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Implied Hearsay: Defusing the Battle Line between Pragmatism and Theory

Ronald J. Bacigal*

Scene: A M.A.S.H. unit somewhere in Korea.

Colonel Potter: Klinger, take that damn dress off!

Klinger: I'm not that kind of a girl.

Query: Will the hearsay rule prevent Colonel Potter from testifying to Klinger's outrageous clothes and dialogue, which imply that Klinger believes he is a female, which in turn implies that he is insane?

The riddle of implied assertions has delighted academicians for 150 years with the subtleties of its intellectual challenges.¹ Such intellectual subtleties generally confuse or bore many pragmatists who regard the academicians' favorite hypotheticals as metaphysical musings unrelated to "real life" situations. A proper appreciation of implied assertions, however, reveals that they are not mere academic wrinkles in the generally functioning hearsay rule. While everyone may smile at the fictitious antics of Corporal Klinger, implied assertions have become crucial considerations in the very serious world of child abuse cases.² Arising in the emotionally charged context of child molestation proceedings, "metaphysical" hearsay problems are often discarded in a "pragmatic" attempt to protect the victimized child from enduring the additional trauma of a courtroom appearance. While concern for a victimized child is laudable, some of these overly "pragmatic" approaches to hearsay have lost sight

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1. The complexities of implied assertions first came to prominence in *Wright v. Doe d. Tatham*, 112 Eng. Rep. 488 (1837). Implied assertions have been "the subject of an enormous debate in which virtually all of America's leading evidentiary scholars have joined, although judicial treatment of the problem has remained scant." 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* § 801(a)[01], at 801-56 (1985) (footnote omitted). R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 367 n.41 (2d ed. 1982), wonder if "the issue would not have disappeared entirely by now if the problem were not so intriguing to commentators and teachers of evidence." But in *United States v. Zenni*, 492 F. Supp. 464, 465 (E.D. Ky. 1980), the court confronted "a classic problem in the law of evidence, namely, whether implied assertions are hearsay."

2. See *infra* text accompanying note 57. The problem of implied assertions arises much more often than is recognized by the bench and bar.

of the fundamental purpose of the hearsay rule—protecting the right of cross-examination.³

A return to the emotionally neutral fundamentals of the hearsay rule presents the clash between pragmatists and academicians in a setting which is free of the value laden considerations surrounding child abuse cases. This clash arises at the most fundamental level, that of defining hearsay.⁴ Many academicians favor a definition of hearsay as evidence whose reliability depends upon the veracity of someone not subject to cross-examination.⁵ Pragmatists (particularly trial lawyers) often find this formulation awkward and prefer a concise definition of hearsay as an out-of-court statement offered for the truth of the contents.⁶ The choice of definitions can make a profound difference with respect to: 1) assertions implied within conduct; and 2) assertions implied within oral or written statements.

I. ASSERTIONS IMPLIED WITHIN CONDUCT

Implied assertions focus, not on the literal contents of a statement, but on the assertion impliedly contained within a statement⁷ or within conduct. A classic example of an assertion implied within conduct is evidence that a sea captain took his family on a voyage in a questionable vessel.⁸ At trial the captain's conduct is offered to prove that the vessel was seaworthy. This evidence can be analyzed as nonhearsay if it is classified as a nonstatement—in other words, objectively manifested conduct from which the jury may draw an inference that the ship was seaworthy.

3. "The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence." *Anderson v. United States*, 417 U.S. 211, 220 (1974) (footnote omitted).

4. There are hundreds of definitions of hearsay, but most can be categorized in one of two popular types: "(1) those which focus on the type of statement and the purpose for which it is offered, and (2) those which focus on purported defects in testimony classified as hearsay." R. LEMPERT & S. SALTZBURG, *supra* note 1, at 355.

5. See, e.g., 2 JONES ON EVIDENCE § 8:1 (6th ed. 1972). "By 'hearsay' is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness has received his information." *Id.* (quoting *Clement v. Packer*, 125 U.S. 309 (1888)). The hearsay rule "signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination." 5 WIGMORE, EVIDENCE § 1362 (Chadbourn rev. 1974). Evidence is hearsay "if so offered as to call for reliance upon untested perception or memory . . ." Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 769 (1960); see also Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 n.8 (1974); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir. 1974).

6. FED. R. EVID. 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."

7. See *infra* text accompanying note 49.

8. The hypothetical was suggested in the debate over *Wright v. Doe d. Tatham*, 112 Eng. Rep. 488 (1837).

Under this analysis the captain's nonverbal conduct is deemed to be circumstantial evidence whose relevance rests upon the validity of an inference, rather than resting upon the veracity of a declarant. Facts and inferences are thus presented to the jury, but there is no statement for purposes of the hearsay rule.⁹

The opposing view of this hypothetical maintains that the captain's conduct makes a statement as clearly as if he had nodded when asked whether the ship was seaworthy.¹⁰ Under this analysis the fact the jury is asked to infer (seaworthiness) is the very fact that is being impliedly asserted by the declarant's conduct. Thus, the jury is being asked to accept the truth of the captain's out-of-court assertion of seaworthiness. The question for the trial judge is whether to follow the nonhearsay analysis classifying the captain's conduct as an objective fact from which inferences may be drawn, or to follow the hearsay analysis classifying the conduct as an implied statement for purposes of the hearsay rule. The Federal Rules of Evidence answer this question by focusing on the intent of the declarant.¹¹ A statement is a condition precedent to the existence of hearsay, and the declarant's conduct is a statement only if he *intended* to make an assertion to an observer.¹²

Intended assertions are exemplified in the classic portrayals of the strong but silent hero who lets his actions speak louder than his words. For example: The frightened masses huddle on the pier of some war-torn port trying to decide between the dangers of remaining on shore with the attacking hordes or facing the hazards of the sea by fleeing on a questionable vessel. The background music reaches a crescendo, and the camera focuses on the bridge of the ship where the prototypical hero turns his steely gaze toward the captain's cabin from which emerge his lovely wife and innocent children. Is there anyone in the audience who does not get the message? By his conduct the captain has made a dramatic *statement* that the ship is seaworthy. He meant his conduct to be a communication; it was perceived as a communication by the observers; and the jury will certainly view it as a communication. As such the captain's conduct

9. The starting point for the pragmatic definition of hearsay is the existence of an out-of-court statement. See FED. R. EVID. 801(a).

10. Pragmatist and academician agree that some conduct must be classified as a statement. See *infra* note 30.

11. FED. R. EVID. 801(a) provides: "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." The advisory committee's note states: "The key to the definition is that nothing is an assertion unless intended to be one." FED. R. EVID. 801(a) advisory committee note.

12. The question whether conduct is intended as an assertion is a preliminary determination for the trial judge. "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . ." FED. R. EVID. 104(a).

must be classified as a statement for hearsay purposes.¹³

An unintended implied assertion is exemplified in testimony that the captain was observed sneaking his family onto the ship in the dead of night, supposedly unseen by human eyes. The captain's state of mind, which can be inferred by the jury, may still be that he believes the ship to be seaworthy. The captain, however, does not intend to communicate his belief to any observer. Under the Federal Rules of Evidence, conduct which is not intended to be an assertion or communication is not a statement for hearsay purposes.¹⁴ Federal Rule 801(a) thus looks to the intent of the person engaged in the conduct to determine whether the conduct amounts to a statement for purposes of the hearsay rule.¹⁵ The Federal Rule does not address the more subtle assertions implied within conduct, but does provide a bright-line standard (a favorite approach of pragmatists) which applies to an obvious intention to make an assertion.¹⁶

Unlike the "pragmatic" approach of the Federal Rules, the "academic" approach to hearsay does not concern itself with the declarant's intent, but rather his veracity.¹⁷ Whether the captain is grandstanding for an audience or sneaking around in the dead of night is relatively unimportant. The crucial consideration is whether to allow the jury¹⁸ to attach any weight to the captain's apparent belief that the ship is seaworthy. In turn, the trustworthiness of that belief depends upon the captain's: (1) sincerity (danger of fabrication); (2) narration (danger of ambiguity); (3) perception (danger of inaccurate observation); and (4) memory (danger of faulty recollection).¹⁹

A. *Sincerity/Fabrication*

In either of the hypotheticals involving an open or covert boarding,

13. See, e.g., *United States v. Barash*, 365 F.2d 395, 399 (2d Cir. 1966) (quoting *Wright v. Tatham*, 112 Eng. Rep. 488, 516-17 (1837)).

14. FED. R. EVID. 801(a).

15. A statement not offered for the truth of the matter asserted is not subject to the hearsay rule. FED. R. EVID. 801(c).

16. Whether the intent is obvious is a preliminary question to be determined by the court. See FED. R. EVID. 104(a).

17. See *supra* note 5.

18. This article uses the terms fact finder and jury interchangeably because the hearsay rule theoretically applies to the fact finder, whether judge or jury. In a bench trial, however, the judge is likely to admit a great deal of hearsay and subsequently discard or attach little weight to questionable hearsay. The hearsay rule is of prime importance when it is used to protect jurors from the "misleading potentialities of purely conjectural evidence . . ." Maguire, *supra* note 5, at 764.

19. "[T]he rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity, and faulty narration, memory, and perception . . ." Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 218 (1948).

the captain's willingness to risk his family's lives on the vessel provides some assurance of his sincere belief that the vessel is seaworthy. To distinguish the two hypotheticals there must be an assurance of sincerity which is present in the implied assertion (covert boarding) but lacking in the intended assertion (public boarding). If an actor does not consciously intend to communicate with an observer, there is less danger he would intend to deceive the observer. A person who did not intend any statement could hardly intend to make a false statement.²⁰ The danger of insincerity is somewhat reduced in the case of unintended implied assertions and thus forms a possible basis for distinguishing the covert boarding from the captain's display of his family to the crowd.

B. *Narration/Ambiguity*

The Federal Rules suggest that there is no danger that the jury will attach the "wrong" meaning to unintended implied assertions because the actor had no "right" or intended meaning in mind.²¹ This characterization of a right and wrong meaning from the perspective of the declarant is misleading. The captain may not intend to communicate his state of mind, but his mental state must have a logically probative meaning to the factfinder, or it is irrelevant.²² To the jury, the only "right" meaning is one which relates to an operative issue of the case—is the ship seaworthy? Was this what the captain had in mind when he boarded the vessel? Some degree of ambiguity is inherent in the factfinder's attempt to correctly identify the declarant's existing state of mind.

With no evidence beyond a description of the vessel's boarding, there are many hypothetical mental states which could have existed. For example, the captain could have believed: (1) the ship is in great shape; (2) the ship will not complete the journey, but perhaps it can get as far as the rescue vessels; or (3) the ship will never make it out of the harbor, but it is better to die at sea than to be tortured by the attacking hordes. If the "right" state of mind is the one which is logically probative of seaworthiness, then the first state of mind is clearly relevant. The third state of mind is not probative of seaworthiness, but in fact disproves the proposition for which it is offered. The second state of mind suggests an ambiguous state of partial seaworthiness. Whether the captain boarded the

20. M. GRAHAM, *EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* 86 (1983).

21. Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 *STAN. L. REV.* 682, 685-86 (1962).

22. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *FED. R. EVID.* 401.

vessel] at night or in the presence of the crowd does not provide any guidance as to which of these three possible states of mind he possessed.²³

If there is a distinction in the ambiguity of intended and implied assertions, the distinction indicates that unintended implied assertions are inherently more ambiguous.²⁴ When a declarant consciously intends to communicate with an observer, he desires his communication to be understood by that observer. Even if the declarant is engaged in a fabrication, he will seek to clearly and effectively communicate his false story by choosing the least ambiguous means to get his message across.²⁵ With unintentional implied assertions, however, the declarant makes no effort to avoid ambiguity, because there is no intent to convey his message to anyone. Thus, unintentional implied assertions have an inherently greater potential to be more ambiguous than intended assertions. The Federal Rules have it backward by classifying the less ambiguous intended assertions as hearsay, while classifying the more ambiguous unintentional assertions as nonhearsay.

C. Perception/Inaccurate Observation

Even if the factfinder can correctly identify and determine the sincerity of the captain's belief, the question remains as to the foundation for that belief. The captain's belief constitutes an expert opinion on the issue of seaworthiness,²⁶ and the admissibility and weight of expert opinion depends upon the adequacy of the foundation for that opinion²⁷—in other words, the reliability of the underlying facts upon which the opin-

23. Inferences as to the belief of the actor sought to be drawn from his conduct would be mere speculation when there are several reasonable explanations for such conduct. 4 J. WEINSTEIN & M. BERGER, *supra* note 4, at § 801-62-63 (quoting Comment, *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1077, 1084 (1969)). Speculation problems could be addressed under relevancy considerations. See Comment, *Negative Hearsay—The Sounds of Silence*, 84 DICK. L. REV. 605 (1980). However, all rules of evidence are theoretically reducible to relevancy and reliability questions. Some 50 years ago McCormick lamented the trend to reduce all rules of evidence to mere discretionary canons for judging the trustworthiness of evidence. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930).

24. Generally, a diminution in sincerity problems will be accompanied by an increase in ambiguity. R. LEMPERT & S. SALTZBURG, *supra* note 1, at 368. The hearsay label cannot be avoided solely by getting away from the kind of conscious assertion which gives rise to a sincerity problem. Maguire, *supra* note 5, at 756.

25. "The communicator frames his words [or conduct] deliberately so that the communicant will receive information about an event the speaker observed that the speaker wishes to transmit." 4 J. WEINSTEIN & M. BERGER, *supra* note 4, at § 801-54.

26. "When hearsay or something that looks like hearsay gets compounded with opinion, its admissibility is doubly unlikely." Maguire, *supra* note 5, at 754.

27. See FED. R. EVID. 703. The sixth amendment's confrontation clause is not violated when the expert cannot remember the basis of his opinion. *Delaware v. Fensterer*, 106 S. Ct. 292, 295 (1985).

ion is based. Whether the captain's opinion is intentionally or impliedly expressed has nothing to do with its foundation.

In either of the hypothetical shipboardings there are far ranging possible foundations which are not contingent upon an intent to make an assertion. For example, the captain's opinion of seaworthiness may be based upon: (1) a careful inspection two hours before sailing; (2) a casual inspection some weeks before the voyage; or (3) no inspection at all, because who can afford to be choosy when the barbaric hordes are approaching. Whether the captain engaged in a dramatic gesture to the crowd or in a surreptitious boarding, the jury is totally ignorant of the foundation for his opinion of seaworthiness. Intended and implied assertions cannot be distinguished in terms of the danger of inaccurate perception by the declarant.

D. *Memory/Faulty Recollection*

If the captain's opinion of seaworthiness is based on an inspection of the vessel, the inspection may have occurred two hours, two weeks, or two years before the vessel sailed. An intent to make an assertion and a dramatic gesture to the crowd provide no insights into the time period in question. Intended and implied assertions cannot be distinguished in terms of the danger of faulty recollection.²⁸

In sum, problems of memory, perception, narration, and sincerity on the part of declarants remain the same with or without an intent to make an assertion. The only distinction that can be drawn between intended and unintended implied assertions relates to the danger of insincerity. Intentional communications provide more opportunities for conscious fabrication; thus there may be more need to classify them as hearsay to facilitate cross-examination on the declarant's truthfulness. Balanced against the decreased risks of fabrication in unintended implied assertions is the greater danger of ambiguity and the equal dangers of faulty perception and memory. The Federal Rules' distinction between intended and unintended implied assertions hangs on a very thin thread—the relative risk of insincerity. On a fair balance the slightly

28. It is sometimes argued that conduct often occurs soon after supporting facts are perceived, thus attenuating the dangers of faulty memory. R. LEMPERS & S. SALTZBURG, *supra* note 1, at 368. The key word is "often," because it is not universally true that people base all conduct on recent perception. "[D]oes apparent belief translated into *action* stand in any better case as respects the hearsay rule than apparent belief translated into *statements*?" McCormick, *supra* note 23, at 491. The timeliness of the perception would not justify classifying an oral statement as nonhearsay in a situation where the declarant emerged from a room and stated: "There's a dead body in there." Timeliness of recent perception is properly handled by hearsay exceptions, not by altering the definition of hearsay. Federal Rule 803(1) recognizes the present sense impression exception. A proposed exception for statements of recent perception was deleted from Federal Rule 804(b)(2).

reduced risk of fabrication in unintended implied assertions hardly seems to warrant the drastic consequences which may flow from the hearsay/nonhearsay classification.²⁹

The pragmatist may acknowledge all of the above considerations and concede that the Federal Rules of Evidence draw a somewhat arbitrary distinction between assertive and nonassertive conduct. He may suggest, however, that the error was in placing either form of conduct within the definition of hearsay. Rather than being under-inclusive, perhaps the Federal Rules are over-inclusive and should be amended to exclude all conduct from the definition of hearsay.³⁰ The hypothetical pragmatist would argue that the captain's conduct is relevant and admissible only to the extent that it is reliable evidence of the condition of seaworthiness. Problems of reliability (sincerity, narration, perception, and memory) are present to some degree in all extrajudicial human behavior, whether the behavior be analyzed as a statement or as circumstantial evidence.³¹ Thus, the pragmatist argues, the captain's conduct might be better analyzed under the nonhearsay rules governing the relevance and reliability of circumstantial inferences.³²

To illustrate his point, the pragmatist poses a hypothetical in which a witness accompanied the captain on a careful inspection of the vessel two hours before boarding. This witness cannot tell the jury what was in the captain's mind, thus problems of ambiguity remain.³³ However, the witness' testimony decreases the dangers of inaccurate perception and faulty memory by providing factual information as to the nature and timeliness of the captain's inspection. Although the problem of ambigu-

29. "While the danger of insincerity may be reduced where implied rather than express assertions of the third parties are involved, . . . there is the added danger of misinterpretation of the declarant's belief. Moreover, the declarant's opportunity and capacity for accurate perception or his sources of information remain of crucial importance." *United States v. Pacelli*, 491 F.2d 1108, 1117 (2d Cir. 1974) (citation omitted). The Federal Rules seem to take the approach that, because implied assertions have less danger of insincerity, we can live with the dangers of ambiguity, perception, and memory. Finman, *supra* note 21, at 685-86. If in fact the dangers are de minimus, then there should be sufficient guarantees of reliability to apply the "catch all exceptions" of Federal Rule 803(24) or 804(5).

30. See, e.g., Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912) (arguing to admit all conduct as evidence of the actor's belief and of the fact believed). Some conduct, such as pointing at the defendant in a lineup, must be labelled hearsay. If the act is done solely for purposes of expression, then it is on a parity with purely verbal acts. McCormick, *supra* note 23, at 491.

31. Professor Morgan argued that the danger of misunderstanding the meaning of conduct is no greater than in the case of any circumstantial evidence. Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 7 (1937).

32. See FED. R. EVID. 401, 403. "The admissibility of . . . nonverbal conduct . . . is governed by principles of relevance, not by hearsay principles." *In re Dependency of Penelope B.*, 104 Wash. 2d 643, 652-53, 709 P.2d 1185, 1191 (1985).

33. See *supra* text accompanying note 21.

ity remains,³⁴ the hearsay rule should be discarded because the testimony of the captain's companion decreases three of the four risks inherent in analyzing conduct.³⁵ Furthermore, the hypothetical illustrates the inadequacy of the academic hearsay definition which focuses on the need for cross-examination. In this hypothetical the declarant (the captain) is not subject to cross-examination, yet the factual basis of the declarant's belief can be developed by the testimony of the captain's companion. To the pragmatist this illustrates that the proper question is not one of classifying conduct as hearsay. The true question is the reliability of the underlying facts from which circumstantial inferences may be drawn.

The question of how the reliability of those underlying facts is to be established and tested raises anew the purpose of the hearsay rule and the function of cross-examination. The hearsay concept is not a self-contained system of rules whose only end is to classify evidence as hearsay or nonhearsay. The hearsay rule and the concept of implied assertions are best viewed as tools to accomplish the goal of promoting adequate cross-examination. Thus, the academician would maintain that the pragmatist's hypothetical actually affirms the academic definition of hearsay which did not state that the declarant must be available for cross-examination. The academician's definition stated that the reliability of the evidence turned upon the veracity of *someone* not subject to cross-examination.³⁶ In this hypothetical the reliability of the underlying facts turns upon the veracity of the captain's companion, who is subject to cross-examination. This hypothetical is similar to situations involving radar, or drug sniffing dogs where the operator of the radar or the dog's trainer must be subject to cross-examination on the reliability of the "statement" made by the radar or the dog.³⁷

To illustrate his point the academician would separate the two inferences contained within the hypothetical involving the captain's companion: 1) From the captain's conduct the factfinder may infer the captain's belief regarding seaworthiness; and 2) From the captain's belief the factfinder may then infer the existence of the condition of seaworthiness. The first inference, from conduct to belief, raises only two of the four inherent dangers of interpreting human conduct. Problems of ambiguity and insincerity exist, but problems of perception and memory are eliminated. The captain's conduct reflects a presently existing state of mind;

34. If the evidence is so ambiguous that it amounts to speculation, it can be excluded as logically or legally irrelevant. *See infra* text accompanying note 40.

35. The risk of insincerity was reduced by the captain's willingness to risk the lives of his family. *See supra* text accompanying note 20.

36. *See supra* note 5.

37. *See, e.g.,* *People v. Centolella*, 61 Misc. 2d 723, 305 N.Y.S.2d 279, 281-82 (Oneida Co. Ct. 1969).

thus there is no danger of faulty recollection. There is no danger of faulty perception because the law recognizes that an individual can best perceive his own state of mind.³⁸ If the pragmatist were to stop at the first inference regarding the captain's belief, the hearsay/nonhearsay controversy would be rendered meaningless by the existence of the state of mind exception to the hearsay rule.³⁹

When state of mind is an operative issue, the hearsay rule will not determine the admissibility of the captain's conduct. Either the conduct amounts to a direct assertion of the captain's mental state, in which case the state of mind exception applies, or the conduct is circumstantial evidence of a state of mind, in which case the trial court must determine whether the circumstantial inference is so ambiguous that it must be excluded as logically or legally irrelevant.⁴⁰ In the latter case, the admissibility of the captain's conduct is determined by resort to the rules of relevancy, and there is no need to consider the hearsay rule.

Hearsay considerations, however, are applicable to the second inference—inferring from the belief of seaworthiness that the condition of seaworthiness actually existed. With this second inference the factfinder is no longer satisfied in knowing what the captain *thought* about seaworthiness; the fact finder seeks to determine the actual *fact* of seaworthiness. The existence of this fact necessarily rests upon the accuracy of the captain's perception and memory.⁴¹ Inferences are valid only to the extent that they are based upon reliable facts, and facts are reliable only to the extent that they are accurately perceived and remembered.⁴² If the underlying fact is inaccurately perceived or remembered, then the inference will be faulty.

What then supports the inference that there was accurate perception and memory by the captain? One possible avenue of support lies in legal

38. There is no possibility of erroneous perception because what one perceives as his mental sensation is his sensation. Tribe, *supra* note 5, at 965.

39. Whenever the state of mind of the declarant is a fact of consequence in the litigation, the discussion of whether the statement is hearsay is of no practical importance. M. GRAHAM, *supra* note 20, at 99; see *United States v. Southland Corp.*, 760 F.2d 1366 (2d Cir. 1985). An outright assertion of one's existing state of mind is a hearsay exception. FED. R. EVID. 803(3). A statement which provides the basis for drawing a circumstantial inference as to the declarant's state of mind is nonhearsay. Whether the evidence is labelled nonhearsay state of mind or the state of mind exception to the hearsay rule, the inferences to be drawn from that state of mind remain the same.

40. See FED. R. EVID. 401, 403.

41. Behind a belief or state of mind lies the process of acquiring information, and the whole sequence of sensory, mental, and demonstrative processes from acquisition to ultimate transmission must be considered in gauging the reliability of evidence of human behavior. Maguire, *supra* note 5, at 743.

42. "The basic hearsay problem is that of forging a reliable chain of inferences, from an act or utterance of a person . . . to an event that the act or utterance is supposed to reflect." Tribe, *supra* note 5, at 958; see also McCormick, *supra* note 23, at 490.

recognition of a general premise regarding human nature.⁴³ For example, the law might presume that every individual's state of mind is likely to have an accurate factual foundation.⁴⁴ If this premise is accepted, the captain's conduct cannot be classified as hearsay because no individual's veracity is in question. It is general knowledge of human nature, not a particular individual, which asserts that on this occasion there was accurate perception and memory.⁴⁵

If the law does not accept this universal postulate regarding human perception and memory,⁴⁶ then specific evidence regarding the captain's perception and memory is required.⁴⁷ Someone must establish that the captain's belief of seaworthiness was based on accurate recall of a correctly perceived condition. If the captain's conduct amounts to his assertion that he perceived the condition of the vessel, then the captain's veracity is in question. Because the captain is not in court and subject to cross-examination on his veracity, his conduct should be classified as hearsay. If the evidence of perception and memory come from the captain's companion, then it is the companion whose veracity is in question. The hypothetical companion is in court and subject to cross-examination; thus, the captain's conduct no longer fits the academic definition of hearsay. The reliability of the evidence of perception and memory rests upon the veracity of someone subject to cross-examination.

This hypothetical involving the captain's companion further demonstrates that the pragmatist and the academician are in substantial agreement as to the importance of cross-examination in testing the reliability

43. A general premise regarding human nature often underlies a hearsay exception. For example, the declaration against interest exception rests on the assumption that a person is unlikely to make a statement adverse to himself unless he believes it to be true. Tribe, *supra* note 5, at 964-65. The *Hillmon* doctrine, from *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), rests on the assumption that people are likely to carry out their intentions. *Shepard v. United States*, 290 U.S. 96, 105 (1933). An argument to exclude silence from the definition of hearsay relies on the proposition that "people generally complain when reasons for complaint arise . . ." Comment, *supra* note 23, at 616.

44. Classifying conduct as nonhearsay is often justified on grounds that an individual would not act unless he were fairly confident of perception and memory. "[T]his rationale fails to take account of substantial defects of memory and perception of which a declarant cannot be conscious." Tribe, *supra* note 5, at 965.

45. The extent to which this general premise can be accurately applied to a particular individual goes to the weight of the evidence. This approach would be similar to efforts to impeach a particular hearsay declarant. See FED. R. EVID. 806.

46. The hearsay rule would be destroyed if courts admitted statements about past events on the theory that they merely showed a state of mind, which in turn was circumstantially relevant to establish past events which could have caused the state of mind. *Shepard v. United States*, 290 U.S. 96, 105-06 (1933).

47. "[A]ny evidence of extrajudicial human action or inaction offered for a purpose necessitating reliance upon the sincerity of the *particular human being* must be classified as hearsay." Maguire, *supra* note 5, at 765 (emphasis added).

of evidence. Shortcomings of perception and memory, as well as the existence of insincerity and ambiguity, are the very things cross-examination is intended to reveal. The captain's belief as to seaworthiness may be admissible: 1) under the academician's hearsay analysis, if the requirement of cross-examination is satisfied; or 2) under the pragmatist's circumstantial evidence analysis if cross-examination is available to test the reliability of the facts from which inferences may be drawn. The pragmatist and the academician arrive at the same litmus test (cross-examination) for admitting or excluding the evidence. However, their paths to this common result are quite distinct, and the question then becomes which path or analysis is best. If it is assumed that the more direct path is superior because simplicity is preferred to complexity,⁴⁸ then the academician's analysis is to be preferred. The academician's approach is straightforward and consists of a single-minded focus on the fundamental right of cross-examination; the captain's belief of seaworthiness is admissible if cross-examination is available to test the captain's perception, memory, narration, and sincerity. If counsel cannot adequately cross-examine someone about these factors, then the evidence must be hearsay.

In contrast to the single-mindedness of our hypothetical academician, the pragmatist must engage in a two-step analysis. He must first confront the initial controversy over whether there is a statement for hearsay purposes. If he wins that debate and succeeds in classifying the captain's conduct as nonhearsay/circumstantial evidence, the pragmatist must then focus upon the separate relevancy rules governing the admissibility of circumstantial evidence. For example, aside from hearsay considerations, are there reliable facts from which logical inferences can be drawn? Can the reliability of the facts be determined without cross-examination as to the veracity (perception, memory, narration, and sincerity) of the source of the facts?

The pragmatist and the academician ultimately come to the same question as to the adequacy of the opportunity for cross-examination to test the reliability of the evidence. The academician's allegedly metaphysical approach, however, is in reality the more desirable approach because it simplifies the analysis to a one-step process—is the declarant's conduct to be admitted in violation of the right to adequate cross-examination on the declarant's veracity?

II. ASSERTIONS IMPLIED WITHIN ORAL OR WRITTEN STATEMENTS

The first section of this article addressed nonverbal conduct where

48. The Federal Rules' approach is often defended on the practical grounds that the problem of analyzing nonassertive conduct is likely to lead to confusion and error. See R. LEMPERT & S. SALTZBURG, *supra* note 1, at 367.

the crucial question was whether conduct amounted to a statement which conveyed the actor's state of mind. However, with oral or written communications the declarant normally intends to make "a" statement,⁴⁹ and the focus shifts to a possible conflict between the implied substance and the literal contents of the statement. Thus, even when there is agreement that a statement was made, a difficult question may remain as to whether the declarant intended to assert the literal contents of the statement, or whether it is appropriate to "read between the lines" to decipher what the declarant really intended to assert.

Although oral or written implied assertions have received less attention than nonassertive conduct,⁵⁰ the concept of assertions implied within the written word should be familiar to both pragmatic and academically oriented lawyers who examine court opinions. The significance of implications contained within a single sentence or footnote in a court decision is often exaggerated,⁵¹ but the legal profession properly expends considerable effort trying to discern what is implied within the literal language of a court's opinion. It is ironic that a profession so attuned to the full nuances of legal decisions can, at times, be less astute at spotting the subtle implications contained in out-of-court statements.

Of course, not all implied assertions are subtle. Some are so obvious that common sense dictates that they be recognized as hearsay. For example, a potential buyer asks: "Is this pure heroin?"⁵² To which the declarant responds: "Do cops wear blue?" Counsel offering this statement may contend that the statement is not hearsay because it is not offered for the truth of the literal statement that police wear blue uniforms. The mere uttering of such words can be seen as an objective fact from which the jury may or may not infer something other than the color of police uniforms, such as inferring that the heroin is pure. Although the inference is rather obvious, this does not necessarily convert the inference into an assertion by the declarant. Under this analysis, if the jury is not asked to accept the literal truth of the matter asserted, then the matter cannot be classified as a hearsay statement.

49. Screams of pain or singing in the shower may not be intended as assertions even though they are oral statements. The familiar: "Have a nice day," may not reflect an intentional expression of either fact or opinion. "[I]f the statement was offered on a nonassertive basis, *i.e.*, for proof only of the fact it was said, the statement would not be subject to the hearsay objection." *United States v. Sanders*, 639 F.2d 268, 270 (5th Cir. 1981).

50. Scholars have developed considerable literature on nonassertive conduct. "Much less attention has been paid to the problem of assertions implied from other assertions." R. LEMPERS & S. SALTZBURG, *supra* note 1, at 369. *But see* *Krulewicz v. United States*, 336 U.S. 440 (1949).

51. The famous footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), has produced volumes of analysis.

52. A statement offered only to place the statement of another in context is not hearsay. *N.L.R.B. v. National Car Rental Sys.*, 672 F.2d 1182, 1187 (3d Cir. 1982).

Such superficial analysis is not convincing because counsel, judge, and jury will recognize the clear message contained between the lines of the declarant's colorful language. The very implied assertion that made the declaration relevant cannot simultaneously make the declaration nonhearsay merely because the assertion was implied. Common sense dictates treating such statements as hearsay. Unfortunately, implied assertions also come in much subtler forms than the above hypothetical on the color of police uniforms. Common sense is not a complete or obvious answer in more subtle situations such as the following hypothetical.⁵³ The defense offers the out-of-court statement of the alleged homicide victim who hugged the defendant and said: "I love you." Defense counsel may argue that such a statement is not hearsay because it is not offered for the literal contents of the statement (love being irrelevant to a homicide prosecution). Counsel may assert that the mere uttering of the words (and the hug)⁵⁴ are objective facts and are thus circumstantial evidence from which the jury may or may not draw inferences. For example, if a victim would not love her assailant, then it can be inferred that the defendant is not the assailant. Defense counsel will point out to the court that the prosecution remains free to argue possible counterinferences. The expression of love may have been an act of forgiveness and thus does not disprove the attack. Under this analysis the jury is not asked to consider hearsay, but is discharging its traditional function when considering circumstantial evidence. The jury must choose between competing rational inferences.

The prosecution, however, may not accept a characterization of the "I love you" statement as nonhearsay. The prosecution may argue that the only relevant inference to be drawn by the jury is the very message implied within the literal statement of the declarant.⁵⁵ If the statement were evidence of forgiveness, then forgiveness, like love, is irrelevant in a homicide prosecution. The only relevant purpose for which the defense could offer the statement is to prove that the defendant is innocent. Thus, the defense is seen to introduce an out-of-court statement that the defendant is not the assailant. The question for the judge is whether the assertion possibly implied within the statement is offered for the truth of the assertion, or whether the implication is merely a permissible inference to be accepted or rejected by the jury.

The Federal Rules of Evidence provide no clear answer to the puz-

53. The hypothetical is a variation on a hypothetical suggested in K. BROUN & R. MEISENHOLDER, *PROBLEMS IN EVIDENCE* 97 (2d ed. 1981).

54. The hug may simply be another way of saying, "I love you," and would thus be analyzed as nonverbal conduct. *See supra* text accompanying note 8.

55. The truth of the matter literally asserted (love) must be assumed for the nonasserted inference to be drawn. *See M. GRAHAM, supra* note 20, at 97.

zle of assertions implied within statements, and it may be that no bright-line answer is feasible.⁵⁶ The admissibility of implied assertions can best be resolved on a case-by-case basis after placing the statement within the context of the entire case. Thus, the Federal Rules respect the benefits of flexibility in allowing the judiciary to resolve these difficult questions on a case-by-case basis. Perhaps the prime benefit of a codification of evidence rules is to provide clear guidance in commonly recurring situations. If so, the Federal Rules provide such guidance and are not fatally flawed by their failure to provide a definitive answer for the more esoteric aspects of implied assertions.

While it may be wise for codifiers of rules to ignore the rare esoteric questions, such admirable restraint is of no assistance to the trial judge who confronts one of those difficult situations. Nor are those situations quite as rare as some pragmatists contend. The recent case of *Church v. Commonwealth*⁵⁷ demonstrates the type of implied assertion problems which have occurred in many child molestation cases.

In *Church*, the defendant was charged with sexual offenses against a seven-year-old girl. The victim did not appear at trial, but her mother testified that the child became preoccupied with sex and told the mother that sex was "dirty, nasty, and it hurt."⁵⁸ Defense counsel's hearsay objection to this statement was overruled by the trial court. In its review of the case, the Virginia Supreme Court applied the pragmatic definitions of hearsay and nonhearsay. The court defined hearsay as extra-judicial statements "offered for a special purpose, namely, as *assertions to evidence the truth of the matter asserted*."⁵⁹ Nonhearsay was defined as out-of-court statements not offered to show their truth.⁶⁰

The court noted that the prosecution did not offer the child's statement to prove its literal contents that sex is "dirty, nasty, and it hurt." The statement was offered to show the child's attitude toward sex, "an attitude likely to have been created by a traumatic experience. . . . Thus, the child's out-of-court statement was not hearsay, but was admissible as circumstantial evidence tending to establish the probability of a fact in issue."⁶¹ This fact, of course, was the corpus delicti of the sexual offense at issue.⁶² The court's brief analysis, contained within a single paragraph, correctly applied the literal definition of hearsay to the literal con-

56. The author is not aware of any codification of evidence rules which addresses the question of assertions implied within oral or written assertions.

57. 230 Va. 208, 335 S.E.2d 823 (1985).

58. *Id.* at 211, 335 S.E.2d at 825.

59. *Id.* at 212, 335 S.E.2d at 825.

60. *Id.*

61. *Id.* at 212, 335 S.E.2d at 825-26.

62. The corpus delicti relates to the body of the crime regardless of the identity of the perpetra-

tents of the statement. The court, however, failed to confront the more subtle aspects of applying the hearsay rule to assertions implied within the literal contents of a statement.

The Virginia Supreme Court failed to consider the assertion impliedly contained within the child's statement that sex was "dirty, nasty, and it hurt." What was the child trying to communicate to the mother? If the child was "really" saying, I think sex is nasty because I have had a traumatic sexual experience, then this is the very purpose for which the statement was admitted. The jury was asked to accept the truth of the child's out-of-court statement that she had experienced a traumatic sexual act. When the statement is offered for the truth of the implied assertion, the statement should be classified as hearsay.⁶³

If the child's statement is not offered for the truth of the implied assertion, then the mere uttering of the statement must somehow be probative (circumstantial evidence) of an operative issue. From the uttering of the statement, the court inferred the child's "attitude toward sex." From the existence of that attitude, the court inferred the existence of a factual basis for the attitude (the occurrence of the sexual act). Stringing these inferences together⁶⁴ is a roundabout way of reaching the same point reached by the concept of implied assertions.⁶⁵ Under either analysis the child's statement is relevant only if the statement is accepted as reliable evidence that a sexual act occurred. Implied hearsay analysis would regard the statement as direct evidence of the act, while nonhearsay analysis would regard the statement as circumstantial evidence of the act. This somewhat artificial distinction between direct and circumstantial evidence should not determine the evidence's admissibility.⁶⁶ Yet, that is precisely the result reached in *Church*. Had the statement been classified as hearsay, the statement would not be admitted in the absence of cross-examination to test the child's sincerity, memory, narration, and perception of the alleged sexual act.

tor. See BLACK'S LAW DICTIONARY 310 (5th ed. 1979). Thus, the child's statement is evidence that the crime occurred, but the statement does not link the defendant to the crime.

63. See M. GRAHAM, *supra* note 20, at 98.

64. The hearsay rule exposes "the series of inferences which must be made in the mental journey from the item of evidence to the fact which it is offered to prove." Morgan, *supra* note 31, at 9; see also Tribe, *supra* note 5.

65. "[T]o the extent that one fact must be being asserted if another that is directly asserted is to be taken as true, both should be treated as hearsay when the direct assertion is offered to prove the other." S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 511 (2d ed. 1977). It is often a mere chance use of words which determines which assertion is direct and which implied. For example, if the child in *Church* had said: "I have had a painful sexual experience," the implied assertion would be that sex hurt. See Seligman, *supra* note 30, at 150-51.

66. "Characterizing assertive statements as circumstantial evidence is simply irrelevant when addressing the definitional framework of hearsay set forth in Rules 801(a)-(c)." M. GRAHAM, *supra* note 20, at 111.

The failure to permit cross-examination lies at the heart of the hearsay rule,⁶⁷ and the dangers of denying cross-examination are present in *Church's* characterization of the statement as nonhearsay. If the child were on the witness stand, the child could be asked: Why do you think sex is nasty? The possible answers include: (1) because such and such (the traumatic sexual experience) occurred; (2) because one of my friends said so; or (3) because I peeked in the bedroom and saw Mommy and Daddy doing nasty things to each other. These quite different answers demonstrate that it is not the child's attitude toward sex that is relevant. Rather, it is the factual basis of that attitude which may or may not be relevant. The child's attitude is probative of the relevant underlying facts only if the court accepts the general premise that every human attitude inherently has an accurate and relevant basis in fact.⁶⁸ If the reliability of the underlying facts rest, not on the inherent reliability of human attitudes, but upon the credibility of a particular individual, then that individual must be subject to cross-examination. The danger of faulty perception, memory, narration, and sincerity are present in the child's out-of-court statement and cannot be tested on cross-examination.

If a superficial formulation of the hearsay rule is mechanically applied,⁶⁹ the rule may lead to the result in the *Church* case. If, however, the purpose of the hearsay rule (protection of the right of cross-examination) is given proper consideration, then the result in *Church* is difficult to defend in terms of evidence law. There are, of course, many legitimate interests in seeking to protect a victimized child from enduring the additional trauma of vigorous cross-examination.⁷⁰ Such policy considerations may justify the result reached in *Church*, but the court's decision is not openly based on a legitimate concern for the child. The decision is phrased wholly in terms of a general application of the hearsay rule.

It is doubtful that the court would apply the same hearsay analysis outside the context of a child molestation case. Consider a hypothetical involving an automobile tort case which is free of the weighty policy considerations which may apply to juvenile victims of sex offenses: The declarant made an out-of-court statement that "the traffic light was green." At trial the statement is not offered to prove the literal truth that the light was green.⁷¹ Rather, the statement is offered to establish the declarant's "attitude" regarding the light. It can then be inferred that this atti-

67. See *supra* note 3.

68. See *supra* note 43.

69. The Federal Rules' approach to hearsay encourages mechanical analysis. Tribe, *supra* note 5, at 972.

70. See generally Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983).

71. If offered for the literal truth, the statement would be hearsay.

tude must have been created by some relevant experience (viewing the traffic light). Therefore, the statement is admissible to establish that there was an operating light at the intersection. If the operation of the light is a material issue because of a party's contention that the light was inoperative, then the declarant's statement is circumstantial evidence that the light was in working order. This hypothetical use of "nonhearsay" presents the same dangers which are inherent in the denial of cross-examination of a hearsay declarant. For example, if the declarant were on the witness stand and asked why he thought the light was green, his answer might be: (1) because I saw it; (2) because someone told me; or (3) because green is my favorite color.

III. CONCLUSION

Pragmatism is often defended on grounds that intellectual purity must be sacrificed for workable rules. A simpler rule which "misses" the subtle points but can be correctly applied in the vast majority of cases, is said to be preferable to a complex rule which "covers" all subtleties but which also unduly increases the risks of misapplying the rule.⁷² This pragmatic approach to implied hearsay was endorsed by the drafters of the Federal Rules of Evidence,⁷³ but it does not make hearsay concepts more "workable" in practice. A practitioner with expertise in the intricacies of the hearsay rule is not seen as a pragmatist. He or she more closely resembles a medieval scholar operating within an enclosed system of rules which have developed far afield from the origins of the rule. Under this approach, the hearsay expert (a.k.a. pragmatist) attempts to "squeeze" implied assertions into a preconceived definition of hearsay. Some of the seemingly metaphysical aspects of implied assertions, and the difficulty of fitting them within definitions of hearsay, are due to pragmatists and academicians losing sight of the fundamental purpose of the hearsay rule.

Intellectual purity is sometimes defended for its own sake, but it can also be the more workable approach because of its emphasis on fundamentals.⁷⁴ A return to the foundation of the hearsay rule and a proper emphasis on protecting the right of cross-examination is not only the proper academic approach, it is also the common sense approach and the

72. "Clear-cut rules allow a lawyer preparing his case to know in advance with a fair amount of certainty what he "can get in, and what he cannot. If a question as to admissibility does arise, the judge who has no time for subtle discrimination in the heat of trial can make a decision in his stride This is splendid, and the only difficulty is that it does not work." McCormick, *supra* note 23, at 503.

73. See R. LEMPert & S. SALTzBURg, *supra* note 1, at 367.

74. A major problem of hearsay analysis is that "the courts do not ordinarily get down to fundamentals." Morgan, *supra* note 31, at 9.

easiest approach to apply in practice. The multitude of rules, definitions, and exceptions that surround the hearsay concept can be best understood, or appropriately discarded, by proper attention to the purpose of the rule. "*Cessante ratione legis cessat lex.*"

The fundamental purpose of the hearsay concept is not to promulgate a self-enclosed system of rules whose only end is to classify evidence as hearsay or nonhearsay. The hearsay rule and the concept of implied assertions are best viewed as tools to accomplish the fundamental goal of promoting adequate cross-examination. Rather than attempting to fit implied assertions within a preconceived definition of hearsay, the proper approach is to start with the right of cross-examination and work backward to a definition of hearsay which will include implied assertions whenever their introduction into evidence would frustrate adequate cross-examination.