Reconstructing the Definition of Hearsay

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I. INTRODUCTION

Evidence professors seem to have a pathological compulsion to scrutinize and reorder the hearsay system.[1] Like the compulsive behavior of a person who

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[1] *See* Michael H. Graham, *"Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay*, 1982 U. ILL. L. REV. 887 (employing a heuristic device to present a change in the form of the definition of hearsay and offering a simplified method of understanding the hearsay rule); Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521 (1992) (discussing the degree to which the Constitution permits and requires liberalization of the hearsay rules); John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741 (1961) (describing "characteristic defects" of hearsay in the evidentiary system and proposing a "functioning definition of hearsay"); Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367 (1992) (discussing modern and post-modern criticisms of, and proposals for, reform and suggesting an approach designed to lead to better understanding of hearsay); Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987) [hereinafter Park I] (arguing that the Federal Rules of Evidence should be modified to address issues that arise in criminal, but not civil, cases); Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783 (1990) [hereinafter Park II] (evaluating the preference of hearsay scholars for a declarant-oriented definition of hearsay and concluding that change from the assertion-oriented definition in the Rules to a declarant-oriented definition would not be desirable in light of cases applying the Rules to implied assertions); Paul R. Rice, *Should Unintended Implications of Speech Be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence*, 65 TEMP. L. REV. 529 (1992) (arguing that all speech carries a danger of insincerity and that as a result all inferences from direct assertions should be considered to carry a danger of insincerity); David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts*, 24 DUQ. L. REV. 741 (1986) (highlighting the Advisory Committee note to Federal Rule of Evidence 801(a) and advocating rejection of its purported contention that implied assertions should be treated as nonhearsay); Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473 (1992) (surveying the application of the hearsay system and discussing possible results if the hearsay rule were liberalized); Glen Weissenberger, *Unintended Implications of Speech and the Definition of Hearsay*, 65 TEMP. L. REV. 857 (1992) [hereinafter Weissenberger, *Unintended Implications*] (arguing that an implied assertion based on a statement that cannot be true or false should be admissible); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49 (1982) (concluding that Rule 801 should be revised and proposing amendments to

cannot leave home without checking whether each appliance is turned off, and then agonizes about whether each appliance was checked after he or she has left home, evidence professors cannot resist an inner need to turn their scholarly minds to the examination and reexamination of the byzantine structure of the law of hearsay. Of necessity, we evidence professors develop such an intimacy with the theory and application of the hearsay system that we are tormented by dissonance between its underlying policies and its application. Consequently, because we struggle to master an intractable hearsay system in order to teach it to our students, it is only natural that at some point in our lives as scholars, we want to rebuild the system we are compelled to master beyond any conceivable purpose except to teach it to other people.[2] Professor Wellborn said it best: "Nearly every important scholar in the field of evidence, and many a lesser one, has written on the problem of the scope of the hearsay rule."[3] It is probably not because evidence professors are by nature reformers. Rather, for most of us, it is probably because hearsay bothers us on some deep level where our need for intellectual order originates.

In this Article I unabashedly succumb to the compulsion to write about the problem of the scope of the hearsay rule. Nevertheless, my surrender to this compulsion is tempered by a mature realization that scholarship on hearsay may be more therapeutic for the author than for the audience. Consequently, before suggesting new approaches to the hearsay system, this Article begins in Part II by first examining the lessons that may be learned from others who have turned their minds to hearsay. Then, in Part III, this Article examines the nature of the problem presented by the hearsay definition. In Part IV, this Article offers a reform of the hearsay system that does not seek to recast the analytic qualities of the hearsay system, but rather reorders the rhetorical process involved in applying the hearsay system. As the lessons derived from previous scholarship teach, the problem with hearsay lies less in its theoretical attributes than in the rhetorical logic employed in addressing hearsay issues. In Part V of this Article, the reader will find the necessary but inescapably boring discussion of possible problems presented by my proposed reform. The reader, however, is encouraged to persevere, because my conclusion may be somewhat surprising.

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address difficulties identified in the hearsay system).

Other distinguished authors have scrutinized the hearsay system in treatises and texts. *See* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE (2d ed. 1987); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE (John W. Strong ed., 4th ed. 1992); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE (1993).

[2] *See* sources cited *supra* note 1.

[3] Wellborn, *supra* note 1, at 58.

II. HEARSAY SCHOLARSHIP AND HEARSAY REALITY

Despite what may be the low level of tolerance among evidence professors for intellectual disorder, the hearsay system may be working reasonably well in practice.[4] As evidence professors, few of us have the opportunity of judges to develop an intuitive sense of whether the system is working effectively.[5] In fact, some jury studies suggest that the system is not all that bad.[6] Moreover, the development of the Confrontation Clause of the Sixth Amendment has created a body of law that barely diverges from the hearsay system as it is codified in the Federal Rules of Evidence.[7] Of course, the Supreme Court's shaping of the Confrontation Clause is not itself a test of the soundness of the hearsay system it tends to mirror.[8] Nevertheless, the Court in developing Confrontation Clause jurisprudence is not constrained by language of the Rules of Evidence nor by principles of interpretation and construction that apply to the Rules.[9] Despite the

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[4] Professor Park has been a leading advocate of maintaining the current system, reasoning that it works "tolerably well" in practice. *See* Park II, *supra* note 1, at 838; *see also* Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 698–99 (1992) (arguing that jurors properly assess the weight of hearsay testimony); Park I, *supra* note 1.

[5] Although professors may lack the opportunity to gain this intuitive sense, this has not prevented us from pointing out the failures of the system. *See, e.g.*, Wellborn, *supra* note 1, at 66–92 (criticizing the Federal Rules' definition and offering a proposal for reform); *see also* Rice, *supra* note 1, at 533–34; Seidelson, *supra* note 1, at 754–75.

[6] *See* Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992); Meine et al., *supra* note 4, at 698–99.

[7] *See, e.g.*, White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); United States v. Owens, 484 U.S. 554 (1988); United States v. Inadi, 475 U.S. 387 (1986); *see also* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 557–58 (1992) (discussing relegation of the Confrontation Clause to mere evidentiary importance); Imwinkelried, *supra* note 1 (focusing on hearsay issues in analyzing Confrontation Clause jurisprudence); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 709–62 (analyzing Supreme Court Confrontation Clause jurisprudence); Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 158–62 (1995) (asserting that the analysis by the Supreme Court equates hearsay with confrontation and results in incoherent constitutional rules); David E. Seidelson, *The Confrontation Clause and the Supreme Court: From "Faded Parchment" to Slough*, 3 WIDENER J. PUB. L. 477, 478–80 (1993) (arguing that the Supreme Court treats the Confrontation Clause and the hearsay rule as congruent).

[8] *See* sources cited *supra* note 7 (showing how the hearsay system has been treated as a guideline for the Court's analysis of the Confrontation Clause).

[9] For a discussion of the issues surrounding the interpretation of the Federal Rules of

opportunity that Confrontation Clause jurisprudence provides in affording a second look at the values of the hearsay system in criminal prosecutions, the analysis in cases construing the Confrontation Clause does not even suggest a misalignment of underlying values and specific rules in the functioning federal hearsay system.[10]

In truth, as evidence professors, most of us know very little about the way the hearsay system functions and affects participants and results.[11] In advocating reform, we are not inclined to argue, even anecdotally, on the basis of any factually-based dysfunction. Rather, we are more likely to argue that it is a system in need of reconstruction, mainly because its internal qualities are

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Evidence, see Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1311–38 (1992); see also Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. REV. 295, 302–11, 318–35 (1989).

[10] *See* Berger, *supra* note 7, at 592–605 (detailing the history of Confrontation Clause jurisprudence and the alignment with the hearsay rule). In *Wright*, the Supreme Court stated that "hearsay rules and the Confrontation Clause are generally designed to protect similar values." *Wright*, 497 U.S. at 814. In *White*, the Court explained that "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." *White*, 502 U.S. at 356. Nevertheless, according to Professor Berger, "the Court's evidentiary approach ignores a supporting role for the Confrontation Clause in restraining the capricious use of governmental power." Berger, *supra* note 7, at 560. Confrontation by cross-examination is not simply a means of obtaining reliable evidence for the factfinder to rely upon in reaching a decision. Although confrontation does promote fairness and accuracy, scholars argue that it also should be used to keep in check the advantage over the defendant that the prosecution derives from the government in criminal trials. *See id.* at 561. According to Professor Berger, the "Confrontation Clause should bar hearsay statements elicited by governmental agents unless the declarant is produced at trial or unless special procedures . . . are followed." *Id.* at 561–62. The Court's focus on the reliability of hearsay rather than the Bill of Rights guarantee of confrontation does not recognize the value of confrontation which "enables the public to scrutinize the process by which the government obtains and uses evidence in a criminal trial." *Id.* at 562. *See generally* Imwinkelried, *supra* note 1; Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992).

[11] As theorists, evidence professors tend to ignore or remain ignorant of the practical application of the system as it is employed by judges and litigators. Instead, we seem preoccupied with the subtle nuances abundant in the Rules' syntax. *See* Ronald J. Bacigal, *Implied Hearsay: Diffusing the Battle Line Between Pragmatism and Theory*, 11 S. ILL. U. L.J. 1127, 1127 (1987) (noting that pragmatists are often bored with academicians' "metaphysical musings unrelated to 'real life' situations").

incoherently misaligned.[12] Perhaps what we are really saying is that this is an integrally flawed system because we have had a perfectly miserable time teaching this system to extremely intelligent and moderately motivated people who are reasonably focused on the task of learning it. Imagine, we implicitly argue, how this system must function in a world of lawyers and judges where there is no evidence professor to guide the discussion.[13]

I am not arguing that the body of literature scrutinizing hearsay is without value.[14] Putting aside potentially judgmental concerns about how one expends one's intellectual energy, there is no question that there are instances where scholarly articles on hearsay have had an authentic impact on the law.[15] Also, insights contained in this literature inform and stimulate the ongoing evaluation of the hearsay system, a scholarly process in which evidence professors must

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[12] *See* sources cited *supra* note 1; *see also* Roger C. Park, *Foreword: The Hearsay Reform Conference—The New Wave of Hearsay Reform Scholarship*, 76 MINN. L. REV. 363, 363–66 (1992) [hereinafter Park, *Foreword*] (discussing the resurgence of the critical evaluation of the core issues of the hearsay policy).

[13] *See* James W. McElhaney, *It's Not for Its Truth*, 77 A.B.A. J. 80 (1991). Professor McElhaney provides a supposedly fictional example of a judge's misunderstanding of the hearsay system and its application:

> Oh, he [the judge] can recite the magic words [not offered for its truth] . . . but that doesn't mean he really understands them. If the other side objects to your evidence as hearsay all you have to say is, "It's not for its truth, your honor," and Judge Feckler will overrule the objection. It works every time.

Id. at 80.

[14] My purpose is to highlight the deficiency of practical suggestions designed to assist lawyers and judges in properly analyzing out-of-court statements. A proposed solution which would address this need is discussed *infra* notes 84–100 and accompanying text.

[15] *See, e.g.*, TEX. R. EVID. 801. The influence of Professor Wellborn on the Texas Rules' departure from Federal Rule 801 is dramatic. *See* Wellborn, *supra* note 1, at 92 (offering a proposal for a new definition); Olin Guy Wellborn III, *Article VIII: Hearsay*, 30 HOUS. L. REV. 897, 903–16 (1993) [hereinafter Wellborn, *Article VIII: Hearsay*] (comparing Texas Rule 801 and Federal Rule 801). Professor Wellborn argued that Federal Rule 801 should be revised because "the rule's attempt to confine the verbal hearsay concept strictly to 'assertions' that are 'offered in evidence to prove the truth of the matter asserted' will simply not work in practice, because it mandates unnatural, hair-splitting, semantic distinctions and unsound, arbitrary results . . . ." Wellborn, *supra* note 1, at 52. The impact of Wellborn's scholarship is clear in the revised Texas rule which provides that "'matter asserted' includes not only explicit assertions but also 'any matter implied by a statement' if its probative value depends upon the declarant's belief in the implied assertion." Wellborn, *Article VIII: Hearsay*, *supra*, at 906–07.

maintain a modicum of faith.[16] Nevertheless, we rarely can calculate the ultimate effect of the publication of intricate analyses or simple insights. Consequently, while hearsay scholars undoubtedly hope that their writing will have some impact,[17] rarely is it possible to gauge whether it does or does not.[18] What appears to be the case, however, is this: there is a great deal of writing advocating hearsay reform, and, simultaneously, there is very little palpable change.[19] If this observation about the impact of scholarly literature on trials, judges, and lawyers is correct, there are a few possible explanations. A nonexhaustive list might include: first, hearsay scholars want to change a system that others do not see the need to repair;[20] second, hearsay scholars have not made cogent or comprehensible arguments for change;[21] third, nobody takes evidence professors very seriously. Nevertheless, if I were to offer my best speculation as to why large-scale hearsay reform has not occurred, I would suggest that it is because, generally, procedural rules in a legal system do not undergo significant change except in the context of crisis, and no reality-based crisis has occurred.[22] In any event, in light of the rarity of

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[16] *See generally* AN EVIDENCE ANTHOLOGY (Edward J. Imwinkelried & Glen Weissenberger eds., 1996); Roger C. Park, *Evidence Scholarship, Old and New*, 75 MINN. L. REV. 849 (1991).

[17] *See supra* note 14.

[18] *See* Maguire, *supra* note 1, at 777–78 (discussing possibility of despair among reformists due to lack of change in hearsay system); Park, *Foreword*, *supra* note 12, at 363–64 (noting the discouragement of the reformists from the apparent lack of responsive action by the rule's advisory committee).

[19] There have, in fact, been no substantive amendments to Federal Rule 801(a)-(c) since its adoption in 1975.

[20] *See* Park II, *supra* note 1, at 838 (arguing that the hearsay system works "tolerably well" in practice); *cf.* Wellborn, *supra* note 1 (advocating a need for change).

[21] *See, e.g.*, Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145 (1991) [hereinafter Weissenberger, *Hearsay Puzzles*]; Weissenberger, *Unintended Implications*, *supra* note 1.

[22] *See* David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 560–83 (1994); *see also* Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271 (1995) [hereinafter Park, *The Crime Bill of 1994*]. While acknowledging the policies behind the rule excluding character evidence, Roger Park recently wrote in support of carving out a narrow exception that would admit evidence of other sexual assaults in sex crime cases in which the defendant raises a defense of consent. *See id.* at 271–72. Responding to concerns that the exclusion of relevant character evidence was resulting in acquittals of sex offenders, Congress recently created exceptions which allow evidence of an offense of sexual assault or child molestation to be admitted. *See* FED. R. EVID. 413–415. According to Professor Park, "When a rule of exclusion flies in the face of common sense and is based on dubious generalizations about the danger of misdecision, it does not take

traceable real world reactions to hearsay literature, it may be inefficient and positively deflating to spend time advocating reform that is not destined to be accepted. This may be reason enough not to give in to the compulsion to write about reconstructing the hearsay system.[23]

Advocating change in the hearsay system, however, may serve a modest, but more realistic function. Rather than advancing change with the expectation that change might actually occur, a scholar may advocate change as a means of illuminating certain problematic aspects of the existing system.[24] The best way to assist in the navigation of an intricate pathway may be to demonstrate the ways in which the path might be redirected.[25] Such a discussion would not only identify problems in the system, but it would simultaneously provide some insight into whether the problems are of sufficient magnitude to justify the cost of teaching a new system to those who would actually use the results of the reform. It is this metaphoric function which may best serve to improve the hearsay system.[26] It is also the spirit in which this particular discussion proceeds.[27]

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much to justify an exception that will let the trier hear more of the relevant data." Park, *The Crime Bill of 1994*, *supra*, at 272. Park urges an exception which would apply only in the specific context of consent defense cases while Rules 413–415 apply to all sexual assault and child molestation cases. *See id.*

[23] *See* Park, *Foreword*, *supra* note 12, at 363–66 (noting the reformists' sense of futility).

[24] Accordingly, it is not the purpose of this Article to supplant the framework of Rule 801, but to provide a more intelligible organization of the intentions of Rule 801.

[25] Many of the authors cited in this Article have offered their own concrete proposals for a more workable system. *See, e.g.*, Graham, *supra* note 1, at 920–23 (reformulating the Rule 801(c) definition of hearsay); Maguire, *supra* note 1, at 768–73 (proposing reform of the Uniform Rules of Evidence); Wellborn, *supra* note 1, at 92 & n.191 (offering a proposal for a new definition).

[26] For it must be that the primary goal of our theoretical discourse is to illuminate the deficiencies of the hearsay system in an effort to make it more practical for the people who actually rely on it—judges and litigators.

[27] Likewise, this discussion proceeds with a style of prose that is, by design, less dense than that in many law review articles. To quote Anthony D'Amato:

> [T]he choice of style is quite deliberate. For I believe that the most elusive and hardest ideas are best tackled by the simplest and most direct kind of prose. This is in large part a reaction to my frustration over the years in reading "heavy" prose which often, because of its convoluted style (such as the use of third-person, passive tense, and overly long sentences), turns out to be ambiguous. When the subject of an article is difficult, the last thing we need is an ambiguous analysis of it. The simpler the prose, the more naked are the ideas expressed in support of the author's conclusion. I hope to convey precisely what I mean, and if there is illogic or incoherence in what I say, it will be exposed to

My self-ordained mission here is not to propose a massive reconstruction of the essential qualities of the hearsay system.[28] Likewise, I do not see gross injustice wrought by our hearsay system; consequently, I have no passion for reshaping the values it fosters.[29] Accordingly, I do not propose changes which would radically change what is admissible, and I do not propose changes that would make the system fairer. Rather, my reform would be based on what I know best. I would change the system by making it easier to teach. By "teach," I refer not only to the function of a professor in a classroom, but equally I mean the function of lawyers teaching judges, of judges teaching lawyers, and of lawyers and judges teaching one another.[30] Fundamentally, I would reorder the system to better organize and direct the rhetoric brought to bear on the issue of the admissibility of out-of-court statements.

Through the experience of teaching, I have come to believe that a central problem of the hearsay system, if not the singular problem of greatest magnitude, is that the evolution of the common law has given contemporary evidence law an excessively dense and overburdened hearsay definition.[31] The hearsay definition simply requires too much unpacking every time it is used. And, of course, it must be unpacked every time the hearsay system is applied. The definition is simultaneously the threshold consideration in the application of the hearsay system as well as the core concept which justifies admitting or excluding out-of-court assertive behavior.[32] As the pivotal concept of the

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your scrutiny, not buried in a heavy style.

Anthony D'Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527, 528 (1993).

[28] *See* sources cited *supra* note 25.

[29] *See supra* note 14. My purpose is merely to provide lawyers and judges with a more intelligible framework within which to work.

[30] To reach this objective, the system must be one that is easily comprehensible to all—students, lawyers, judges, and not least of all evidence professors. As it stands now, it is easy to feign understanding and gloss over the wording of Rule 801. See *infra* notes 82–97 and accompanying text for a discussion of the proposed reform.

[31] Evidence professors will frequently boast about how many class sessions they spend teaching the deceptively simple appearing, one sentence definition of hearsay contained in Rule 801(c) of the Federal Rules of Evidence. For commentary on the evolution of the complex structure of the hearsay rule and its exceptions, see LILLY, *supra* note 1, § 7.28; Ronald J. Allen, *Commentary: A Response to Professor Friedman—The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 797–802 (1992); Wellborn, *Article VIII: Hearsay*, *supra* note 15, at 900.

[32] To this point, reformists' efforts have concentrated on changing the definition of hearsay while accepting the general framework of the system. *See* Graham, *supra* note 1, at 920–23 (revising the hearsay definition in form only, to reflect more accurately the intent of Rule 801); Maguire, *supra* note 1, at 768–77 (expanding the definition of hearsay to make the

hearsay system instructs the analysis of every hearsay issue, the definition of hearsay, in my experience, creates the most far-reaching difficulties in understanding and applying the hearsay system. If the definition presents these kinds of difficulties for students in the classroom, it must inevitably inflict similar discomfort upon lawyers and judges, whether they realize it or not. Consequently, a threshold reform which would be helpful to the rational application of the hearsay system, even if offered only as critical metaphor, would be to reform the unnecessarily dense hearsay definition that is the hallmark of both the historical and contemporary system. I am not advocating any real change in the analytic qualities of the definition. Rather, I would recast the definition to make it more functional and less cryptic in order to facilitate more meaningful advocacy about the admissibility of particular items of evidence.

This discussion proceeds by employing the Federal Rules of Evidence as a frame of reference. Adopted in 1975, the Federal Rules of Evidence have served as a model for many state evidence codes.[33] The provisions of the Federal Rules primarily pertinent to this discussion are Rules 801 and 802. Rule 801 provides:

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
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> (b) Declarant. A "declarant" is a person who makes a statement.
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> (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.
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> (d) Statements which are not hearsay. A statement is not hearsay if—
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> (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 the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or
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> (2) *Admission by party-opponent.* The statement is offered against a party

intentions of Rule 801 more explicit); Wellborn, *supra* note 1, at 91–93 (redefining the definition of statement and hearsay to broaden the exclusionary rule).

[33] *See, e.g.*, FLA. R. EVID. 90.801.

> and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the 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.[34]

Rule 802, the "Hearsay Rule," provides: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."[35] Consequently, under the federal codification, "hearsay," as defined in Rule 801, is made inadmissible by Rule 802. Nevertheless, it is subject to exceptions expressly identified in Rule 802, "Hearsay Rule," and Rule 801(d), "Statements which are not hearsay."

If one were to invent the hearsay system by simply building upon its underlying values and objectives, it is doubtful that the result would look anything like Rule 801 and the accompanying Rules in Article VIII of the Federal Rules of Evidence. Like so many things, its structure is a product of historical development rather than conscious attention to design, a matter to which we turn in the next section.

III. THE EVOLUTION OF FEDERAL RULE 801 WHICH CONTAINS THE DEFINITION OF HEARSAY

The hearsay system codified under the Federal Rules of Evidence is a direct descendant of the common law.[36] A rule excluding hearsay has always been the cornerstone of the system, with numerous exceptions admitting hearsay otherwise made inadmissible. The problem with this codification is that the system will not work unless the users of the system have a common understanding of exactly what "hearsay" means. This is where the problem lies: "hearsay" as a construct is complicated, multilayered, and intricate. Also,

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[34] FED. R. EVID. 801.

[35] FED. R. EVID. 802.

[36] *See* FED. R. EVID. 803 advisory committee's note (explaining that Rule 803 is a "synthesis" of the exceptions developed by the common law "with revision where modern developments and conditions are believed to make that course appropriate"); 2 MCCORMICK, *supra* note 1, § 244 (describing the history of hearsay at common law); Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 504 (1930) (criticizing the rigidity of the system and predicting change to the discretionary rule); Charles T. McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A. J. 507, 512 (1938) (same).

there is debate, at least at the fringes, as to the scope of the definition.[37] The complexity of the definition is illustrated by the fact that every major work on evidence devotes several pages to discussing what is and what is not "hearsay."[38]

During the debate which occurred when the Federal Rules of Evidence were in their formative stage, some critics of the common law system argued that the codified rule should be broadened to allow for more judicial discretion in admitting evidence, and proposals were submitted to the Federal Rules Advisory Committee urging a less formal approach.[39] Responding to these proposals, the Committee, in an early draft, did in fact substitute two rather general exceptions for the specific common law list in its 1969 draft.[40] The proposed exceptions would have provided judges with new found discretion in deciding that a statement had sufficient "assurances of accuracy" to be admissible under this proposed version of the Rule, and the admission of hearsay would not have been based on fitting a statement into such categories as "dying declaration" or "excited utterance."[41] By the end of the drafting process, however, the common law system which is comprised of an exclusionary rule, a hearsay definition, and formal exceptions was left intact; "with nonformal [i.e. residual] exceptions merely supplementing rather than supplanting them."[42] Consequently, the hearsay system enacted in 1975 varied only slightly from the common law, leaving in place a hearsay definition overburdened by the accretion of layers of common law evolution.[43]

In order to understand my suggested reform, it is necessary initially to

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[37] *See* sources cited *supra* note 1.

[38] *See* 2 MCCORMICK, *supra* note 1, §§ 246, 248–51, at 97–99, 100–24; 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §§ 368–430, at 4–354 (2d ed. 1994); 4 WEINSTEIN & BERGER, *supra* note 1, ¶¶ 801[01]–801(d)(2)[03], at 801–1 to 801–381; GLEN WEISSENBERGER, FEDERAL EVIDENCE, § 801.1–.11, at 385–406 (2d ed. 1995). In my Article, my treatise gets the status of a "major work."

[39] *See, e.g.*, Wellborn, *supra* note 1, at 54–55 & n.36 (describing the drafting process of the Advisory Committee).

[40] *See id.* at 54 n.36. Proposed Rule 8-03(a) provided: "A statement is not excluded by the hearsay rule if its nature and special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available." 46 F.R.D. 161, 345 (1969). Proposed Rule 8-04(a) provided: "A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness." *Id.* at 377.

[41] *See* Wellborn, *supra* note 1, at 54–55.

[42] *Id.* at 55; *see also* FED. R. EVID. 803(24), 804(b)(5).

[43] *See* Park II, *supra* note 1, at 802–29 (illustrating, through post-1975 caselaw, the liberal interpretation of the definition with respect to implied assertions).

appreciate the manifold nature of concepts that are packed into the hearsay definition. Rule 801(c) defines "hearsay" as 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."[44] In Rule 801(a), "statement" is defined as "(1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by the person as an assertion."[45] Preliminarily, it should be appreciated that under the federal system the hearsay definition applies only to statements, and that not all verbal noises are statements. Likewise, some forms of nonverbal, soundless conduct may be statements subject to the hearsay definition.[46]

Continuing the analysis further, assuming the out-of-court communication meets the definition of statement, the statement may yet escape the bounds of the hearsay definition. In Rule 801(c), "hearsay" is defined as an out-of-court statement *offered for its truth.*[47] Not all out-of-court statements are offered for their truth, and where an out-of-court statement is not offered for its truth, it is not made inadmissible by Article VIII.[48] Unfortunately, this critical defining quality is elusive in regard to some statements. Nevertheless, in regard to certain types of statements, there is common agreement. For example, some statements may be admissible nonhearsay because they are offered for their effect on a particular listener or reader. Statements communicating warnings or notices or statements offered to show emotional injury inflicted on the listener are commonly accepted as part of this category of nonhearsay, out-of-court statements.[49] Similarly, statements which have their own independent legal significance (often referred to as "verbal acts") are outside the scope of Rule 801(c).[50] A common example is an oral or written statement constituting a

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[44] FED. R. EVID. 801(c).

[45] FED. R. EVID. 801(a).

[46] *See* Rice, *supra* note 1, at 532–36 (arguing against the assertion-oriented approach adopted by the Rules); Weissenberger, *Unintended Implications*, *supra* note 1, at 857–60. Under the common law, the hearsay rule proscribed evidence which depended upon the credibility of the out-of-court declarant. This so-called "declarant-based" approach focused on the source of the evidence in determining its value, rather than on the nature of the statement itself. *See* Weissenberger, *Unintended Implications*, *supra* note 1, at 858.

[47] *See* FED. R. EVID. 801(c).

[48] *See id.*

[49] *See* 2 MCCORMICK, *supra* note 1, § 249; 4 MUELLER & KIRKPATRICK, *supra* note 38, § 387; 4 WEINSTEIN & BERGER, *supra* note 1, ¶ 801(c)[01]; WEISSENBERGER, *supra* note 38, § 801.7.

[50] *See* 2 MCCORMICK, *supra* note 1, § 249; 4 MUELLER & KIRKPATRICK, *supra* note 38, § 385; 4 WEINSTEIN & BERGER, *supra* note 1, ¶ 801(c)[01]; WEISSENBERGER, *supra* note 38, § 801.8.

binding agreement.[51] Statements which do not directly assert the declarant's state of mind are also commonly considered to be admissible nonhearsay. A child's statement, "My father, A, murdered B," is a nonhearsay statement if it is offered to demonstrate the fearful state of mind of the child with respect to his father and not to prove that the father is a murderer.[52] Finally, prior inconsistent statements used for impeachment purposes also qualify as nonhearsay, out-of-court statements because the statements are not offered for their truth, but are only offered to show that the witness is the type of person who makes conflicting statements.[53]

The categories of nonhearsay, out-of-court statements considered in the foregoing paragraph, among others, have been traditionally recognized under the preexisting common law and have continued to be recognized with little controversy under Federal Rule 801. They are derived from the implicit logic of the definitional language of Rule 801(a) through (c).[54] More controversial is the treatment of so-called "implied assertions" where the logic is more elusive. Whether the definition of hearsay in Rule 801 should be applied to implied assertions at all is a contentious issue among scholars.[55] The term "implied assertion" refers to the derivative message that flows inferentially from the declarant's primary statement.[56] In terms of relevancy, it is this derivative message that is important, not the primary utterance. An illustrative and commonly used example of an implied assertion occurs in a case where it is relevant to determine whether the place being called is a betting establishment: a law enforcement officer, in the midst of a raid on the defendant's premises, picks up a ringing telephone and hears the out-of-court statement, "Put two dollars on Paul Revere in the third at Pimlico."[57] Offered to show the implied

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[51] *See* 2 MCCORMICK, *supra* note 1, § 249; 4 MUELLER & KIRKPATRICK, *supra* note 38, § 385; 4 WEINSTEIN & BERGER, *supra* note 1, ¶ 801(c)[01]; WEISSENBERGER, *supra* note 38, § 801.10.

[52] *See* 4 MUELLER & KIRKPATRICK, *supra* note 38, §§ 389–90; 4 WEINSTEIN & BERGER, *supra* note 1, ¶ 801(c)[01]; WEISSENBERGER, *supra* note 38, § 801.10.

[53] *See* 4 MUELLER & KIRKPATRICK, *supra* note 38, § 386; 4 WEINSTEIN & BERGER, *supra* note 1, ¶ 806[01]; WEISSENBERGER, *supra* note 38, § 801.11.

[54] *See* FED. R. EVID. 801.

[55] It is generally accepted that the assertion-oriented definition of hearsay in Rule 801 and the Advisory Committee's note thereto substantially changed the common law by excluding implied assertions from the definition. *See* Park II, *supra* note 1, at 810–11, 829–38; Seidelson, *supra* note 1, at 766–67; Wellborn, *supra* note 1, at 64. *But see* Graham, *supra* note 1, at 908-09 (arguing that Rule 801(c) should be interpreted to include implied assertions).

[56] *See* Weissenberger, *Unintended Implications*, *supra* note 1, at 862. See also *infra* note 72 for a chart explaining the concept of implied assertions.

[57] *See* United States v. Zenni, 492 F. Supp. 464, 465 (E.D. Ky. 1980). *Zenni* is also

belief or message of the caller that he or she is calling a betting establishment, the evidence is relevant for what it inferentially reveals about the caller's indirectly or impliedly asserted beliefs.[58] Under contemporary cases, implied assertions have become a basis for the introduction of out-of-court statements which would have been classified as hearsay under the common law.[59]

In rejecting the common law approach, modern courts have generally interpreted Rule 801 and the Advisory Committee's note as exempting implied assertions from the definition of hearsay.[60] The shift in thinking from the position of the common law reflects a recognition that implied messages are likely to be accurate because the declarant usually does not intend to assert the messages that others imply from his or her primary declarations.[61] As a result,

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discussed in Park II, *supra* note 1, at 810–12.

[58] *See Zenni*, 492 F. Supp. at 465; Park II, *supra* note 1, at 810-12; *see also infra* note 72.

[59] *See supra* note 55. The common law approach, exemplified in Baron Parke's opinion in *Wright v. Tatham*, 112 Eng. Rep. 488 (Ex. Ch. 1837), *aff'd* 47 Rev. Rep. 136 (H.L. 1838), would exclude as hearsay evidence offered to prove the truth of a matter explicitly or impliedly asserted. *Tatham* involved a will contest in which the mental competency of the decedent was an issue. *See id.* at 488. Letters written to the decedent by third parties were offered as evidence in support of the decedent's competency. *See id.* at 489. Because the way in which the letters were written indicated that the writers believed the decedent was mentally competent, the proponent of the evidence wanted this belief and competency itself to be inferred from the letters. *See id.* at 493–95. However, the court ruled the letters to be hearsay. *See also* Park II, *supra* note 1, at 788–93 (explaining the factual and common law background of *Tatham*).

[60] *See* Park II, *supra* note 1, at 810–13 (discussing the recent cases explicitly treating implied assertions as nonhearsay); *see also Zenni*, 492 F. Supp. at 466–69 (cited and discussed in Park II, *supra* note 1, at 810–13). *But see* Wellborn, *supra* note 1, at 66. Professor Wellborn has pointed out that certain dangers are actually more likely to arise in the case of an implied assertion than in a direct assertion:

> Thus, a declarant's out-of-court statement "I shot X" is hearsay; but the statement, "I never did think that X had much longer to live" is not hearsay even though both may be used to prove the same fact and even though both rest upon the reliability of the same mental processes, with one exception. The implied assertion requires a guess as to what the declarant really believed and for that reason may be less reliable than the hearsay statement.

Id. at 66 n.94 (citation omitted).

[61] *See Zenni*, 492 F. Supp. at 466 n.7; *see also* Park II, *supra* note 1, at 811; Weissenberger, *Unintended Implications*, *supra* note 1, at 861 (arguing that such statements are not subject to conscious insincerity unless analysis is strained to assume that it is the implied message that is sought to be misleading).

courts often find implied assertions likely to have enhanced accuracy.[62] Although isolated examples can be hypothesized which would refute the generalization that the declarant usually does not intend messages implied from primary communications to be relied upon, it appears that courts have realized that, in the main, it is better to admit out-of-court implied assertions than to have no evidence at all.[63]

Some scholars have questioned the wisdom of the contemporary position of admitting implied assertions. They argue that implied assertions are insufficiently reliable to be admitted, which is consistent with the common law analysis.[64] Focusing on the derivative quality of an implied assertion, these scholars argue that the logical possibility of conscious falsification in the primary assertion inevitably infects the reliability of the assertion implied from it.[65] According to this position, the "assertion-oriented" definition of hearsay in Rule 801 is inadequate and inferior.[66] Accordingly, these scholars prefer a "declarant-oriented" approach which focuses on the source of the evidence. Because the declarant is not subject to the usual safeguards attending courtroom evidence, the declarant-oriented approach would, consistent with the common law, find implied assertions inadmissible.[67]

My own position, which has been the subject of a prior article,[68] is that some implied assertions should be admitted and some should not.[69] I have

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[62] *See* Weissenberger, *Unintended Implications*, *supra* note 1, at 861; Weissenberger, *Hearsay Puzzles*, *supra* note 21, at 148–49.

[63] *See* Park I, *supra* note 1, at 52. Critics of Rule 801 would dispute the contention that the hearsay dangers are magically minimized in admitting implied assertions. The letters in *Tatham*, 112 Eng. Rep. at 488, for example, if admitted to show the competence of the testator, could still pose dangers. The writers may have known that the testator or recipient was not in full control of his faculties, and yet nevertheless they may have written to him as if he were so as not to offend. *See* Seidelson, *supra* note 1, at 757.

[64] *See* Rice, *supra* note 1, at 534; Seidelson, *supra* note 1, at 575. Professor Rice argues that an implied assertion is only as credible as the direct assertion from which it is inferred. Professor Rice uses the example of a will contest where the deceased's verbal statement, "my nephew John is the most attentive and caring member of the family" is offered to show fondness for John. Admissible under Rule 801, Professor Rice argues that the statement could have been made satirically, and accordingly the implied assertion of fondness is completely unwarranted. *See id.* at 534. I tend to agree. *See* Weissenberger, *Unintended Implications*, *supra* note 1, at 860–62.

[65] *See* Rice, *supra* note 1, at 534–35; Seidelson, *supra* note 1, at 757; Weissenberger, *Unintended Implications*, *supra* note 1, at 860–62. But see Park II, *supra* note 1, for a discussion of reasons to retain the assertion-oriented definition.

[66] *See* Rice, *supra* note 1, at 532; Seidelson, *supra* note 1, at 774–75.

[67] *See* Rice, *supra* note 1, at 531–32.

[68] *See* Weissenberger, *Unintended Implications*, *supra* note 1, at 857.

[69] *See id.* at 861.

suggested, and continue to maintain, that there is a class of implied assertions for which the hearsay dangers are all but nonexistent.[70] These are implied assertions derived from primary utterances which are not factually assertive.[71] In other words, where the primary message cannot, by its nature, be true or false, the implied assertion should be admitted.[72] Utterances in this category are not likely to be consciously infected by a sincerity defect, and consequently, the implied message possesses enhanced reliability.[73] Take, for example, the out-of-court statement, "Put two dollars on Paul Revere in the third at Pimlico," offered for the implied assertion that the declarant is calling a place where bets are made. As the primary utterance is not factually assertive (it simply is incapable of being true or false), there is a substantial reduction in the risk of insincerity and inaccuracy in the implied assertion. By comparison, primary utterances which are factually assertive (*i.e.*, capable of being true or false), remain susceptible to the insincerity danger and should not be admissible bases for implied assertions.[74] As scholars have argued, where a declarant's primary

[70] *See id.* at 861–62.

[71] *See id.*

[72] *See id.* at 862. The following examples are illustrative:

PRIMARY COMMUNICATION	IMPLIED ASSERTION
"Put two dollars on Paul Revere in the third at Pimlico."	I am calling a place where bets can be made.
"Is John at home?"	I am calling [or at the door of] the place where John lives.
"Don't stick your hand in the disposal."	Disposals can harm your hand.
"Treat Ralph with penicillin" (statement by treating physician).	Ralph has a bacterial infection.

[73] *See id.* at 861. The only way for these primary utterances to be infected with a sincerity defect is in the unlikely event the declarant intended to lie via the implied message. *See id.* For example, if the callers in *Zenni* who gave directions for placing bets intended to frame the defendant as a bookmaker, then the sincerity issue is raised. However, it is my contention that although possible, this is also highly unlikely, and consequently, admission of the evidence is justified. *See id.* at 861–62.

[74] *See id.* at 862; *see also* Rice, *supra* note 1, at 538. It should be noted that some statements that appear to fall in this category still pose some increased hearsay dangers. Thus, the question "Et tu Brute?" offered to show that Brutus was an assailant of Caesar creates an intriguing problem. *See* Mueller, *supra* note 1, at 418 (refuting the idea that all imperatives and questions are nonassertive and thus nonhearsay). The dying words of Caesar could very well be admitted under the title nonassertive, though this appears to clearly implicate Brutus, a factual assertion. *See id.*; *see also* Park II, *supra* note 1, at 795–96 (noting the problem with

statement may be infected with insincerity, then all implied messages derived from that statement may be likewise infected.[75] For example, the statement, "[m]y nephew, John, is the most attentive and caring member of the family,"[76] could give rise to the implied assertion that the declarant was fond of John. However, if the declarant's statement was calculatedly insincere or satirical, then fondness could not be accurately derived or inferred from the declarant's statement.[77]

The foregoing is an extremely abbreviated analysis of the function of the hearsay definition and the scholarly debate it has engendered, and it is not meant to substitute for the actual study of the pertinent literature. The debate among scholars over the interpretation of Rule 801 is extensive in volume and diversity of positions.[78] At a minimum, this debate illuminates the absence of a common interpretation of the very Rule which is designed to define hearsay.[79] The Rule is deceptively complex, and in its complexity it relies upon intricate sub-definitions of "statement," "intend," "verbal," "assertion," "truth," and "declarant," some of which are expressly codified in the Federal Rules and some of which are not.[80] It likewise relies upon the context of a long history of common law development, without which the rule would be indecipherable.[81]

Despite the fact that it has attracted extensive analysis and criticism, the contemporary hearsay system, including the design of the hearsay definition, is a largely unmodified product of the historical evolution of the common law.[82] Seemingly, the common law developed by building on the keystone concept of the definition of hearsay in a way which symbolically reminded lawyers and

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the generalization that all imperatives and questions are nonassertive and therefore admissible). *But see* EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 235 (1980) (stating that "[a]s a practical matter, only declarative sentences ordinarily fall within the hearsay definition").

[75] *See supra* note 64. This argument is persuasive when applied to primary utterances which are indeed factually assertive, but it cannot apply when the primary message does not attempt to assert anything. *See* Weissenberger, *Unintended Implications*, *supra* note 1.

[76] Rice, *supra* note 1, at 534.

[77] *See id.*

[78] *See* sources cited *supra* note 1.

[79] *See id.*

[80] See discussion of implied assertions *supra* notes 55–77 and accompanying text.

[81] See discussion of reformist efforts *supra* notes 12–31 and accompanying text.

[82] Rule 801, like the common law ban against hearsay, acts as an exclusionary rule used to prevent the admission of out-of-court statements which are likely tainted by hearsay dangers. *See* Park II, *supra* note 1, at 785 n.15 (discussing hearsay dangers and various authors' analyses and terminology regarding them). For a discussion of the development of the hearsay system under the common law and the Federal Rules of Evidence, see *supra* notes 32–41 and accompanying text.

judges that the hearsay system is bent upon distinguishing between reliable and unreliable statements. In its complexity and density, the definition seems to whisper the message that distinguishing between reliable and unreliable out-of-court statements is not a simple matter. Despite its simple appearance, the hearsay definition has evolved to the point of being an overburdened construct.[83]

The goal of the reform I propose is to make the rule more reflective of the process that should logically and rhetorically occur when the definition is applied, thereby allowing lawyers to make more precise arguments and judges to make more soundly-based decisions.

IV. PROPOSED REFORM

In order to reform the definition of hearsay, I would make two major changes. First, I would recast the structure of the applicable rules to reflect the functional operation of the hearsay system in the courtroom. Second, I would unpack and make explicit the obscure subtleties of admissibility and inadmissibility contained in the overladened definition of hearsay. As part of this second change, I would once-and-for-all definitively resolve the disputes probably more interesting to scholars than to lawyers and judges as to the admissibility of implied assertions.

Using the Federal Rules of Evidence as a common frame of reference, the

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[83] Apparently, the density of the hearsay definition is at times lost on courts. In addition to attracting voluminous scholarly literature, the hearsay definition has engendered inconsistent judicial applications. *See* Wellborn, *supra* note 1, at 83. Wellborn examined several cases that required an analysis of the hearsay definition with respect to implied assertions. In one case, *United States v. Ariza-Ibarra*, 605 F.2d 1216, 1222 (1st Cir. 1979), the court cited Rule 801 and *Wright v. Tatham* in the same sentence, "without any hint of inconsistency between the two." Wellborn, *supra* note 1, at 89. Other cases cited by Wellborn to illustrate judicial interpretations of Rule 801 include *United States v. Perez*, 658 F.2d 654 (9th Cir. 1981); *United States v. Check*, 582 F.2d 668 (2d Cir. 1978); *United States v. Snow*, 517 F.2d 441 (9th Cir. 1975); *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir. 1974); *Park v. Huff*, 493 F.2d 923 (5th Cir. 1974), *withdrawn on other grounds*, 506 F.2d 849 (en banc). *See* Wellborn, *supra* note 1, at 83–91. While some courts have strictly applied the Rule, classifying any expressions besides direct assertions as nonhearsay, other courts have followed the traditional common law approach more closely. *See id.* at 89. Undoubtedly, the primary reason for the inconsistency is that judges and lawyers are not conversant with the intricacies and subtle nuances of Rule 801. Judges are required to make spontaneous decisions regarding admissibility, and if the Rule provides inadequate guidance, judges will likely rely on "sound instincts" rather than unpacking the logic of the definition each time it is applied. *See id.* at 83.

first step would be to erase completely the existing definition of hearsay in Rule 801. In its place would be a simple rule which would make all out-of-court statements presumptively inadmissible regardless of whether "offered for their truth." As a further initial simplification, the term "statement" would be defined as anything intended to be communicative.[84] As *exceptions* to this basic rule of exclusion, I would expressly codify traditional nonhearsay bases of admissibility such as "verbal act" and "effect on the listener." And rather than leaving the matter of implied assertions to elusive interpretations of terminology, I would expressly codify exactly what types of implied assertions are admissible.[85] I would retain all of the traditional bases of admissibility delineated in Rules 801(d), 803, and 804. Though perhaps radical at first glance, this proposal does not dramatically change the end result of applying the current version of Rule 801. It merely explodes the definition into its constituent parts with the aim of better framing argumentation about admissibility.[86]

I will make no attempt here to draft the actual language of the definitions, the basic rule of exclusion, and the exceptions identifying the classes of admissible out-of-court statements. Such an exercise might be illustrative, but it

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[84] This particular definition closely resembles that advocated by Professor Wellborn. *See* Wellborn, *supra* note 1, at 92. Wellborn's approach is good because it eliminates the tortured analysis used by courts to determine whether a statement was intended as an assertion, an analysis which requires a compound inquiry of intent to communicate plus an examination of the purpose for which the evidence is offered. Note that expanding the rule so that all expressions intended to be communicative come within the category of presumptively inadmissible out-of-court statements does not lead to the result that these statements will not be admitted; this is merely the first step of the analysis. *See infra* note 86 and accompanying text.

Placing the burden on the proponent of the statement does represent a departure from the current system which seems to label out-of-court statements as presumptively admissible. "This rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility." FED. R. EVID. 801(a) advisory committee's note. For a discussion of the issue of burdens, see *infra* notes 101–26 and accompanying text.

[85] While my own view is that the Rules should specify that certain implied assertions are admissible, see *supra* notes 68–72 and accompanying text, the implied assertion issue should be resolved in any event.

[86] Thus the verbal expression "Is John at home?" is admissible under both systems. Under Rule 801 a court would likely rule that because it is used as an implied assertion that John lives there, it is not a statement, nor is it offered for its truth. In any event, it would be classified "nonhearsay." Under the proposal, this would be a statement since it is intended to be communicative, and would be presumptively inadmissible. The proponent could then offer as a basis for admission that, because the statement is not a factually assertive statement—that is, it cannot by its nature be true or false—it possesses enhanced reliability and admission is justified. *See* Weissenberger, *Unintended Implications*, *supra* note 1, at 861.

is beside the point. Rather, the point is that it would be beneficial to make explicit what is now only cryptically implicit in the definition of hearsay, and a logical scheme is necessary to provide the framework for such a codification.

In advancing this logical framework, I do not wish to minimize the task of drafting the language of the reformed codification. Nevertheless, just as each of the common law hearsay exceptions was translated into a neat one or two sentence exception in Rules 803 and 804, each of the common law bases for concluding that a statement is "nonhearsay" could be expressed in a similar compact category exception delimiting admissibility.[87] Likewise, the admissibility of certain, but not necessarily all, implied assertions could be circumscribed by an exception.[88] Finally, this codification would not be complete without a recognition that there are statements which defy such categorization as, for example, a "verbal act," but which nevertheless should be considered admissible.[89] Borrowing once again from Rules 803 and 804, I would utilize a "catch-all" or "residual" exception such as those codified in Rules 803(24) and 804(b)(5) to address these statements. Admittedly, the wording would be difficult because absent extreme care, the host of problems that presently reside in the existing codification of definitions in Rule 801 would reemerge under this residual exception. Thankfully, the problems would be reduced to a much smaller horizon of instances, but reducing the problems does not make them go away entirely. Recognizing these problems, here is how I would conceptually construct the residual exception: I would embrace a "declarant-oriented" approach and thereby compel the proponent of the statement (the party using the exception) to argue that the use of the statement does not rely upon the declarant's sincerity or powers of narration, perception,

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[87] *See* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1320-21 (1992) (explaining that the Federal Rules of Evidence "were promulgated pursuant to congressional enabling authority" but "originated in the judicial branch of government"). According to one of the authors of the Federal Rules of Evidence, "[i]n reality . . . the body of common law knowledge [of evidence] continues to exist, though in the somewhat altered form of a source of guidance . . . ." *Id.* at 1331 (quoting Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978)). Just as the current provisions of the Federal Rules incorporate the common law, so could other features of the common law be incorporated into the Rules. For example, the language, "a statement containing words having independent legal significance," could be incorporated.

[88] For example, an exception could provide for the admissibility of messages implied from out-of-court statements which are not fact-assertive. *See supra* notes 68-72 and accompanying text.

[89] *See* 2 MCCORMICK, *supra* note 1, § 249; WEISSENBERGER, *supra* note 38, § 801.8; Park II, *supra* note 1, at 833-34, 836.

and memory.[90] Consequently, in the small number of instances where a statement fails to fit within a codified category of statements that have been traditionally designated as nonhearsay, I would channel the rhetoric to the underlying theory of the distinction between hearsay and nonhearsay.[91]

Having been sweepingly presented with a grand scheme of reform, please endure some comments about its virtues. A significant benefit of my codification is that it obviates the problem of categorizing certain statements as "admissible nonhearsay" because they are not offered for their truth or because they are not intended as assertions.[92] Also, it sequences the analysis of its application in a manner that is subject to more comprehensible progression and more precise and logical argumentation. For example, under my reform a court would easily evaluate the statement, "Put two dollars on Paul Revere in the third at Pimlico." It is a verbal expression intended to be communicative and is thus presumptively inadmissible. Next, the proponent would show the court why this statement should nevertheless come in under an exception to the exclusionary rule. The proponent would *not* try to place the expression outside the definition through incantation of the phrase, "implied assertions" or "not offered for its truth."[93] Instead of attempting to circumnavigate the definition of hearsay, the proponent would be affirmatively required to follow a logical progression of reasoning and argumentation by bearing the burden of satisfying an express basis for admissibility.[94] It is my contention that my rule would

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[90] *See* Park II, *supra* note 1, at 785–86.

[91] Under my scheme, the existing residual exceptions in Rules 803(24) and 804(b)(5) would be retained and available to apply to situations where sincerity, narration, perception, or memory are *reduced* because of circumstantial guarantees of trustworthiness.

[92] Under Rule 801, only oral or written assertions, or nonverbal conduct intended by the declarant as an assertion are statements. *See* FED. R. EVID. 801(a). Hearsay is then defined as a "statement . . . offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). This codification requires that the out-of-court behavior first be evaluated to see if it is a statement (*i.e.*, assertive) and then to see if it is offered to prove the truth of the matter asserted.

[93] This is not to say that all arguments regarding implied assertions are obviated, but at least they are not present in the first step of defining an out-of-court statement. *See supra* notes 68–72 and accompanying text.

[94] Professor McElhaney has noted:

> That thicket of endless possibilities is what makes the buzzwords "not for its truth" so attractive. Some lawyers figure they can lose the judge and the other lawyer in the bushes, wondering what the evidence really proves.
>
> And it's amazing how often it works. Caught in the tangle of awkward phrases and endless possibilities, some lawyers and judges would rather pretend that they, too, like the way the emperor is dressed, instead of confessing they don't see what he's got on. It is a trap for the intellectually insecure who do not want to appear as if they don't

channel the rhetoric in a more constructive fashion.[95]

Finally, it might be asked why I have selected the so-called "declarant-oriented" approach for my catch-all or residual basis for admitting out-of-court statements that currently elude a traditional category of nonhearsay and yet should be admitted. My answer is both simple and not quite so simple. The simple answer is that I am an evidence professor, and as such, I inevitably favor a declarant-oriented approach to hearsay because it captures the theory underpinning the system. But that answer is too quick (but in large part true nonetheless). Less simply, however, I have elected to use the declarant-oriented approach for this purpose because the declarant-oriented approach would be universally considered superior due to the fact that it captures the pivotal policy of hearsay were it not for two problems: first, it is excessively restrictive in certain contexts; and second, it is difficult to apply because it requires too much understanding of the theory supporting the hearsay system.[96] In large measure, my codification ameliorates these concerns. First, the arguable restrictiveness of the declarant-oriented approach lies in its treatment of virtually all implied assertions as hearsay.[97] My codification would make admissible certain implied assertions where it is highly unlikely that the implied message is infected with insincerity, thus diminishing the harshness of the declarant-oriented approach.[98] Second, by virtue of my overall codification scheme, the use of the declarant-oriented analysis would rarely be necessary.[99] In most situations the category exceptions would be employed to admit out-of-court statements that historically have been considered admissible nonhearsay. It is only where a statement does not fit a category exception, and the proponent is seeking admission in what would be described under the present system as "nonhearsay," that the residual basis would be invoked. In this relatively rare context, if the proponent cannot articulate a plausible declarant-oriented basis for admitting the statement, it should be excluded unless it achieves admissibility pursuant to Rules 803 and 804 due to traditional notions of circumstantial guarantees of trustworthiness.[100]

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understand.

McElhaney, *supra* note 13, at 82.

[95] *See* Park II, *supra* note 1, at 802–04 & n.84 (noting that very few courts have discussed the issue of implied assertions).

[96] *See* Park II, *supra* note 1. Park explains that "rigorous application of the declarant definition would require that certain reliable utterances that are now admissible as nonhearsay find a new route to admission." *Id.* at 784.

[97] *See id.*

[98] *See supra* notes 68–72 and accompanying text.

[99] *See supra* note 83.

[100] Such "declarant-oriented" reasons focus on the reliability of the declarant.

V. PROCEDURAL ISSUES

The question naturally arises whether my proposed system would effect changes that would alter the burdens placed on the proponent and the opponent of "out-of-court statement" evidence such that some important balance in the current system is disturbed. It is my contention that, ultimately, this apparent alteration of burdens is illusory, and what is effected in actuality is a desirable sequencing of argumentation.

Under the Federal Rules of Evidence, as under most evidence systems, the proponent of evidence bears the burden of demonstrating the relevancy of the evidence.[101] Once relevancy has been established (and in many cases it is so self-apparent that no argumentation is necessary), the burden is then on the opponent of the evidence to substantiate an objection if the opponent wishes to exclude the evidence.[102] Accordingly, under current practice pursuant to the Federal Rules, if the opponent of relevant evidence wishes to exclude evidence on the basis of hearsay, the opponent is required to demonstrate that the evidence in question is hearsay under the definition of Rule 801(c). In order to substantiate this ostensive burden, the opponent must demonstrate not only that the proponent is offering an out-of-court statement, as "statement" is defined in Rule 801(a),[103] but also that the relevant purpose for which the proponent is offering the evidence depends upon the truthfulness of the out-of-court statement.[104] If the opponent fails in substantiating his or her position, then the objection fails, and the relevant evidence is admitted.[105] If the opponent establishes to the judge's satisfaction that the evidence is hearsay, the burden then shifts back to the proponent to show that some basis for admitting the

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[101] This burden is derived from the basic requirements of Rules 401 and 402. *See* FED. R. EVID. 401, 402.

[102] *See generally* 1 MCCORMICK, *supra* note 1, § 52, at 204 ("The precept constantly urged is that objections must be accompanied by a reasonably definite statement of the grounds, that is to say, that objections must reasonably indicate the appropriate rules of evidence as reasons for the objections made.").

[103] *See* FED. R. EVID. 801.

[104] *See* FED. R. EVID. 801(c).

[105] In other words, the hearsay objection might be overruled because the trial judge concludes that the evidence is not an out-of-court statement, or because it is an out-of-court statement, but it is not offered for its truth. *See, e.g.*, United States v. Perez, 658 F.2d 654, 659 (9th Cir. 1981) (holding that the defendant's phone conversation was used only to show the defendant's involvement with the conspiracy, not for the truth of what was said); United States v. Zenni, 492 F. Supp. 464, 469 (E.D. Ky. 1980) (holding that the statement, "Put $2 on Paul Revere in the third at Pimlico," was not offered for its truth because it was a direction and could not be true or false).

hearsay exists.[106]

Under the system that I am proposing, the basic relevancy burden is, of course, still inescapably on the proponent. However, if the opponent seeks to exclude relevant evidence that involves an out-of-court statement, he or she would only need to show that the proponent is indeed offering an out-of-court "statement" as defined in the rule (*i.e.*, that the behavior of the declarant is intended to be communicative). Once the opponent establishes that the proponent is offering an out-of-court statement, the burden would then shift back to the proponent of the evidence to demonstrate that the out-of-court statement fits within some category of admissibility.[107]

The most substantial procedural change of my system would appear to arise when what would be termed under the current system "a nonhearsay out-of-court statement" is sought to be introduced. My proposed system appears to involve an alteration of the traditional allocation of burdens in the context of identifying which out-of-court statements are admissible because, under current analysis, they are not "offered for their truth." Under the Federal Rules, the proponent need only show relevancy, and it is the opponent who bears the burden of substantiating the hearsay objection.[108] The opponent must show that the out-of-court behavior is a statement and that it is offered for its truth in order to substantiate his or her objection. Under my proposed system, the proponent would be required to show relevancy, as under the Federal Rules. But if the opponent objects and shows that the evidence offered is an out-of-court statement (*i.e.*, intended to be communicative), the burden would then shift back to the proponent to substantiate a basis for admissibility. Consequently, in the current "nonhearsay out-of-court statement" context, the burden in my system is on the proponent to show the statement falls within an admissible category such as "verbal act," "effect on listener," "admissible implied assertion," and so forth.[109]

Before addressing the concern that this alteration of the existing allocation of procedural burdens would result in insurmountable problems, I will identify and dispose of a slightly more subtle issue, that involving nonverbal conduct intended as an assertion. Under existing practice, when conduct is offered as

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[106] These bases include the exceptions to the definition contained in Rule 801(d), the exceptions codified in Rules 803 and 804, and other bases identified in Rule 802.

[107] The system would expressly identify the traditional categories of nonhearsay out-of-court statements as bases for admission. Other bases for admitting out-of-court statements would include the traditional exceptions now codified in Rules 803 and 804.

[108] *See supra* note 101–05 and accompanying text.

[109] My system's modification of burdens would not change the burdens regarding other bases of admitting out-of-court statements such as those contained in Rules 801(d), 803, or 804.

evidence and is objected to as hearsay, it is necessary to determine whether an assertion was intended by the actor (potential declarant), and, consequently, whether the assertion meets the definition of a statement contained in Rule 801(a).[110] The proponent of the evidence has the initial minimal burden of identifying the conduct to be proven and the relevancy of it.[111] If the trial judge concludes that the conduct is not intended as an assertion, then the burden shifts to the opponent of the evidence to show otherwise.[112] The conduct situation is slightly different from the verbal one in that conduct is less likely than the spoken word to be intended as an assertion. For this reason, the common procedure in the context of nonverbal conduct has created something of a presumption in favor of the proponent of the evidence that the conduct is not assertive. This pseudo-presumption stems from the fact that it is the opponent of the evidence that shows that the conduct is intended to be communicative.[113] My proposed system would really have no effect on this procedure. The informal presumption remains since the burden is now totally on the objecting party to show that the proponent of the evidence is introducing an out-of-court "statement."[114] In order to show that the conduct amounts to a "statement," the objecting party must show that the conduct is intended to be communicative.[115] Consequently, once the proponent meets his or her initial relevancy burden, it would still be incumbent on the objecting party to show that the conduct is a statement (*i.e.*, communicative) and thus inadmissible unless some basis for admissibility can be shown. Although the primary objective of my proposal is to make the proponent effectively more responsible for the rationale for admitting the evidence he or she introduces, the objecting party must be able to bear the burden of proving that the proposed evidence is a statement (*i.e.*, that it is communicative). Just as under the current system, this burden would be more difficult when dealing with nonverbal conduct than with spoken words.

With verbal conduct, however, the informal presumption of admissibility

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[110] *See* 4 WEINSTEIN & BERGER, *supra* note 1, ¶ 801(a)[02], at 801–67.

[111] *See id.*

[112] *See id.* For example, an accused defendant, D, presents testimony that another person, X, fled the crime scene as soon as the crime occurred. D does not present the evidence as an assertion on X's part, but its relevancy attaches to its mere occurrence. If the prosecution, P, objects to this testimony being admitted by claiming that X purposely fled the scene so that suspicion would not be drawn to D, but to X instead, P should have the burden of establishing that fact. *See* Maguire, *supra* note 1, at 766.

[113] *See* FED. R. EVID. 801(a) advisory committee's note. This method of procedure in the hearsay system is proposed by Maguire. *See* Maguire, *supra* note 1, at 769.

[114] *See* FED. R. EVID. 801(a) advisory committee's note.

[115] *See supra* note 84 and accompanying text (discussing the proposed definition of statement).

which attaches to nonverbal conduct does not exist under current practice.[116] Spoken words rely on context and tone of voice, among other things, for their true meanings. Accordingly, under my proposed system, when an objection is raised and the issue arises as to whether a verbal utterance is a statement (*i.e.*, intended as a communication), both arguments would be heard and all preliminary evidence proffered before an evidentiary ruling would be made.[117] Consistent with current practice, judges would simply ask for the arguments from both sides under no formal procedural method and then make a decision.[118] The judge would weigh the opponent's objection that the proponent is introducing an out-of-court statement, and if the objection is sustained, it would be the proponent's burden to show that the statement is admissible under one of the express category exceptions.[119]

When an "out-of-court statement" is introduced, it has always been well

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[116] If anything, the reverse may be present. With the procedural burden on the proponent of the evidence, the evidence is technically and presumptively inadmissible.

[117] Consistent with courtroom experience, there is little reason to conclude this is not the way decisions are typically made regarding hearsay in actual, current practice. "It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence, verbal assertions readily fall into the category of 'statement.'" FED. R. EVID. 801(a) advisory committee's note.

[118] In many situations, the judge asks the proponent of the evidence for an offer of proof following the opponent's objection. This offer is to determine whether or not the statement is being offered for its truth (and thus hearsay) or not for its truth (and thus nonhearsay). Although technically the offer of proof is used only to establish the proponent's argument concerning the evidence for appeal purposes, it is apparently also used by judges in the decisionmaking process. *See* 1 MCCORMICK, *supra* note 1, § 51, at 195–96. The typical use of an offer of proof is found in *United States v. Hansbrough*, 450 F.2d 328 (5th Cir. 1971). In this case, the district court judge allowed testimony that had been objected to as hearsay. *See id.* at 329. On appeal, the circuit court upheld the decision based on the district court's finding that the statement was offered to prove a "verbal act" and therefore was not hearsay. *See id.* A more revealing case as to how an offer of proof is used at the trial level is *United States v. Payden*, 622 F. Supp 915 (S.D.N.Y. 1985). Here, the trial judge requested an offer of proof from the proponent of the evidence before making a ruling on its admissibility, thus allowing the judge to weigh the arguments of the opponent and the proponent in order to decide. *See id.* at 917. In effect, this impliedly placed the burden of proof on the proponent of the evidence since the opponent's objection argument needed to be rebutted.

[119] No longer would the opponent illogically try to prove something he or she really does not know (*i.e.*, the true motive of the proponent of the evidence). If, however, the opponent comes up with an alternate theory as to the proponent's true motive or purpose for introducing the out-of-court statement that would make it inadmissible, the opponent must substantiate his or her argument. My proposed rule would not change this practice in reality, because the opponent is in effect becoming the proponent of his or her theory and, therefore, must bear the burden of persuading the court to adopt it.

understood that the proponent of the evidence has the burden of proving not only its relevancy, but also, where the statement satisfies the definition of hearsay, that the evidence falls into one of the hearsay exceptions.[120] Nevertheless, before and after the adoption of the Federal Rules of Evidence, when an out-of-court statement is a "nonhearsay out-of-court statement," there has been no long-standing tradition as to whether the proponent or opponent bears the burden of showing this proposition (*i.e.*, showing that the statement is not offered for its truth because it is, for example, a "verbal act" or an "implied assertion," or is offered for its effect on the listener).[121] Intuitively, it would appear that the burden of showing the statement's nonhearsay quality would be upon the proponent. But technically, substantiating that the statement is "offered for its truth" might appear to fall upon the party asserting the hearsay objection. In the blur of reality, the trial judge simply hears both sides (generally requiring the proponent of the evidence to provide a strong argument for admission), and then rules without regard to formal burdens.[122] Accordingly, by placing the burden to demonstrate admissibility on the proponent of the evidence after the opponent has substantiated an objection by demonstrating that a statement is offered, my proposed rule should not have any substantial effect on traditional courtroom procedure other than to further shape the way in which the argument might sequentially proceed at trial.[123]

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[120] These hearsay exceptions include exceptions contained in Rules 801(d), 803, and 804, as well as other bases identified in Rule 802. *See* FED R. EVID. 801(d), 802, 803, 804; *see also* Maguire, *supra* note 1, at 769 (proposing an entire hearsay system based on the Uniform Rules of Evidence that specifically embraces the proponent's burden of classifying the hearsay statement into an admissible exception).

[121] The issue lies in determining whether it is the opponent's task to prove that the statement is hearsay, or the proponent's task to show that it is not. There is very little documentation regarding the burden of proving that an out-of-court statement is or is not offered for its truth. Obviously, trial courts do not detail the procedure when writing their decisions, and even the authors of major evidence treatises (Lilly, Mueller & Kirkpatrick, McCormick, Weinstein, and Wigmore) neglect to discuss the Rule or reality differences of these procedural burdens.

[122] *See* Wellborn, *supra* note 1, at 89.

[123] I should acknowledge that by placing this burden on the proponent, it may be arguably more difficult for a criminal defendant to introduce relevant evidence in certain contexts. Although this effect could create a constitutional dilemma regarding the due process rights of the accused, the Supreme Court's treatment of cases involving the admissibility of out-of-court statements in the criminal defense context eliminates this possibility. *See* Rock v. Arkansas, 483 U.S. 44 (1987) (lowering the standard for determining trustworthiness by invalidating the state's per se rule which disallowed the defendant's hypnotically refreshed testimony); Chambers v. Mississippi, 410 U.S. 284 (1973) (allowing the hearsay testimony because of assurances of trustworthiness and to ensure the defendant's right to due process). Analyzed together, these two cases illustrate the evolution of a doctrine that allows a criminal

Finally, there is an argument that my proposal would not really change any of the pertinent burdens in the existing system. This argument is based in the logic of the system itself, and it is predicated on a recognition that when a proponent offers an out-of-court statement on a nonhearsay basis under existing practice, he or she must initially show relevancy in order to satisfy Rules 401 and 402.[124] As a part of this relevancy burden, the proponent of traditional nonhearsay out-of-court statements must show that the statement offered is not relevant for its truthfulness but relevant in some other way. Consequently, if the "not offered for its truth" quality of an out-of-court statement is seen as logically part of the relevancy burden, my system does not modify the existing burdens under the Federal Rules.[125]

VI. CONCLUSION

If this Article had been written while the Federal Rules of Evidence were being formulated, would I believe that my suggestions for codification might be seriously considered as a model for the Rules? Do I believe that this Article might inspire amendments to the Federal Rules? Might states considering the adoption of the Federal Rules as their evidence code take my approach and substitute it for Federal Rule 801? These are entertaining fantasies, but they really are not what this Article is about. Also, in the main, this Article is not about hearsay reform. Other articles have charted this territory by focusing on which forms of evidence should be admissible and which should not.[126] This Article is different.

Also, this Article is not about real lawyers and real judges and what is really good for them in real courtrooms. As evidence professors, we can look at reported decisions and glean some notion of what transpires in such courtrooms, but our perspective is limited. The vast majority of evidence law is practiced orally without a trace of a written opinion. Consequently, there may

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defendant to override the evidentiary limitations of the common law and the statutory hearsay rules. *See generally* Imwinkelried, *supra* note 1, at 539–48.

[124] *See* FED. R. EVID. 401, 402.

[125] The preceding offer of proof discussion, *supra* note 118, may apply to this argument. As previously mentioned, when the offer of proof is used in regard to evidence objected to as hearsay, it is generally used to determine whether the statement is offered for its truth. As much as this question is determinative of hearsay, it is also determinative of relevancy in many instances.

[126] Other articles take a similar approach. *See* Graham, *supra* note 1, at 900–23; Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 961–69, 971–74 (1974). Admittedly, I have taken a position on specific points including the admissibility of implied assertions (because I believe a codification should address them) and, in a narrow context, the declarant-oriented approach to hearsay.

well be an unfounded arrogance in recommending a reconstruction of a system where the active participants are not seeking change.

This Article, rather than a call for change, is much more an allegory about change. Basically, the moral of this story is that if a truly workable codification of the hearsay system were sought, it would be necessary to think long, hard, and clearly about a number of subtle and intricate concepts. Moreover, if precision in that workable codification were sought, then the codification should not merely gather up and embrace the imprecise and elusive terminology of the common law [127]

Ultimately, this Article is about the kinds of changes that were *not* made when the Federal Rules of Evidence were drafted.

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[127] *See generally* Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393 (1994).