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Foreword to the First Virtual Forum: Wallace Stevens, Blackbirds and the Hearsay Rule

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SYMPOSIUM ON HEARSAY AND IMPLIED ASSERTIONS: HOW WOULD (OR SHOULD) THE SUPREME COURT DECIDE THE *KEARLEY* CASE?

FOREWORD TO THE FIRST VIRTUAL FORUM: WALLACE STEVENS, BLACKBIRDS AND THE HEARSAY RULE

*Craig R. Callen**

I. THE VIRTUAL FORUM

The *Mississippi College Law Review* is publishing this virtual forum, which we believe is an innovative mode of interaction among legal scholars. It consists of essays on a recurring and difficult question of evidence law, followed by an edited transcript of an electronic discussion of the topic among the essayists and seven other commentators.[1]

Three developments combined to stimulate this forum.

First was the House of Lords' recent reaffirmance of *Wright v. Tatham*[2] in *Regina v. Kearley*.[3] *Wright* classified a set of letters, offered to show the addressee's competence to make a will, as hearsay under English law. The writers of the letters would doubtless have expected the addressee, based on their letters, either to infer that the writers thought he was competent or to strengthen an assumption that they thought he was competent, but they did not directly convey such an opinion in the letters. Every evidence coursebook discusses *Wright*, and similar problems recur in the federal courts even today, particularly in regard to drug prosecutions and police raids of various sorts.[4] *Kearley* considered whether police testimony that a single caller asked for the defendant, and for drugs, should be admissible to show that the defendant (who admittedly possessed a small amount of drugs) possessed drugs for the purpose of sale. Relying heavily on *Wright*, *stare decisis*, and the belief that changes in the hearsay rule were a matter for Parliament, the *Kearley* Court held that the requests should be hearsay.

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1. A word about the mechanics. Upon receiving each essay in this Symposium, the staff of the law review distributed copies to the other essayists and to additional commentators participating in the electronic discussion about the essays. The discussion began on June 1, 1995, and ended on August 1, 1995. The editors and I have edited and annotated the various contributions to the electronic exchange, and have arranged them according to topic for ease of comprehension.

2. 112 Eng. Rep. 488 (K.B. 1837).

3. *See Extracts from Kearley* (Craig R. Callen ed., 1995), 16 MISS. C. L. REV. 197, for a summary of the opinions (or speeches in English terminology) in *Kearley*.

4. *See e.g.*, United States v. Gaines, 726 F. Supp. 1457 (E.D. Pa.) *aff'd*, 902 F.2d 1558 (3d Cir. 1989); People v. Scalzi, 179 Cal. Rptr. 61 (Cal. Ct. App. 1981); State v. Tolisano, 70 A.2d 118 (1949).

The second stimulus was the continuing debate over new theories[5] about the proper scope of the hearsay rule under the Federal Rules of Evidence. The disparate theories rest on differing understandings of the problems that hearsay, or for that matter, any other evidence, poses for factfinders. I refer to these understandings as "models" and discuss them in the next section. These models are not mutually exclusive, but adherents of a particular model do tend to use similar arguments and roughly the same test for distinguishing between hearsay and nonhearsay. While most understandings of hearsay yield the same result for relatively easy problems, they are not wholly reconcilable. For example, Professor Park has identified the inconsistency between what I refer to as strict application of the "explicitness-based" and "dangers-based" models.[6] Scholars and courts have used as many as nine distinct approaches, perhaps too many for comfort, but still four fewer than Wallace Stevens' thirteen ways of looking at a blackbird.[7]

The final stimulus was the Internet — already a vehicle for academic communication and the means through which the interchange at the end of this Symposium took place. Through the essay and electronic interchange format, this exchange analyzes a new development in the law of hearsay, the *Kearley* case, and provides a forum in which persons with different perspectives can interact relatively directly, without the barriers of time and formality that publication of a series of articles in a number of journals can create.

II. THE MODELS OF IMPLIED ASSERTIONS

The participants in the forum, essayists and commentators alike, are distinguished and insightful scholars whose work has already amply introduced them to students of evidence. Moreover, there are so many participants that an attempt to introduce them and summarize their work would probably amount to nothing more than a bloated table of contents. This Foreword will not, then, be of the classic "Pat Smith offers an insightful analysis of *X*" format. It seems more useful to introduce readers to the problem of implied assertions, shorthand for the sort of question critical in *Wright* and *Kearley*, and to summarize the different attempts to resolve that problem.

The Federal Rules of Evidence say that " '[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evi-

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5. Most of the theories of hearsay discussed below do have some historical antecedents. Given that the theories relate to a rule of evidence with considerable historical background, it is unlikely that any theory would be wholly new. On balance, it does seem fairly clear that a number of approaches have survived after the adoption of the Federal Rules of Evidence, and new variations have developed.

6. Roger C. Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers*, 65 MINN. L. REV. 423, 427 (1981). *See infra* notes 21-29, 34-35 and accompanying text. I have used the term "literalist" elsewhere to refer to all the theories I call here "explicitness-based." Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 46 n.9 (1994). Professor Mueller has persuaded me that the term is a bit too partisan (at least for *all* of the three explicitness-based theories) and it was never a really comfortable fit with Professor Park's analysis. I do, however, believe the term "strict literalism" accurately describes one way of determining whether a statement is hearsay for a proposition it is offered to show. *See infra* notes 28-29 and accompanying text.

7. WALLACE STEVENS, *Thirteen Ways of Looking at a Blackbird*, *in* THE PALM AT THE END OF THE MIND: SELECTED POEMS AND A PLAY 20 (Holly Stevens, ed. 1969).

dence to prove the truth of the matter asserted."[8] A statement, in turn, is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[9] Federal Rule 802 makes hearsay inadmissible unless within an exception.[10] That definition of hearsay leaves open many possible interpretations of the terms "assert" and "assertion," as well as the question whether the clause beginning with "if" in the second definition of a statement refers only to nonverbal conduct.[11] The Advisory Committee's Notes for this portion of the Rules are cryptic at best.[12] As a result, the pre-Federal Rules debate over the distinction between hearsay and nonhearsay has continued after the adoption of the Rules.

Some of the readers of this Symposium may be familiar with the extensive literature that discusses the topic of implied assertions.[13] Many others might find themselves suddenly in the middle of a debate with which they have only passing familiarity. For the latter readers, and for students who are in the throes of their initial attempt to understand the problem, it seems useful to think of the debate in terms of models of the problem under the Federal Rules.

Models of the definition of hearsay, and thus of the problem of implied assertions, each focus on some inferential problems that evaluation of out-of-court conduct[14] may create for the factfinder. Adherence to a particular model strongly correlates with choice of standards for deciding whether a statement is hearsay if offered to show a proposition at trial — a judgment based largely on the models' identification of critical hearsay dangers or risks.[15] Each model is associated with two or three alternative standards: for example, there are three standards for

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

9. FED. R. EVID. 801(a). FED. R. EVID. 801(d) creates certain exclusions from the hearsay rules not relevant here.

10. FED. R. EVID. 802.

11. *See* David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts*, 24 DUQ. L. REV. 741, 764 (1986).

12. *E.g.*, RONALD J. ALLEN & RICHARD B. KUHNS, AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS AND CASES 323-24 (1989); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.14, at 822-24 (1995); Seidelson, *supra* note 11, at 756, 759; Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 71-91 (1982).

13. The *Wright* case, is of course, over 150 years old. For most practical purposes, discussion in American scholarship dates from JOHN H. WIGMORE, 3 A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1715, 1788, 1790 (1904). Professor Shapira pointed out to me that the roots of the hearsay rule go back considerably further. In Gwyneth Matthews' translation of Plato's THEAETETUS 201, Socrates asks:

> Then when judges are rightly persuaded about things that it is possible for only an eye-witness to know, but otherwise not, then, arriving at their verdict from hear-say [sic] and acquiring true belief, do they give their verdict without knowledge, being rightly persuaded, given that they are judging correctly?

GWYNETH MATTHEWS, PLATO'S EPISTEMOLOGY AND RELATED LOGICAL PROBLEMS 199 (1972).

14. I use the term "conduct" here because non-verbal behavior, such as pointing, may be a statement for purposes of the hearsay rule. MUELLER & KIRKPATRICK, *supra* note 12, § 8.5, at 798. Moreover, advocates of the dangers-based approach may argue that conduct should be hearsay when offered for certain purposes even though the actor did not intend her actions to convey any information to anyone. *E.g.*, Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 972 (1974).

15. The reader should not understand the order in which I discuss the models as a designation of relative merit. In fact, as I have said elsewhere, I strongly believe that a version of the third, communicative intention-based model, is the proper standard for distinguishing between hearsay and nonhearsay. Callen, *supra* note 6.

determining the matters a communication asserts that are associated with what I call the explicitness-based model. None of these standards is identical to any standard associated with another model.[16] Nevertheless, analyses of some problems by, for example, adherents of the explicitness-based and dangers models who use flexible criteria for delineating the limits of the hearsay rule may look much the same.[17] For the purpose of this introduction, the models are only offered as descriptions rather than as an attempt to postulate an *a priori* framework for hearsay analysis. Courts and commentators may employ different models for different problems,[18] or they may attempt to meld one or more models.[19] Moreover, it is important to keep in mind that classifying an implied assertion as hearsay does not entail the conclusion that it is inadmissible:[20] there are a number of exceptions that may apply to specific out-of-court statements.

Here are thumbnail sketches of the models.

Model 1: The Explicitness-based Model

For advocates of the explicitness-based model, the central problem that evaluating the probative value of out-of-court statements and conduct that is the equivalent of a statement[21] poses for factfinders is the danger that the speaker[22] may have been insincere.[23] Deception about *X*, in their eyes, is most likely to take place when the speaker makes an explicit misstatement about *X*.[24] Accordingly, the advocates believe that, for any conduct to be hearsay, it must be a direct assertion, or statement, of the proposition for which it is offered.[25]

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16. In addition, commentators frequently advocate positions that they believe disagree with the relevant case law. Professor Friedman, for example, believes that the rules as written require strict literalism. RICHARD D. FRIEDMAN, THE ELEMENTS OF EVIDENCE 143 (1991). On strict literalism, *see infra* notes 28-29 and accompanying text. He also believes that test is not optimal. Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667, 723-29 (1987). Professor Park advocates a flexible version of the explicitness-based analysis (*see infra* notes 32-33 and accompanying text), not as the ideal approach but because (i) he believes his flexible analysis squares with the language of the rule, but avoids the worst problems of strict literalism, and (ii) he believes that any further broadening of the reach of the hearsay definition would require an amendment of the rule, incurring costs that would outweigh any social benefit. 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, 829-38 (1990).

17. For an example of similar results *compare infra* notes 28-29 and accompanying text *with* notes 46-47 and accompanying text.

18. Professor Park has pointed out that courts tend to use the strict literalist analysis (*see infra* notes 27-29 and accompanying text) when hearsay dangers are minimal. Park, *supra* note 16, at 836.

19. *E.g.*, RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 363-64 (2d ed. 1983).

20. Edmund M. Morgan, *Hearsay and Non-hearsay*, 48 HARV. L. REV. 1138, 1147 (1935).

21. 2 MCCORMICK ON EVIDENCE § 250, at 107 (John W. Strong et al. eds., 4th Practitioners' ed., 1992).

22. For simplicity, where evidence is the product of a communication, I will typically refer to the conduct and the relevant actors as if the evidence at issue were an oral utterance.

23. *E.g.*, GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 63, at 196 (2d ed. 1987). Under this analysis, ambiguous statements are less dangerous because the ambiguity is sufficiently obvious to make the factfinder wary. *See, e.g.*, LEMPERT & SALTZBURG, *supra* note 19, at 398; Tribe, *supra* note 14, at 969 n.42.

24. *See, e.g.*, 2 MCCORMICK, *supra* note 21, § 250, at 110. *See also* Paul S. Milich, *Re-Examining Hearsay Under the Federal Rules: Some Method for the Madness*, 39 KAN. L. REV. 893, 909 (1991).

25. *E.g.*, LILLY, *supra* note 23, at 195.

Users of explicitness-based models do recognize that factfinders confronted with an out-of-court statement may make mistaken assumptions about the accuracy of the speaker's memory, perception, or use of language or gesture. Nevertheless, they view the central danger of hearsay as the possibility that the factfinder might mistakenly conclude that the speaker was sincere.[26] If, in contrast, the speaker made the statement while testifying, they believe that the oath, the cross-examination and the jury's ability to observe the witness' demeanor would help to check the risk that the factfinder might be misled by insincerity.[27] The most zealous proponents of the model, what one might call strict literalists, would hold that neither the letters in *Wright*[28] nor the call in *Kearley* should be hearsay under the Federal Rules. They would contend that the out-of-court statements involved in those cases did not directly assert[29] the proposition for which they were offered.

Less strict adherents, in deciding whether an utterance would be hearsay evidence for a proposition, may look to the speaker's specific intent. Adherence to that understanding avoids some of the more marked problems with strict literalism. In contrast to the arguments in early editions of *McCormick*,[30] this more flexible view would hold the statement "Harold is the finest of my sons" hearsay to show that the declarant was fond of Harold. In contrast, the speaker of "Good afternoon, Reuben," according to this analysis, would not specifically intend to convey that the listener for whom she primarily intended the message was named Reuben. Instead, she only intended to engage in social pleasantries.[31] While this view tends to avoid some extreme anomalies of explicitness-based analysis, the specific intent approach would nevertheless hold the statements in *Wright* and *Kearley* nonhearsay. It is fairly unlikely that the authors of the letters in *Wright* had consciously intended to convey their impression of the testator's competence. Nor was it likely that the callers in *Kearley* telephoned or knocked on the door specifically to notify the persons they contacted that the defendant was selling drugs.

Finally, the most flexible school of explicitness-based theory might argue that an utterance should be hearsay for (or that it asserted) a proposition even though

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26. *See* Edward J. Imwinkelried, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt — and Quickly Forgotten*, 41 FLA. L. REV. 215, 219-24 (1989), on the common law focus on the significance of the sincerity danger in analyzing hearsay.

27. LILLY, *supra* note 23, at 182.

28. 2 MCCORMICK, *supra* note 21, 247, at 99-100. Another argument would be that the statement amounted to a verbal act if offered to show the character of the premisses. *Id.* at 102. The character of the premises does not seem to be an ultimate fact in *Kearley*, or *Wright*, as opposed to a prosecution for conducting a gambling establishment on which McCormick seems to rest the verbal act argument.

29. The *Kearley* opinion gives no indication that any of the callers ever said, in so many words, that the defendant had sold drugs in the past, or that he possessed the drugs in question for sale.

30. MCCORMICK ON EVIDENCE § 228, at 465-66 (E. Cleary ed., 2d ed. 1972).

31. The example is from STEPHEN A. SALTZBURG ET AL., 3 FEDERAL RULES OF EVIDENCE MANUAL 1225 (6th ed. 1994). Milich, *supra* note 24, at 910-12, also seems to rely on a specific intent theory. Saltzburg, Martin, and Capra do cite a communicative intention-based theory with seeming approval, in SALTZBURG, *supra*, at n.19, but their own analysis does not seem to square with it. On communicative intention-based theories, *see infra* notes 37-47 and accompanying text.

it did not directly state that proposition when (1) the utterance gave a marked indication that the speaker consciously believed the proposition and intended the communication to make at least one hearer aware of that belief, and (2) the utterance's relevance for the purpose for which it is offered depends on the presence of the belief. Suppose a suspected bank robber and his sister were having a rather contentious conversation and the sister said "Well, at least I never robbed a bank."[32] The sister would not have directly stated that the suspect was a robber, but her intent to convey that belief would be fairly likely. Moreover, if the state offered the statement against the suspect, its relevance would depend on the assumption that the sister believed the suspect had robbed the bank. Otherwise, the statement would merely tend to show that the sister had avoided commission of bank robbery. Adherents of this approach, which one might call "explicit awareness," would tend to hold a single call in *Kearley*-type facts hearsay, but to consider the letters in *Wright* nonhearsay[33] on the theory that the writers probably unconsciously assumed, but did not consciously intend to convey, that the addressee was competent.

Model 2: Dangers-based Model

For adherents of this model, the central reason for the hearsay rule is that it limits the admissibility of out-of-court conduct without cross-examination of the actor who engaged in that conduct. That might seem to coincide with explicitness-based analysis, but the dangers-based approach tends to consider other hearsay dangers in addition to sincerity. Classic hearsay dangers analysis (as do most other hearsay analyses) posits four dangers that hearsay presents for the factfinder: that she may draw mistaken conclusions about the speaker's accuracy in perception, or her memory, that the meaning of the speaker's words or behavior may be ambiguous, or that the speaker may have been insincere in engaging in the conduct. In addition, particularly enthusiastic users of dangers-based analysis may argue that conduct should be hearsay if its proffer creates any of the four risks in any degree.

While the common conception of hearsay involves linguistic communications, the committed advocates of the dangers-based model believe that conduct that is not intended to communicate any information may present essentially the same risks as spoken or written words. For example, the behavior of a ship captain who walked around the ship, escorted his family aboard and embarked would present some degree of the hearsay risks if offered to show the ship was seaworthy. Currently, that position is essentially an argument for hearsay reform rather than a description of positive law. In fact, it is rare now to see an argument that non-communicative conduct is hearsay under the Federal Rules, given that such a conclusion is extremely difficult to square with the Rules or the Advisory Committee's Notes. The drafters' repeated use of forms of the word "assert"

32. The example is from ALLEN & KUHNS, *supra* note 12, at 342. For an example of the flexible explicitness-based analysis see Park, *supra* note 16, at 799.

33. Park, *supra* note 16, at 800-01.

seems to remove evidence of non-communicative conduct from the strictures of the hearsay rule.[34]

The staunchest adherents of the dangers-based theory argue for a broad interpretation of the Federal Rules' definition of hearsay; they would hold both the letters in *Wright* and the call in *Kearley* to be hearsay on the theory that each presented one or more hearsay dangers in regard to the inferences for which they were offered.[35] Less zealous adherents of the model may argue that whether conduct should be hearsay depends on the degree to which it raises hearsay dangers. They may consider the statements in *Wright* and *Kearley* nonhearsay on the theory that the evidence did not present a sufficient quantum of hearsay risks; at the least, they are likely to be very doubtful about *Wright*.[36] These more flexible supporters of the dangers-based model would tend to class non-communicative conduct as nonhearsay on the theory that it would present insignificant hearsay risks.

Two other models have essentially developed within the last two decades, although their historical roots stretch much further back.

Model 3: Communicative Intention-based Model[37]

The courts and commentators who employ what I call the "communicative intention" model believe that communicative conduct offered to show such generally intended propositions raises hearsay risks[38] to the same extent as would such conduct offered to show explicitly stated propositions. Communications,

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34. *See, e.g.*, FED. R. EVID. 801(a) advisory committee's note.

35. Even the strictest adherents of the dangers analysis tend to exclude conduct not designed to convey any information from hearsay, because either (i) the Federal Rules appear to do so, or (ii) they believe that the conduct does not entail the hearsay risks to a significant degree. *E.g.*, MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.3 (3d ed. 1991).

36. *E.g.*, ALLEN & KUHNS, *supra* note 12, at 320-22. JACK B. WEINSTEIN ET AL., 4 WEINSTEIN'S EVIDENCE ¶801(a)[01] (1995), appears to take a fairly strict literalist approach. A later section of the treatise argues that a flexible dangers-based analysis is preferable. *Id.* ¶ 801(c)[01], at 801-104 to 801-106.

37. I have advocated a form of analysis called co-operative analysis. Callen, *supra* note 6, at 82. It is clear that Professors Mueller and Kirkpatrick employ notions of intention in analysis of hearsay. The similar use of intention in our views leads me to classify us as adherents of the same model; an exploration of our differences, at least from my standpoint, must wait for another time. Professor Wellborn's proposed rule, in Wellborn, *supra* note 12, at 92-93, indicates a preference for analysis in terms of communication and beliefs that accord with analysis of communicative intention in the terms I use *infra* in notes 38-39 and accompanying text. *See* Callen, *supra* note 6, at 86. On the other hand, he doubts whether such a standard can fit with existing Federal Rule 801. Wellborn, *supra* note 12, at 92.

38. Professors Mueller and Kirkpatrick analyze the risks of hearsay in terms of the received description of the dangers. MUELLER & KIRKPATRICK, *supra* note 12, § 8.2. I argue that there is one core danger, of which the classic four dangers are aspects. That core danger is that the factfinder might lack information needed to evaluate the extent to which the communicator was complying with the implicit conventions of communication such that the communication could be relied on. Those conventions are: (i) that the speaker should be neither more nor less informative than necessary; (ii) the utterance should relate to the purpose of the parties to the communication; (iii) the speaker should be perspicuous: orderly, brief, and clear; (iv) the speaker should try to make her contribution true. PAUL GRICE, STUDIES IN THE WAY OF WORDS 74 (1989). The differences between these two positions are too subtle for the space available here. *But see* Callen, *supra* note 6, at 74-78.

they argue, convey information that communicators do not expressly articulate, and even information that the communicators may not consciously intend to convey.[39] For instance, the utterance "He took the car to work," most often conveys any number of propositions that the communicator might not specifically intend, such as that the subject of the sentence was employed and could drive.[40] Similarly, the utterance "Can you pass the pepper?" often conveys that the hearer has access to pepper, that the speaker is requesting the pepper for herself or someone else at the table, and any number of other propositions.[41]

One who construed the Federal Rules in this light might well conclude that the statements in *Wright* and *Kearley* should each be hearsay under the Rules — each is offered for a proposition that the communicator would have generally intended the audience to understand from the communication. The authors of the letters in *Wright* could have expected the testator, as addressee of the letters, to derive information about their opinions of him from the letters; the callers in *Kearley* could have expected the persons answering the door or the phone to understand that the callers thought Kearley was involved in the distribution of drugs.[42]

In the excellent hornbook that they just completed, Professors Mueller and Kirkpatrick[43] offer a somewhat different view, limiting the reach of the hearsay rule under the communicative intention model by reliance on a cross-cutting argument: that many communications are predominantly actions, rather than assertions. For example, if the police were to search an apartment with a warrant, and find an eviction notice addressed to *X* on a table in the apartment, they argue that the notice is primarily an action and as such should not be hearsay if offered to show that someone at least occasionally known as *X* lived at the apartment.[44] In their eyes, the landlord's behavior is primarily an effort to evict, so that any hearsay dangers created by the communicative aspect of the landlord's conduct are minimized.[45] Their analysis would lead them to the conclusion that *Kearley* is wrong, in that the calls were much more actions than assertions,[46] and

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39. While I am not entirely sure that other commentators to whom I refer in this section would concur, I believe the critical intent in communication is general intent as opposed to conscious intent. I use "general intent" to refer to that sense of intent in which a speaker intends to convey any proposition that she could reasonably expect a hearer to infer based on her communication. *See* Callen, *supra* note 6, at 86-87 n.190. I use the term "could" rather than "would" because it is important to treat a communication as hearsay if offered as evidence of a proposition when that proffer might be based on a misunderstanding of the speaker's intent. I use "expect" because communications include considerable information other than the speaker's conscious conclusions. As an example, none of the essayists will bother to say that their efforts are original, yet they would be extremely offended if the reader drew another conclusion. Setting aside questions of academic integrity, they would expect the reader to conclude that their essays offer new information — otherwise the essays would violate Grice's maxims by providing less information than necessary, and failing to relate to the purpose of the exchange: the exchange of new information. *See* GRICE, *supra* note 38.

40. MUELLER & KIRKPATRICK, *supra* note 12, 8.12, at 820.

41. Callen, *supra* note 6, at 69-70. The source of the example is Raymond W. Gibbs Jr., *Contextual Effects in Understanding Indirect Requests,* 2 DISCOURSE PROCESSES 1, 10 (1979).

42. Callen, *supra* note 6, at 102, 108.

43. MUELLER & KIRKPATRICK, *supra* note 12.

44. *Id.* § 8.22, at 844.

45. *See id.*

46. *Id.* § 8.22, at 844-45.

that *Wright* is questionable, in that the statements in the letters that pertained to the addressee's competence amounted to respectful treatment combined with efforts to do business with him. Therefore, they would argue, the letters are behavior or action rather than assertions offered to show what they assert.[47]

Model 4: System-based Model

The final group of approaches consists of two opposing views that, to date, have not been precisely addressed to the hearsay status of implied assertions. As theories of the proper operation of the hearsay rule, and the exceptions, they clearly have implications for the treatment of implied assertions.

Scholars who argue in favor of abolition of the hearsay rule (or at least for drastic curtailment of restrictions other than those required by the Confrontation Clause) often argue that the adversary system contains within it the means for adequate exposition of whatever flaws there may be in a piece of hearsay evidence. They believe that the parties have every incentive to make the best case they can, and thus to forego most hearsay of truly questionable or cumulative value.[48] Moreover, the adversarial process gives the party or parties affected by evidence a marked incentive to point out flaws in the proffering party's evidence or arguments. Assuming, at least, that the offer of hearsay is not an undue surprise,[49] the hearsay abolitionists argue that the adversary system is quite capable of ferreting out flaws in the evidence, or of turning up whatever information the factfinder may need to evaluate a piece of hearsay.

Further, the abolitionists argue that the system of hearsay rules and exceptions is far too complex.[50] They believe that there are only two essential evidentiary provisions: a rule excluding irrelevant evidence, and another excluding evidence whose probative value is substantially outweighed by its prejudicial effect on the opposing party.[51] They might, for instance, admit the evidence in *Kearley*, on the theory that it was relevant and not unduly prejudicial. On the other hand, the letters in *Wright* were so old, and showed so little deliberate evaluation of the addressee's competence, that these scholars might very well exclude them.[52] Of course, abolitionists do not believe that the courts currently follow their approach, with the exception of the argument that the courts' results tend to parallel decisions that would follow the abolitionists' analysis.[53]

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47. *Id.* § 8.9, at 813.

48. Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 429 (1986); Jack B. Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 377 (1967).

49. Many proposals for increased admissibility of hearsay require that the party offering the hearsay give notice in advance. *E.g.*, Callen, *supra* note 6, at 100 n.255; Weinstein, *supra* note 48, at 380. Rules 803(24) and 804(b)(5), hearsay exceptions that resulted from the drafters' efforts to increase the admissibility of hearsay under the Federal Rules, require that the proffering party provide timely pre-trial notice.

50. *E.g.*, Jack L. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 344-46 (1961).

51. Weinstein, *supra* note 48, at 380.

52. *See* Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 208 n.67 (1948).

53. Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 800 (1992).

Counterarguments about the utility of the adversary system view the adversary system as more the cause of hearsay problems than the cure. Consider, for instance, the possibility that a hearsay declarant might be a bad witness, or even that the declarant's testimony (as opposed to her out-of-court statement) might be shown incredible on cross-examination. A party who stood to benefit from the introduction of the declarant's out-of-court communication at the trial might prefer to offer the communication through someone who overheard it, rather than to call the declarant to the stand.[54] In effect, such a choice would be a deliberate choice to mislead the factfinder,[55] because the hearsay would not be accompanied by information that would enable the jury to evaluate the evidence properly.[56] Certainly, if such hearsay were admissible, the parties would have an incentive to screen their hearsay evidence much less carefully than they currently do. Finally, this viewpoint seems to correlate with proposals for reform of the exceptions to the hearsay rule to increase the production of evidence useful for the evaluation of hearsay statements.[57] At least one of its adherents believes that abolishing the exceptions in favor of a general limit on admissibility, such as Federal Rule 403, would have one of two undesirable consequences. Trial courts would either admit massive quantities of evidence that should not be admitted, or graft new requirements into 403 (for example a rule excluding misleading evidence) that would amount to the reinstitution of the hearsay exceptions.[58]

Although none of the scholars who believe that the adversary system creates incentives to offer questionable hearsay evidence has taken a position on *Wright* or *Kearley* directly, it seems quite possible that they would consider *Kearley* hearsay because of the possibility of fabrication. They might consider the letters in *Wright* hearsay because doing otherwise might unduly encourage parties to offer hearsay that might lack probative value when the factfinders lacked information needed to evaluate that evidence.

III. CONCLUSION

I believe, for the reasons that I have more fully explored elsewhere, that the possible meanings of our communications, like the possible descriptions of

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54. Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 930 (1992).

55. Courts have pointed out that narrow construction of the definition of hearsay could create an incentive for police officers to begin fabricating stories about declarants' statements, knowing that the false testimony would become difficult to catch. United States v. Check, 582 F.2d 668, 679-80, 683 (2d Cir. 1978); Park v. Huff, 493 F.2d 923, 927-28 (5th Cir. 1974), *withdrawn on other grounds*, 586 F.2d 849 (en banc), *cert. denied*, 423 U.S. 824 (1975).

56. Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 282-84 (1988); Seigel, *supra* note 54, at 896-97; Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1370-71 (1987). Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration under the Confrontation Clause*, 81 VA. L. REV. 149, 166-74 (1995), makes a very similar point, but relies primarily on the Confrontation Clause for support.

57. Seigel, *supra* note 54, at 932-38; Swift, *supra* note 56, at 1355-57.

58. Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 499-519 (1987).

blackbirds, are infinite.[59] Accordingly, I think communicative behavior should be hearsay whenever offered to show any proposition that the communicator could have expected the audience to understand from the communication. Most of the participants in the Symposium disagree, believing that the reach of the hearsay rule should be either broader or narrower than I do.

Each of the essayists and commentators has made a noteworthy contribution to the group's analysis of the issues that implied assertions raise. Although treatises and cases announce that the question of the status of implied assertions is settled (and the House of Lords believed it settled in American law), the discussion shows that judgement is optimistic at best.

The question of the status of implied assertions has been debated, at the least, since the first decision in *Wright*. The past century and one-half of debate has helped lawyers and courts to understand the nature of human decisionmaking, and the role of language and communication in the decisions of judges and jurors. The debate has not always made things simple for law students, trial lawyers, and judges. It has, though, offered some of the best thought in scholarship on the law of evidence, as exemplified in the work (here and elsewhere) of the essayists and commentators who have participated in this Symposium. Ultimately, their efforts will help us to fully understand the evidentiary system, and, in turn, improve it.

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59. Callen, *supra* note 6.