertions as not hearsay but there does not appear to be any justification for discrimination along these lines. It would not be necessary to redefine hearsay in order to solve this problem. The first two sentences of rule 806 could be rewritten to provide rights to impeach hearsay declarants, agents, employees, and co-conspirators when they are the source of an admission, and any person whose nonassertive conduct or implied assertions are received in evidence.

¹⁰³ See authorities cited note 23 *supra*; McCormick, *The Turncoat Witness, Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 588 (1947); Falknor, *Hearsay*, *supra* note 26, at 597-98; *United States v. Cunningham*, 446 F.2d 194, 197 (2d Cir. 1971); *Gelharr v. State*, 41 Wis.2d 230, 163 N.W.2d 609 (1969). Cf. *California v. Green*, 399 U.S. 149 (1970). In *Green* the United States Supreme Court held that § 1235 of the California Evidence Code was not unconstitutional under the confrontation clause of the sixth amendment. The Court argued that a party against whom a prior inconsistent out-of-court statement of a witness was offered in evidence could conduct a full and effective cross-examination of that witness at the time of trial. *Id.* at 159-61. "The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant." *Id.* at 159. The question the court was deciding, however, was the constitutional adequacy of this procedure and not its wisdom as evidence policy. *Id.* at 155.

to attack or support the creditability of the witness.¹⁰⁴ Of course, the evidence that proves to the judge or jury the fact that the out-of-court statements were made also tells them what the out-of-court statements said. Judges do instruct juries that the inconsistent and consistent prior statements are not to be considered as proof of their contents but only of the fact that they were made. But such instructions are difficult for the jury to follow and easy for them to disregard.¹⁰⁵

The third and fourth theories mixed into subdivision 801(d)(1) are theories about the trustworthiness of out-of-court prior statements and eyewitness identifications. These theories differ greatly from the theories of guarantees of trustworthiness that underlie the exceptions to the hearsay rule set forth in proposed rules 803 and 804.¹⁰⁶

Eyewitness identifications are weak evidence,¹⁰⁷ and there is nothing about out-of-court statements in general that would give circumstantial guarantees of trustworthiness. Indeed, if the out-of-court statements are ones that were obtained by employees of one of the parties in one-party interviews, the circumstances would appear to guarantee less than normal trustworthiness.¹⁰⁸

The argument advanced in favor of admitting these kinds of out-of-court statements is not, however, absolute trustworthiness but relative trustworthiness. The argument is that these statements are more reliable than the corresponding in-court statements by the same declarants. Thus the argument with respect to the prior out-of-court identifications made admissible by 801(d)(1)(C) is that out-of-court identifications by eyewitnesses are so much more valuable and convincing than in-court identifications that testimony that out-of-court identifications were made should somehow be made admissible.¹⁰⁹

The Advisory Committee also argued that a similar comparative trustworthiness could be found in prior inconsistent statements. The Advisory Committee quoted in its note to 801(d)(1)(A) from the Comment of the California Law Revision Commission to Section 1235 of the California Evidence Code:

¹⁰⁴ 3A J. WIGMORE, EVIDENCE § 1018 (Chadbourn rev. 1970).

¹⁰⁵ *Id.* at 690, 1007.

¹⁰⁶ See 5 J. WIGMORE, EVIDENCE §§ 1421, 1422 (3d ed. 1940); *Proposed Federal Rules of Evidence 803 and 804*, 56 F.R.D. 183, 300-03 and 320-22 (1972).

¹⁰⁷ P. WALL, EYE WITNESS IDENTIFICATION IN CRIMINAL CASES (1965); D. LOUISSELL, J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 1203-38 (2d ed. 1972); 4 J. WIGMORE, EVIDENCE § 1130 (Chadbourn rev. 1972).

¹⁰⁸ See note 126 *infra* and accompanying text.

¹⁰⁹ See text accompanying note 138 *infra* and *Advisory Committee's Note to Proposed Federal Evidence Rule 801(d)(1)(C)*, 56 F.R.D. 183, 296-97 (1972).

In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation.¹¹⁰

The admission under 801(d)(1)(B) of prior consistent statements "offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive" might also be defended on similar grounds, but the Advisory Committee did not in fact make such an argument. Instead, they contented themselves with describing the effect of 801(d)(1)(B)¹¹¹ and then stating:

The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.¹¹²

Although the first theory, that an out-of-court statement is not hearsay if the out-of-court declarant is present in the court and available for cross-examination, has received extremely strong scholarly support,¹¹³ it has also encountered extremely great opposition.¹¹⁴ This theory appears in both the Model Code¹¹⁵ and the Uniform Rules¹¹⁶ as an exception applicable to all out-of-court statements whose declarant was present in court to be cross-examined. It was adopted in the California Evidence Code, however, only for three categories of out-of-court statements.¹¹⁷ The draftsmen of the proposed Federal Rules of Evidence followed the California Evidence Code and proposed three similar categories,¹¹⁸ but that proposal has been substantially reduced in the legislation adopted by the House.

This is the only part of proposed rule 801 which the House of Representatives changed. The version of this provision promulgated by the Supreme Court read:

¹¹⁰ *Advisory Committee's Note to Proposed Federal Evidence Rule 801(d)(1)(A)*, 56 F.R.D. 183, 296 (1972).

¹¹¹ *Advisory Committee's Note to Proposed Federal Evidence Rule 801(d)(1)(B)*, 56 F.R.D. 183, 296 (1972).

¹¹² *Id.*

¹¹³ 3A J. WIGMORE, EVIDENCE § 1018 (Chadbourn rev. 1970); Maguire, *supra* note 23; Falknor, *Hearsay*, *supra* note 26, at 597-98; McCormick, *The Turncoat Witness*, *supra* note 103.

¹¹⁴ *Ruhala v. Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967); *State v. Mlynczak*, 268 Minn. 417, 130 N.W.2d 53 (1964); *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939); 1973 *Hearings*, *supra* note 7, at 237, 244, 252, 264, 298, and Supplement at 82, 92, 204, 211, 218, 227, 241, 243, and 305.

¹¹⁵ MODEL CODE rule 503(b).

¹¹⁶ UNIFORM RULE 63(1).

¹¹⁷ CAL. EVID. CODE §§ 1235, 1236, 1237.

¹¹⁸ Proposed Rule 801(d)(1), 56 F.R.D. 183, 293 (1972).

(d) *Statements which are not hearsay.* A statement is not hearsay if—
 (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him;¹¹⁹

The rule in that form would have had two effects: (1) it would have removed all doubt as to whether the hearsay rule barred proof of out-of-court identifications and (2) it would have permitted any prior statements that could qualify for admission for the special limited purpose of impeaching or bolstering the credibility of the witness who had made it also to be considered as substantive evidence.

The Committee Print added a provision that would limit the effect of what was probably the most important section, 801(d)(1)(A), by providing that in order to be admissible as proof of the facts stated, the prior inconsistent statement must have been "given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury."¹²⁰ The bill reported to the House and adopted by it went even further to restrict prior inconsistent statements and provided that they must have been "given under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition."¹²¹

The practical effect of 801(d)(1)(A) in the form promulgated by the Supreme Court¹²² was to permit general use of prior inconsistent statements as substantive evidence. The practical effect of the restrictions on that subdivision adopted by the House¹²³ is drastically to reduce the number of cases in which prior inconsistent statements may be so used. The issue of whether such a restriction on the substantive use of prior inconsistent statements was wise depends upon a judgment of the relative reliability of prior inconsistent statements and of the testimony with which they are inconsistent. This evaluation of the relative worth of inconsistent statements is very likely to break down into an argument using the two conflicting characterizations which can be applied to any hearsay statement depending upon whether one chooses to regard it as

¹¹⁹ *Id.*

¹²⁰ *Proposed Changes, supra* note 13, at 26; *1973 Hearings, supra* note 7, Supplement at 170.

¹²¹ 120 CONG. REC. H559 (daily ed. Feb. 6, 1974).

¹²² *Supra* note 118.

¹²³ *Supra* note 121.

being as strong as it might be or as infirm as it might be.¹²⁴ Thus persons who believe that witnesses in criminal cases sometimes contradict the stories set out in the prosecutor's file when they testify on the stand because the witnesses either have been intimidated by the defendant¹²⁵ or have made their peace with the defendant will be convinced that the out-of-court statements are true. People who are concerned about the procedures by which out-of-court statements are obtained will see them as very doubtful evidence.¹²⁶

The advocates of the admission of inconsistent out-of-court statements as substantive evidence recognize that there is an issue with respect to the adequacy of subsequent cross-examination,¹²⁷ but they tend to assume away by their characterization of the statements the questions of whether the out-of-court statements were in fact made and whether the witnesses intended to say what the statements say.¹²⁸ It appears to this writer,

¹²⁴ See text following note 77 *supra*.

¹²⁵ H. R. Rep. No. 650, *supra* note 11, at 13.

¹²⁶ 1973 *Hearings*, *supra* note 7, at 244, Supplement at 92 and 218. Frederick B. McDonald spelled out the dangers of statement-taking in the following language in a letter reproduced in 1973 *Hearings*, *supra* note 7, Supplement 92-94:

The proposed rule will place enormous power in the hands of investigators. When an investigator takes a signed statement from a witness, he will have admissible substantive evidence of the matter in the statement even though the witness later tells a different story under oath in the courtroom. This gives investigators greatly increased control over the course of litigation, and such power will be subject to abuse that will be virtually impossible to control because:

(a) An investigator normally represents only one side of a controversy, and takes statements with no one present from the other side. Under such circumstances, an investigator's bias often causes him to overlook and fail to uncover facts favorable to the other side.

(b) Whether through ordinary bias or affirmative unscrupulousness, an investigator can establish his employer's case or greatly minimize matters unfavorable by careful phrasing, judicious inclusion and exclusion of facts, and choice of words. With a little practice, he can produce a most innocent appearing, but very slanted statement.

(c) The entire responsibility for fairness in statement taking is almost completely in the hands of the investigator. It is too much to expect that an investigator, who will be well aware of the vastly increased importance of his work, will observe the proprieties of a fair investigation, particularly when his future promotion may depend on the effectiveness of his work for his employer.

(d) The proposed rule will place excessive power in the hands of governmental agencies and other organizations whose work includes court use. The rule will tip the scales of justice much more toward agencies, organizations and those few individuals who can afford investigators and away from the less affluent.

Id. at 93.

¹²⁷ See, e.g., Maguire, *supra* note 23; McCormick, *The Turncoat Witness*, *supra* note 103, at 576-77; Gelharr v. State, 41 Wis. 2d at 234, 163 N.W.2d at 611. Cf. *California v. Green*, 399 U.S. at 159.

¹²⁸ Maguire, *supra* note 23; Gelharr v. State, 41 Wis. 2d at 234, 163 N.W.2d at 611. Cf. *California v. Green*, 399 U.S. at 158-59. But see McCormick, *The Turncoat Witness*, *supra* note 103, at 586, text accompanying n.32; J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 59-63 (1947); *State v. Mlynczak*, 268 Minn. at 420, 130 N.W.2d

however, that the question of whether the witness intended to make a statement saying what the alleged prior inconsistent statement does say is the most important question with respect to the class of hearsay eliminated by the House amendment to 801(d)(1)(A). This problem can also be stated in the terms of our earlier analysis of hearsay, in the form of the question of whether or not the hearsay rule is intended to insure a party not only the right to conduct cross-examination, but the right to require that the evidence introduced against him be introduced through direct examination.

A rule permitting any use of prior inconsistent statements will be used by those who possess such statements. These will usually be organizations such as police departments, prosecutors, insurance companies, and large businesses that employ investigators to obtain statements from witnesses. These statements will normally be in writing but will be composed by the investigator who obtains the statement because the investigator will have a much better understanding of what is relevant than will the witness. The writing will be signed by the witness and the signature will indicate some kind of acquiescence by the witness, but that acquiescence may be based upon fear, indifference, or ignorance of what the statement says. The procedure is the direct opposite of that which can be required on direct examination in a courtroom.

These are not defects that can be used to destroy the effect of the out-of-court statements on subsequent cross-examination at the trial. Cross-examination cannot destroy the fact that the witness did acquiesce, and it is unlikely that cross-examination can even weaken the effect of that fact unless the witness has a perception of what he was doing when he signed the statement that is inconsistent with the fact that he signed the statement.

Only if we can convince ourselves that such statements are very likely to be trustworthy despite the circumstances under which they are taken can we justify their admission. The case for the admission of similar oral prior inconsistent statements, with respect to which there must frequently

at 55; *State v. Saporen*, 205 Minn. at 362, 285 N.W. at 901. The opinion in *Allynchuk* quotes the following statement from *Saporen*:

There are additional practical reasons for not attaching anything of substantive evidential value to extrajudicial assertions which come in only as impeachment. Their unrestricted use as evidence would increase both temptation and opportunity for the manufacture of evidence. Declarations extracted by the most extreme of "third degree" methods could readily be made into affirmative evidence. In criminal cases the defendant would have a similar opportunity to entrap the state's witnesses, and use as evidence all their extrajudicial assertions. The same enlargement of the field of inquiry would result in civil cases.

Id. Cf. *Rubala v. Roby*, 379 Mich. at 124-28, 150 N.W.2d at 156-58.

be a substantial issue of whether the witness even acquiesced in the statement, is even weaker.

The version of 801(d)(1) passed by the House eliminated the substantive use of prior inconsistent statements unless they had been "given under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition," but there are two consequences of this version of 801(d)(1) that should be pointed out.

First, although the language clearly requires that the witness have given his inconsistent testimony at a trial or a hearing, there is no requirement that the trial or hearing was one involving the parties in the case in which the statement is introduced. The trial or hearing may even have been one in which the witness was being prosecuted. Therefore, there is no assurance that the prior cross-examination was carried out by the party "with motive and interest similar to those of the party against whom" the prior inconsistent statement is introduced.¹²⁹

Secondly, 801(d)(1)(A) still remains a rule that will permit a conviction or a judgment to be based on an inconsistent statement in the absence of any other evidence to support the conviction or judgment. A 1973 decision of the Supreme Court of North Dakota, *State v. Igoe*,¹³⁰ held that the grand jury testimony of a witness which was denied at the trial by the witness and which was the only evidence on the charge in question would be enough to uphold a conviction. The court did not uphold the conviction because the trial judge had instructed in accordance with prior law that the grand jury testimony was not substantive evidence. But the court did indicate that at the next trial of that defendant the grand jury testimony alone would be enough to uphold a conviction. It would appear that the inevitable consequence of a decision to use inconsistent statements as substantive evidence will be that in some cases convictions and judgments will be based upon inconsistent statements alone.¹³¹

¹²⁹ Under proposed rule 804(b)(1), former testimony of a witness who is unavailable within the meaning of proposed rule 804(a) could not be introduced unless there had been an opportunity for direct, cross- or redirect examination by such a party. 56 F.R.D. 183, 320-21 (1972).

¹³⁰ 206 N.W.2d 291 (N.D. 1973).

¹³¹ Professor Edward W. Cleary, who served as Reporter to the Advisory Committee, suggests that the requirement that evidence be sufficient to support a judgment will at least save us from judgments based upon no more than an unsworn prior inconsistent statement because the trial judge would direct a verdict (Professor Cleary was writing with respect to the earlier version of 801(d)(1)(A) which would permit such statements to come in as substantive evidence). 1973 *Hearings*, *supra* note 7, Supplement at 98-99. It is not apparent, however, why the prior inconsistent statement would be insufficient once we treat it as substantive evidence. If the facts stated in the statement would be sufficient if presented through an in-court witness with personal knowledge of them, will they not also be sufficient if presented through a prior inconsistent statement?

It does not appear that any practical consequences would flow from the adoption of 801(d)(1)(B). The prior consistent statements which it would make admissible as substantive evidence merely restate testimony given in court.¹³² Section 1236 of the California Evidence Code,¹³³ upon which 801(d)(1)(B) is based, has not had any practical effect in any of the cases in which it has been cited. Even in the one case in which § 1236 was found to be unconstitutional,¹³⁴ the error in admitting prior consistent out-of-court statements as substantive evidence was found to be harmless since the same testimony was given by the in-court witness.¹³⁵

It therefore would seem reasonable to describe 801(d)(1)(B) as a logical counterpart to 801(d)(1)(A) which is neither greatly to be desired nor feared for its own sake. The House of Representatives demonstrated its lack of fear of 801(d)(1)(B) by not applying to it the limitations which it placed on 801(d)(1)(A). Therefore, if the House bill becomes law there will be cases in which the proper instructions to the jury will be that they may consider the prior consistent statements as substantive evidence but not the inconsistent statements.

The argument for adoption of 801(d)(1)(C) is much stronger than the arguments for adoption of parts (A) and (B) of 801(d)(1). Out-of-court eyewitness identifications are, in fact, more valuable and convincing than in-court identifications. This is a result not of the strength of out-of-court identifications, for they are dangerous evidence,¹³⁶ but of the extreme weakness of in-court identifications. Judge Weinstein stated in *United States v. Barbati*:¹³⁷

We should not blind ourselves to what the law has learned by bitter experience—identification in court is frequently an almost worthless formality. See, e.g., authorities collected in *United States v. Wade*, 388 U.S. 218, 228-229, nn. 6-7, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), particularly P. Wall, *Eye-Witness Identification in Criminal Cases*, 26-27 (1965). By the time of trial positions have often become so fixed and memory so attenuated and distorted by subsequent events that witnesses seldom make identifications on the basis of their raw recollection of the

¹³² It is possible to hypothesize a case in which a vital fact is inadvertently not brought out during the testimony of a witness but is introduced into evidence as part of a prior consistent statement that is introduced to counter a "charge of recent fabrication or improper influence or motive." But 801(d)(1)(B) will have no practical effect except on that hypothetical situation.

¹³³ § 1236 provides: "Prior consistent statement. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."

¹³⁴ *People v. Washington*, 71 Cal.2d 1061, 458 P.2d 479, 80 Cal. Rptr. 567 (1969).

¹³⁵ *Id.* at 1077-78, 458 P.2d at 488, 80 Cal. Rptr. at 576.

¹³⁶ See note 107 *supra*.

¹³⁷ 284 F. Supp. 409 (E.D.N.Y. 1968).

original event. Their apparent certitude is often misleading and not infrequently less reliable than earlier reactions.¹³⁸

Many American courts have already adopted an enormous variety of rules permitting out-of-court identifications by eyewitnesses to be proven.¹³⁹

Rule 801(d)(1)(C) would, however, permit either the person who made the identification or any other person who had witnessed the identification to testify that the identification was made. This would mean that the identification could be proven by other witnesses even if the identifying witness could not remember the identification or denied making it. Such denied or forgotten identifications could be proven even if they were made in circumstances that would not permit them to qualify for substantive use under 801(d)(1)(A) for none of the restrictions which the House imposed upon 801(d)(1)(A) apply to 801(d)(1)(C).

Of greater importance, however, is the fact that in the typical case in which the eyewitness is ready to testify to the out-of-court identification his story would be bolstered by, and perhaps even preceded by, statements that the out-of-court identification was made by witnesses who cannot meaningfully be cross-examined about the identification because they do not claim to have any knowledge of the basis on which the eyewitness was made. Given the weak nature of eyewitness identification¹⁴⁰ we should not permit assertions that an out-of-court identification was made to come into court in a form in which it is immune to cross-examination. Only the witness who claims to have made an out-of-court identification should be permitted to testify in court about the identification.¹⁴¹

CONCLUSION

Professor Callahan's close analysis of legal problems frequently removed some unnecessary complications from our classroom discussions, but he was not trying to make legal analysis simple, he was trying to make

¹³⁸ *Id.* at 413.

¹³⁹ See cases collected in 71 A.I.R.2d 449 (1960) and 5 A.I.R.2d Later Case Service 1225-3 (1967) and Supplement 215-34 (1973).

¹⁴⁰ See note 107 *supra*.

¹⁴¹ See *Seals v. State*, 282 Ala. 586, 602-03, 213 So. 2d 645, 661-62 (1968). Even under such a rule, testimony by other witnesses that the identification was made would still be possible under the rules permitting proof of prior consistent statements for the limited purpose of rebutting "testimony tending to impeach or discredit the identifying witness, or to rebut a charge, imputation or inference of falsity." *Id.* at 603, 213 So. 2d at 661. This ought to be permitted only, however, when the fact that the identification was made does tend to rebut some charge rather than merely to repeat the identification.

it more realistic. This goal was expressed in the following description of the statute of limitations in a 1955 article:

Further, such evidence as there is suggests that the statute, even as applied to a single question, reflects a fairly complex mixture of purposes, some of which overlap and some of which may be partly inconsistent with others. It is likely that if this multiplicity of purposes is recognized the "philosophical mind" still will be vexed; but it may see what is vexing it.¹⁴²

This article has attempted to clarify the vexing problems created by the elaborate redefinition of hearsay in proposed Federal Rule of Evidence 801. The most vexing of these problems is that under proposed rule 801 four kinds of evidence which appear to present the usual hearsay dangers—nonassertive acts, implied assertions, prior inconsistent out-of-court statements, and statements by third persons that out-of-court identifications were made—are classified as "not hearsay" and are therefore admissible in evidence. Whether courts should forbid the use of ordinary hearsay as evidence is itself open to question,¹⁴³ but if we do forbid the use of ordinary hearsay we cannot justify the admission of these four kinds of evidence merely by defining them as "not hearsay."

¹⁴² Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 132-33 (1955).

¹⁴³ See, e.g., Maguire, *supra* note 23, at 741. But see, A. LEWIS, GIDEON'S TRUMPET 238 (1964), for proof that experienced judges may not be in a position to judge to what extent apparently valuable evidence would be damaged by a cross-examination that did not occur.

