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How Would or Should the Supreme Court Interpret the Definitions in Rule 801

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HOW WOULD OR SHOULD THE SUPREME COURT INTERPRET THE DEFINITIONS IN RULE 801?

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The stated purpose of this forum is to consider the status of implied assertions under the Federal Rules of Evidence, using the House of Lords' opinion in *Regina v. Kearley*[1] as a springboard for analysis. This inquiry leads to a question that has broader implications for the law of evidence: How should the federal courts go about interpreting a Rule of Evidence? This Essay first discusses briefly the history of implied assertions, and then turns to two recent opinions of the Supreme Court, *Williamson v. United States*[2] and *Tome v. United States*,[3] in which the Court considered interpretive issues in connection with other provisions of the hearsay rule.

In the United States, as in the British Commonwealth, the starting point for any discussion of implied assertions is the House of Lords' 1837 opinion in the celebrated will contest known as *Wright v. Tatham*.[4] The evidence at issue consisted of several letters written to the testator by persons now deceased, including two clergymen.[5] One thanked for past favors and the other requested that the recipient's lawyer take legal action.[6] Other letters were from relatives reporting on trips and other events.[7] The theory underlying the offer of these letters was that the writers would not have written as they did unless they believed the testator to be competent — the central contested issue.[8] The judges found that the letters constituted hearsay; that they stood on the same footing as an explicit declaration by the writers about the testator's sanity.[9]

In dictum, the *Tatham* judges explored hypothetical instances of nonverbal conduct which they concluded would also be barred by the hearsay rule: payment of an insurance policy as proof of the loss of the insured ship; payment of a wager as proof of the happening of the event which was the subject of the wager; precautions taken by a family to show that the person involved was a lunatic; and the famous example of the sea captain who after inspecting a ship embarked with his family as proof of the seaworthiness of the vessel.[10]

The analysis in *Tatham* supported a definition of hearsay that swept within its ambit evidence of any out-of-court behavior, whether verbal or nonverbal, whenever relevancy hinges on an assessment of the declarant's credibility. The discus-

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1. 2 App. Cas. 228 (H.L. Eng. 1992).
2. 114 S. Ct. 2431 (1994).
3. 115 S. Ct. 696 (1995).
4. 112 Eng. Rep. 488 (K.B. 1837).
5. *Id.* at 488-89.
6. *Id.*
7. *Id.* at 490-91.
8. *Id.* at 488.
9. *Id.*
10. *See, e.g., id.* at 516.

sion in *Tatham* indicated clearly that the judges did not view the lessened danger of insincerity as altering the prohibition against admitting evidence not given under oath or subject to cross-examination.[11] They found that the hearsay rule barred the letters because the declarants' failure to testify meant that the jurors would not be apprised fully of the circumstances on which the declarants' conclusions were based.[12] Given this conclusion in *Tatham* and the House of Lords' holding in *Myers v. Director of Public Prosecutions*[13] that "no further judicial development of the law of hearsay was permissible,"[14] it is not surprising that a majority in *Kearley* found that the evidence of verbal and nonverbal conduct admitted at trial ought to have been excluded as hearsay.[15]

Very different issues emerge when we turn to the Federal Rules of Evidence. The guiding principle embodied in the Federal Rules of Evidence is that the Rules' paramount truth-finding function is more likely to be achieved if the trier of fact has liberal access to relevant evidence. Hearsay obviously often has considerable probative value; an out-of-court statement by a declarant who speaks truthfully and unambiguously and who perceives and remembers accurately may be at least as helpful to the trier of fact in ascertaining the truth as some in-court testimony. Consequently, the Advisory Committee did not approve of a broad definition of hearsay that would deprive jurors of highly probative and reliable evidence whose equivalent might not be obtainable.

The Advisory Committee's solution was to limit the potential sweep of the hearsay concept through the definitional sections of Federal Rule 801.[16] Central to this design is the distinction between assertive and non-assertive behavior. Only a "statement" can constitute hearsay.[17] Verbal conduct is a "statement" when it constitutes "an oral or written assertion" and "nonverbal conduct of a person" constitutes a statement only "if it is intended by the person as an assertion."[18] Furthermore, according to Rule 801(c), a statement constitutes hearsay only when it is offered "to prove the truth of the matter asserted," so that an assertion implied from an assertion is also classified as non-hearsay.[19]

Although this concept of "assertion" is the linch-pin of the Advisory Committee's objective to limit the scope of the hearsay doctrine, the Rules and the notes do not provide a definition of the term. The notes, however, tell us what the Advisory Committee was seeking to achieve — to exclude from the hearsay category evidence that poses a very low risk of fabrication. The Note to Federal Rule 801(a) explains:

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11. Wright v. Tatham, 7 Eng. Rep. 559, 566 (K.B. 1838) (Coleridge) ("Nor does the rule vary because the remoteness of the period, and the absence of any dispute on the matter at the time, put aside all suspicion of insincerity.").

12. *Id.*

13. 2 All E.R. 881 (1964).

14. Regina v. Kearley, 2 App. Cas. 228, 237 (H.L. Eng. 1992) (citing Myers v. Director of Pub. Prosecutions, 1965 App. Cas. 1001).

15. *Id.* at 228.

16. Congress made no changes in these sections.

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

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

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

> [N]onverbal conduct [not the equivalent of words], however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. . . . Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalent) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. . . . Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).[20]

The letters and the hypotheticals discussed in *Tatham* both fall into a low risk of fabrication category. The danger of insincerity is minimal when evidence is offered of the declarants' acts in order to prove their underlying beliefs; sincerity is guaranteed by the cost to the declarant if he or she were mistaken, as the ship captain and insurer examples in *Tatham* vividly illustrate. In addition, even with regard to the letters, the circumstances of their nature and timing make it highly improbable that the senders were deliberately seeking to express misleading information about the recipient's mental capacity rather than conveying thanks and tidings about their daily affairs.

Although hearsay dangers other than fabrication might exist, these dangers are clearly less in the case of nonverbal conduct because the sea captain or any other actor is likely to verify the accuracy of underlying perceptions and memory and to clarify any ambiguities before taking costly actions. The Advisory Committee did not explain why the lessened danger of fabrication would minimize other hearsay concerns in the case of verbal conduct — after all declarants, though sincere, might be mistaken in their perceptions or memories. In *Tatham*, the family members and clergymen, who were in a position to check on the mental competence of their correspondent, probably would not have wasted their time in writing to an incompetent; therefore the underlying belief being implied is likely to be accurate. In other instances of implied assertions, however, it is more difficult to see why the absence of insincerity would enhance other components of a declarant's credibility.[21] Perhaps the Committee thought not that other hearsay

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20. FED. R. EVID. 801(a) advisory committee's note.

21. For instance, in Rex v. Wysochan, 54 C.C.C. 172 (Sask. Ct. App. 1930), a woman was fatally shot in the presence of her husband and another man. The other man was charged with the murder, but claimed that the husband did it. Before she died, the victim made two statements in which she said to her husband: "Help me." These were introduced at trial. Even if we assume that the statements were sincere — that she would not have asked her husband for help if he had indeed shot her — we have no way of knowing if she perceived who shot her, or if her imminent death affected her memory. The ambiguity of the statements also make it difficult to assess sincerity.

dangers would be minimized but rather that the risk to the judicial system would be less. It may have assumed that although the trier needs to see the demeanor of a declarant in order to detect fabrication, evidence and argumentation can adequately apprise jurors of the other hazards that affect credibility which must be considered in evaluating the worth of an implied assertion. Furthermore, the Federal Rules contain Rule 403 which a judge might use to exclude evidence that was particularly untrustworthy.

Deciding how the different items of evidence in *Kearley* should be treated under the Federal Rules is, however, considerably more difficult than dealing with the real and hypothetical facts of *Tatham*. Instead of a tidy category of nonverbal conduct, we have a mixture of verbal and nonverbal conduct in *Kearley*. The declarants acted — they telephoned the defendant's home and came to his door — but proof that the telephone and doorbell rang while the police were searching the premises would be irrelevant without some proof of what the declarants said.

Undoubtedly, the risk of insincerity is low with regard to both the phone calls and the statements made in person. Why would anyone send messages to the defendant's own home to deliberately and falsely imply that defendant is involved in the sale of drugs? Only a clairvoyant would know that the police would hear this fabrication because they were presently on the premises. On the other hand, other assumptions embedded in the Advisory Committee's Note are more questionable. When the declarant is a first-time would-be purchaser who has not performed any act more costly than making a phone call or traveling to defendant's house, can one plausibly argue that the other hearsay dangers are minimized because the declarant would not have acted without checking out inaccuracies in perception, memory, and narration? The declarant's phoning or arriving to ask, "Are there drugs for sale?" may in fact constitute the very process by which he or she is verifying a rumor that defendant sells drugs. In a criminal case, should the defendant have to bear the risk of the mistaken, deluded, misinformed, or enigmatic declarant just because the likelihood of fabrication is low?

And to what extent, if at all, does it matter what the Advisory Committee intended? Two recent opinions of the Supreme Court that deal with the hearsay rule suggest that the significance of the drafters' intentions is an issue on which members of the Court may differ, and that there may be a number of different routes by which to find the meaning of the existing hearsay rules.[22]

In *Williamson v. United States*,[23] six Justices construed the word "statement" in Federal Rule 801(a)(1) in the course of determining whether collateral statements in a declaration against penal interest are admissible.[24] Justice O'Connor's opinion, after looking at definitions in Webster's Dictionary, concluded that

22. *See* Williamson v. United States, 114 S. Ct. 2431 (1994); Tome v. United States, 115 S. Ct. 696 (1995).
23. 114 S. Ct. 2431 (1994).
24. *Id.* at 2432.

"statement" could have a number of possible meanings and that "the text of the Rule does not directly resolve the matter."[25] She found, however, that a narrow definition was indicated if one looked at "the principle behind the rule"[26] which is that hearsay statements must be reliable in order to be admissible.[27] Furthermore, she concluded that "the policy expressed in the statutory text points clearly enough in one direction that it outweighs whatever force the Notes [of the Advisory Committee] may have."[28] In contrast, the dissenting opinion of Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, after noting the silence of Rule 804(b)(3) with regard to collateral statements, looked at the Advisory Committee's Note and common law practice in order to determine the Rule's meaning.[29]

In an even more recent hearsay opinion, *Tome v. United States*,[30] the Supreme Court had to determine how the timing of a prior consistent statement affects admissibility under Rule 801(d)(1)(B). Justice Kennedy, now writing for the majority, concluded that the language of the rule was "intended to carry over the common-law . . . rule," and that this reading of Rule 801(d)(1)(B) "is confirmed by an examination of the Advisory Committee Notes."[31] Justices Stevens, Souter, and Ginsburg, who were also in the majority in *Williamson*, joined in praising the "Notes as a useful guide in ascertaining the meaning of the Rules," and in finding it unlikely that the Advisory Committee would have scuttled a common law requirement "without so much as a whisper of explanation."[32]

The four dissenters, on the other hand, in an opinion by Justice Breyer, who was not yet on the Court when *Williamson* was decided, did not rely on the Advisory Committee's Note at all. Instead, the dissenting opinion concluded that "because the Rule addresses a hearsay problem and one can find a reason . . . for why it does so, I would read the Rule's plain words to mean exactly what they say."[33] Justice Scalia, however, disagreed with the dissent's conclusion about the Rule's plain words and joined in the judgment of the majority.[34] Although he insisted that "the promulgated Rule says what it says, regardless of the intent of its drafters," he maintained that in order to interpret the Rule " 'the body of com-

25. *Id.* at 2435.
26. *Id.*
27. *Id.* "Nothing in the text of Rule 804(b)(3) or the general theory of the hearsay Rules suggests that admissibility should turn on whether a statement is collateral to a self-inculpatory statement. The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability." *Id.* Justice Ginsburg's concurring opinion, in which Justices Stevens, Souter, and Blackmun join, finds that all of the declarant's statements should have been excluded because they cannot be ranked as trustworthy. *Id.* at 2439. Justices O'Connor and Scalia were willing to remand in order for the court below to consider separately whether each part of declarant's remarks was sufficiently against interest to be reliable. *Id.* at 2437-38.
28. *Id.* at 2436.
29. *Id.* at 2442-43. It concluded that the Advisory Committee's Note and practice pointed to admitting some collateral statements.
30. 115 S. Ct. 696 (1995).
31. *Id.* at 702.
32. *Id.* at 702-03.
33. *Id.* at 708.
34. *Id.* at 706.

mon law knowledge' must be a 'source of guidance.' "[35] Consequently he found the meaning of Rule 801(d)(1)(B) must be consistent with its interpretation at common law because the language of the Rule tracks common-law cases.[36] Most of his concurring opinion is devoted to explaining why drafters' notes are not authoritative.

What do these opinions tell us about how to construe the word "assertion" in Rule 801? Must one look only to the dictionary meaning, or may one also examine the policy underlying the hearsay rule, the language informed by its common law usage, or the Notes of the drafters? If the dictionary meaning controls, regardless of policy or history, then the evidence in *Kearley* is undoubtedly admissible as not constituting a "statement" under Rule 801. And, indeed, the lower federal courts have admitted evidence of telephone calls intercepted by the police while searching for drugs or betting paraphernalia.[37] In these cases the courts have used a dictionary approach to plain-meaning to conclude that an "assertion" "has the connotation of a positive declaration" that does not cover inquiries about obtaining drugs or placing bets.[38]

But do the Supreme Court's opinions in *Williamson* and *Tome* mandate this result? In *Williamson* the six Justices who consult Webster's make statements about the policy of the hearsay rule that are somewhat at odds with the construction of the hearsay rule that results if Webster's definition of "assertion" is used.[39] Before the opinion even mentions Webster's it states that the premise of the hearsay rule is "that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by this listener."[40] Nothing in this recitation suggests that there is no need for a hearsay rule when the danger of insincerity is low. Indeed, the opinion goes on to state that "the Federal Rules of Evidence also recognize that some kinds of out-of-court statements are less subject to *these* hearsay dangers, and therefore except them from the general rule that hearsay is inadmissible."[41]

Would these Justices countenance a definition of hearsay that would classify evidence as nonhearsay even if the declarant "might have misperceived the events he relates" or his words "might be . . . taken out of context by the listen-

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35. *Id.* Justice Scalia is quoting from the Court's opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2794 (1993) (construing Federal Rule 702 on expert testimony), which in turn quoted from United States v. Abel, 469 U.S. 45, 52 (1984) (examining the status of impeachment by bias under the Federal Rules) which quoted from Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978) (the Reporter to the original Advisory Committee that drafted Rule 801 and its accompanying note).

36. *Id.*

37. *See, e.g.*, United States v. Oguns, 921 F.2d 442, 448-49 (2d Cir. 1990); United States v. Long, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990); United States v. Zenni, 492 F. Supp. 464 (E.D. Ky. 1980).

38. *Oguns*, 921 F.2d at 448-49; *Long*, 905 F.2d at 1579-80; *Zenni*, 492 F. Supp. at 468.

39. Williamson v. United States, 114 S. Ct. 2431, 2434 (1994).

40. *Id.*

41. *Id.* (emphasis added).

er?"[42] Ironically, it is Justice Scalia, usually labeled as the prime proponent of plain-meaning, whose opinion in *Tome* indicates that he might be the most influenced by the common law's failure to differentiate the danger of insincerity from other hearsay dangers, as we know from *Tatham*. Furthermore, he would obviously view the Advisory Committee's Note in a very different light than Justice Kennedy who in both *Williamson* and *Tome* indicates a willingness to consider the Advisory Committee's Note as the authoritative guide to the meaning of a Rule. Chief Justice Rehnquist and Justice Thomas looked to the drafters' intent in *Williamson* though not in *Tome*, and Justices Ginsburg, Souter, and Stevens endorse the Notes "as a useful guide" in *Tome*, although they agree with Justice O'Connor in *Williamson* that when "the policy expressed in the statutory text points clearly enough in one direction that it outweighs whatever force the Notes may have."[43] This brings us full circle to whether a dictionary definition controls in ascertaining the policy expressed in the text of Rule 801.

It would certainly be possible to adopt a definition of "assertion" that would further the common law policy that all hearsay dangers pose unacceptable risks instead of singling out insincerity as the only danger to avoid. Such a definition would exclude from the hearsay category those statements that are less subject to ambiguity, misperception, faulty memory, *and* fabrication. Such an interpretation of "assertion" more consonant with the common law design would focus on what the declarant was seeking to communicate. The result would be to label the declarant's statement as hearsay when it is used to prove what the declarant sought to communicate. Under this definition the evidence in *Tatham* is still nonassertive, just as when a dictionary definition is used, because the declarants' are not communicating about their correspondent's sanity. The evidence in *Kearley*, however, would constitute hearsay because the declarants' statements clearly convey that they want the defendant to sell them narcotics.

Classifying the statements in *Kearley* as hearsay has two desirable consequences. First, although unreliable evidence would be excluded, trustworthy evidence could still be admitted. Under the Federal Rules, but not in England, a judge could admit any statement that is particularly trustworthy because of low hearsay risks pursuant to Rule 804(b)(5)'s residual exception. A statement inquiring for the defendant by his nickname, and requesting the same amount of drugs declarant regularly buys is not ambiguous, and is unlikely to be insincere or the product of an inaccurate perception or memory. There is little danger with such a statement that the declarant was trying to check on a rumor about the defendant

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42. For instance, in United States v. Oguns, 921 F.2d 442 (2d Cir. 1990), where the police, as in *Kearley*, intercepted a telephone call while searching defendant's premises for narcotics, the caller asked to speak to the defendant and then asked "Have the apples arrived there?" *Id.* at 445. The declarant may be mistaken in thinking that defendant has drugs for sale; he may even be inquiring about apples. The court's conclusion that the evidence was admissible because " '[a]n inquiry is not an assertion,' " seems particularly suspect in a case in which the court permitted the government to introduce expert testimony about narcotic traffickers use of code words during telephone conversations about drugs. *Id.* at 449 (quoting Inc. Pub. Corp. v. Manhattan Magazine, Inc., 616 F. Supp. 370, 388 (S.D.N.Y. 1985), *aff'd*, 788 F.2d 3 (2d Cir. 1986).

43. *Williamson*, 114 S. Ct. at 2436.

which may be false, confused defendant's name with someone else's, or called a wrong number.

In *Kearley*, the judges could find no principle that would enable items of evidence individually inadmissible to acquire by association with one another a quality of cumulative admissibility that they did not possess individually.[44] Under the residual exception, however, a judge could take into account that all the statements made during the numerous phone calls and visits were consistent, and that some of them, as indicated above, posed few hearsay dangers. Furthermore, on the facts of *Kearley*, the great unlikelihood that so many statements would implicate defendant as the source of drugs unless they were true should suffice to establish "circumstantial guarantees of trustworthiness."[45] The Federal Rules of Evidence are far more pragmatic than their British counterparts.

Classifying evidence such as that introduced in *Kearley* as hearsay has another valuable consequence as well. It means that the Confrontation Clause applies.[46] I have argued elsewhere for an interpretation that would bar hearsay statements elicited by governmental agents unless the declarant is produced at trial or special procedures are followed.[47] I have just enough space left to suggest that the police should perhaps be required to tape the messages they intercept in cases like *Kearley* or to demonstrate that a reasonable effort was made by the prosecution to secure the declarant as a witness. The high potential for the declarant's absence at trial suggests the desirability of prophylactic rules that would enable the jurors to better assess the circumstances and contents of the out-of-court statements.

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44. *See, e.g.*, 2 App. Cas. 228, 273 (1992) (Oliver).

45. FED. R. EVID. 804(b)(5).

46. In Tennessee v. Street, 471 U.S. 409, 414 (1985), the Court held that the use of a statement in its non-hearsay aspect "raises no Confrontation Clause concerns."

47. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992).

DISCUSSION: INTERPRETATION OF FEDERAL RULE 801

*Robert P. Mosteller**

June 1

I will focus my comments in this Symposium on a question similar to that examined by Professor Berger in her paper.[1] My question is how *Regina v. Kearley*[2] would be decided if the United States Supreme Court, rather than the House of Lords, decided it. Before I examined *Kearley* from this perspective, I tended to agree with the general thrust of Professor Park's paper that implied assertions, while intellectually intriguing, are not a matter of great practical concern because the precedents developed to deal with real problems, like that in *Kearley*, generally eschew extreme interpretations of the definition of hearsay, reach sensible results, and provide guides for solving analogous problems.[3] My concern is two-fold. First, the Supreme Court has shown remarkably little concern for bodies of lower court precedent such as those noted by Professor Park under some versions of its inconsistent "plain meaning" analysis. Second, if the Court takes the view that I believe it would — a "strong version" of the assertion-oriented approach as described by Professor Park — I do not believe that relevancy analysis provides satisfactory protection against the types of dangers most of the contributors to this Symposium believe are present in many implied assertions.

The *Huddleston* case[4] presents the type of result I fear. It is, I believe, correctly decided as a matter of interpretation of Rules 404(b) and 104(b) of the Federal Rules of Evidence. At the same time, it swept aside a very substantial body of lower court authority and common law tradition that treated other crimes' evidence as particularly dangerous and therefore required clear and convincing proof of those other incidents and the defendant's involvement in them before such evidence was admitted.[5] My reading of the results since *Huddleston* is that the alternative approach of using Rule 403 to protect against weak proof of the other incidents has not provided satisfactory protection against dangers of jury misuse and over-valuing.

I fear a similar result for the definition of hearsay if the Supreme Court ever examines a case like *Kearley*. As a consequence, I find myself ultimately in disagreement with Professor Park's position that redefinition of hearsay is not an important practical concern.[6]

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1. Margaret A. Berger, *How Would or Should the Supreme Court Interpret the Definitions in Rule 801?*, 16 MISS. C. L. REV. 13 (1995).

2. 2 App. Cas. 228 (H.L. Eng. 1992).

3. *See* Roger C. Park, *The Definition of Hearsay: To Each Its Own*, 16 MISS. C. L. REV. 125 (1995).

4. United States v. Huddleston, 485 U.S. 681 (1988).

5. *Id.* at 691.

6. Unfortunately, I am not sure that in the present political environment a legislative redefinition providing the protections for criminal defendants that I believe are appropriate is realistic.

Professor Berger has constructed an excellent argument from the *Williamson*[7] and *Tome*[8] cases that if the Supreme Court were examining the *Kearley* case, it should follow common law precedent and classify the statements and conduct of the would-be purchasers as hearsay.[9] She also argues that this approach has two advantages. First, admission would be determined under the residual catch-all exception where trustworthiness is determined in accordance with hearsay policy, and second, the Confrontation Clause would apply.[10]

I believe, however, that the Supreme Court majority would not side with the common law. I agree with Professor Berger that if the Court used the strong form of "plain meaning" often espoused by Justice Scalia, it would employ dictionary definitions that would exclude from the definition of hearsay both nonassertive nonverbal conduct and implied assertions from verbal conduct where the words are not used for their literal meaning. The Court would, of course, tell us that a truly extreme form of literalism is not required by Rule 801 — surely metaphorical speech ("the sky is on fire" to describe a sunset) remains hearsay under the Rule. If it found any ambiguity in the words of Rule 801, I believe the Court would consult the Advisory Committee's Note rather than the common law. In deciding what Congress meant to enact, the Court would presume that the Advisory Committee's Note informed Congress about any ambiguity in the meaning of the rule's language rather than an amorphous and largely unavailable body of common law precedent.

If I am correct that the Court would decide *Kearley* differently than the House of Lords on the issue of hearsay definition, would relevance analysis provide the additional protection that many of the contributors to this Symposium believe is important? Specifically, would it provide a suitable way to decide between a couple of calls regarding drugs and the large number of apparently very purposeful calls and visits involved in *Kearley* or would it draw the type of distinction Professor Mueller believes is appropriate between performance and speech?[11] In extreme cases, I think the answer would be yes, but I do not believe the protection would be equivalent to the trustworthiness principle under the hearsay analysis.[12] However, general relevancy analysis is much too forgiving in my view (evi-

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7. Williamson v. United States, 114 S. Ct. 2431 (1994).
8. Tome v. United States, 115 S. Ct. 696 (1995).
9. Berger, *supra* note 1, at 17-20.
10. Berger, *supra* note 1, at 19-20.
11. *See* Christopher B. Mueller, *Incoming Drug Calls and Performative Words: They're Not Just Talking About It, Baron Parke!*, 16 MISS. C. L. REV. 117 (1995).
12. Professor Swift's paper represents, in my judgment, a search for an effective bridging principle between relevancy and hearsay analysis that would provide an alternative method of guaranteeing trustworthiness. *See* Eleanor Swift, *Relevancy and Hearsay in Regina v. Kearley*, 16 MISS. C. L. REV. 75 (1995).

dence admitted unless prejudice substantially outweighs probative value) to provide the type of protection that I believe is appropriate.[13]

While I disagree with Professor Berger on the result the Supreme Court would reach, I very much approve of the basic premise of the alternative path to admission that she believes otherwise would and should operate generic trustworthiness analysis under the catch-all.[14] However, in order to guarantee this result regardless of the Court's decision on the Rule 801 issue, why not write an explicit trustworthiness requirement into Rule 801 to govern the admissibility of implied assertions? At the heart of much of the unease with wooden and extreme applications of any definition of hearsay is, I believe, a concern that if the evidence is considered hearsay, it is subjected to trustworthiness analysis in some form or the other,[15] while if it is found to be nonhearsay, it escapes entirely that analysis regardless of whether the definition applied eliminates any or all of the hearsay dangers.

Finally, I would like to highlight an interesting point made by Professor Seidelson regarding the Confrontation Clause[16] that could limit the ability of the Court to employ a literal interpretation of Rule 801. He argues that while traditional nonhearsay is not within the protection of the Confrontation Clause,[17] a different result should be obtained if the definition is changed, and that if Rule 801 is interpreted to differ from *Wright v. Tatham*[18] regarding implied assertions, it entails a change in the pre-Rules law adhered to in *Tatham*.[19] While I think he is right,[20] I doubt the Court will explicitly make this distinction. However, his

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13. I think something more than standard relevancy protection is appropriate in criminal cases presenting facts like *Kearley*. In *Kearley*, Lord Oliver used the term "reputation" at one point to describe evidence similar to that used against Kearley. Regina v. Kearley, 2 App. Cas. 228, 268 (H.L. Eng. 1992). Reputation evidence provides an interesting point of departure. It is admitted freely under the hearsay rule as an explicit exception. *See* FED. R. EVID. 803(22). However, reputation has to pass over a separate hurdle in Rules 404 and 405, and in criminal cases, it is excluded when offered against the defendant. The calls and visits in *Kearley* proved something more than that he had the reputation of being a drug dealer, but it also had some of the same dangers, and evidence of this type in other cases might prove little more than reputation. I fear the application of general relevancy analysis will be too generous to the prosecution.

14. *See* FED. R. EVID. 804(b)(5).

15. I do not want to overstate the value of the trustworthiness requirement since, as we all know, some of the traditional exceptions provide virtually none, and courts that are of a mind to do so can find trustworthiness in almost any set of facts. I believe, however, that this type of analysis is more appropriately focused and generally more exacting than is basic relevancy analysis.

16. David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Continuing Quandary for Federal Courts*, 16 MISS. C. L. REV. 33 (1995).

17. *See* Tennessee v. Street, 471 U.S. 409, 414 (1985).

18. 112 Eng. Rep. 488 (K.B. 1837).

19. *See* Seidelson, *supra* note 16, at 38.

20. This is a variant of the argument that hearsay admitted under a "firmly rooted" exception satisfies the Confrontation Clause. *See* Ohio v. Roberts, 448 U.S. 56 (1980). I have made a similar argument regarding the substantial expansion of the definition of Statements for the Purpose of Medical Diagnosis or Treatment, Rule 803(4), to include statements made solely for the purpose of diagnosis as opposed to those made for treatment, which were traditionally received. Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 288-90 (1989).

argument could provide ammunition to those members of the Court who agree with Professor Berger's argument that Rule 801 should not exclude implied assertions from the hearsay definition.[21]

Craig R. Callen

June 13

Professor Mosteller's comment seems to raise two points relating to his predictions about the way that the Court might view the use of forms of the word "assert" in Federal Rule 801.[1] The first is best made with an illustration.

Suppose that the question of how *X* opened a door is relevant. Suppose further that we have the out-of-court declarant's statement "She gave *X* her key and *X* opened the door." Would, or should, the Court consider the statement hearsay to show that *X* used the key given him to unlock the door? One might argue that the plain meaning is that *X* did so, yet the words do not preclude the possibility that someone gave *X* a large key to a city, and that he later used it to bash the door down.[2] The words themselves radically underdetermine the meaning of the sentence, even in ordinary discourse, unless one assumes that the speaker and hearer each rely on knowledge of the world, and a number of other assumptions, to interpret the sentence.[3] In the example I used, the declarant would not literally convey that *X* used the key to unlock the door, so it would not be a direct assertion of the proposition. As to whether it is a positive statement that *X* used the key to unlock the door, (another fairly common explanation of the meaning of assertion), I would argue that it is, but not because the declaration literally says that *X* did so. It is positive simply because, in the empirical world, we must rely on common interpretive assumptions for any communication to take place. Would (or should) the Court impose a meaning on the term "assert" that denies so much of communicative reality as a literalist construction? It would seem to be a very odd understanding of the idea of plain meaning to do so.

The second point I have relates to the possible argument Professor Mosteller noted, which is that the Advisory Committee's Note adequately explained any

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21. Arguably, one of the reasons the Court defined statements as narrowly as it did in Williamson v. United States, 114 S. Ct. 2431 (1994), was to avoid having to make difficult distinctions for Confrontation Clause purposes between statements against interest within the traditional definition and statements like those in *Williamson* made by suspects implicating both themselves and others, which were newly included by courts after the enactment of the Federal Rules.

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1. *See* Robert P. Mosteller, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 21 (1995).

2. The example is from JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 131 (1995).

3. *Id.*

change from the common law definition of hearsay to what I call in the Foreword an "explicitness" test.[4] In fact, it is very difficult to read the Note coherently as an endorsement of a strict explicitness test.

I think I can show one difficulty in relatively little space. The Note to Rule 801(a) says that "Nothing is an assertion unless intended to be one."[5] If assertions must be literal, or explicit, intent should not matter. A statement that might be hearsay would either explicitly state the proposition for which it was offered or not. One could argue that the "intended to be one" criterion was only instituted in order to exclude noncommunicative conduct from hearsay. That argument might work if the Note to Rule 801(a) did not say that considerations "similar" to those governing the status of nonverbal conduct govern "verbal conduct that is assertive but offered as a basis for inferring something other than the matter asserted."[6] If one intends to communicate a proposition by an utterance, that utterance seems to be an assertion under the first sentence I quoted from Rule 801(a). So, the latter provision, referring to verbal conduct offered to show "something other than the matter asserted" would seem more easily construed to refer to, for example, a complaint of pain offered to show that the complainer survived an accident rather than to the requests for drugs in a case such as *Regina v. Kearley*.[7] In other words, unless we are to assume that Congress was familiar with battles among Wigmore, McCormick, and Morgan about the correct definition of hearsay, it seems doubtful that the Note to Rule 801(a) plainly incorporates a literal statement test for distinctions between hearsay and nonhearsay.

*Eileen A. Scallen**

July 19

Greetings to all participating in this innovative Symposium. I have enjoyed reading your essays and comments on the Internet. Your efforts prove that *Regina v. Kearley*[1] was a superb choice as the basis for this discussion on the status of implied assertions; the case raises so many of the important questions bothering evidence scholars not just in the United States or the United Kingdom, but worldwide. Some are narrow questions: Should we ever characterize

4. *See* Mosteller, *supra* note 1, at 22.
5. FED. R. EVID. 801(a) advisory committee's note.
6. *Id.*
7. *See* 2 App. Cas. 228 (H.L. Eng. 1992).

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1. 2 App. Cas. 228 (H.L. Eng. 1992).

nonassertive nonverbal conduct as hearsay? Should we do so if the "conduct" has any verbal component? Should we do so only if the verbal component explicitly asserts a fact to be proved or should we exclude it if the verbal component fairly implies a fact that the proponent of the evidence is seeking to prove?

Some of the questions are a bit broader: Should we eliminate the hearsay rule? Should we replace it with a modification, such as a rule balancing the relevance (the probative strength) of the evidence against its dangers (its cumulative quality given the other evidence in the case, or the likelihood that the trier of fact will misevaluate or misuse it), or amend the rule to incorporate a trustworthiness requirement for implied assertions?

And some of the questions grow wider still: Is some type of hearsay rule so important to a fair trial that it rises to a Sixth Amendment Confrontation Clause issue in the United States, or to some other right in countries with different systems of constitutional law? Who should make the rules of evidence — the courts, the legislature, a committee of experts or some combination of these bodies? Moreover, once the rules have been made, how should judges interpret them? Can any exclusionary evidence rules be acceptable to a public terrified of criminals and unable or unwilling to indulge in the presumption of innocence (that is, if evidence law requires the implied assertions considered in *Kearley* to be excluded, would a lay person, say as Lord Griffith says, " 'Then the law is an ass.' "[2])?

Kearley, as discussed in this Symposium, raises all of these questions. I would like to bring to this discussion consideration of "practical reasoning" in evidence law, for it helps me understand the problems raised by implied assertions. Practical reasoning, in my view, is a process of argumentation in which the interpreter (here, a judge) justifies a decision about the meaning of a statute or constitutional text using all of the sources of meaning in a given legal community (text, precedent, legislative history, consequences of interpretations, etc.). The judge is driven by the need to be candid and complete in exploring these sources, a need that stems from the judiciary's educative role. Practical reasoning is an approach to interpretation based on sensitivity to the communication process, although grounded more in classical rhetorical theory of the sophists and Aristotle than the more modern linguistic approach taken by Craig Callen.[3] I have fleshed out the theoretical aspects of practical reasoning elsewhere,[4] but let me apply it to the questions raised here.

The narrowest questions are about the meaning of the rule on implied assertion. The opinions in *Kearley* demonstrate, to no one's particular surprise, that the common law approach does not produce a determinate result. It is especially difficult to reconcile the outcome in *Kearley* (excluding the telephone calls and

2. *Id.* at 237.

3. *See* Craig R. Callen, *Foreword to the First Virtual Forum: Wallace Stevens, Blackbirds and the Hearsay Rule*, 16 MISS. C. L. REV. 1 (1995).

4. Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1747-59 (1995).

visits as implied assertions)[5] with *Ratten v. Regina*,[6] in which the fearful cries of a woman were held to be properly admitted as nonhearsay to refute the defendant's claim that he had accidentally shot her.[7] However, it is amusing to note that Lord Bridge looked in *Kearley* to the United States for the enlightened view, declaring that "[i]n the federal courts of the United States the law is made clear by the Federal Rules of Evidence."[8] Professors Berger and Seidelson, as well as others, demonstrate that this is hardly the case.[9]

Professors Berger and Seidelson demonstrate that the text of Rule 801 is ambiguous when it comes to implied assertions.[10] They examine the Advisory Committee's Note to Rule 801, concluding that the Advisory Committee intended to exclude the type of implied assertions at issue in *Kearley*, because of the reduced danger of fabrication or insincerity, while ignoring the potential dangers of perception, memory, and communication.[11] However, both Professors Berger and Seidelson, while respectful of the Advisory Committee's approach, are not slaves to this kind of "legislative history."[12] They make convincing arguments that such implied assertions should be hearsay under Rule 801.[13] Professor Berger shows that the United States Supreme Court has been ambivalent about the role of the Advisory Committee's Notes in interpreting the Federal Rules, sometimes relying on them and sometimes not.[14] In this situation, she would opt for a reading of Rule 801 that is consistent with the common law precedents, which are concerned with all of the hearsay dangers, not just the danger of insincerity.[15] She also places the implied assertion problem in its larger context in evidence law — arguing that the implied assertion, although hearsay, might still be admissible under the residual exception if it were sufficiently trustworthy and necessary, and in criminal cases, the Confrontation Clause would apply to provide additional protection.[16]

Professor Seidelson makes similar arguments about the ambiguity of Rule 801 and the Advisory Committee's position, but he is more explicit about the conflicting United States precedents on implied assertions.[17] He also adds Congress into the equation, arguing from its silence that Congress would not have intended to effect such a large change in the common law without clearly saying so.[18]

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5. *Kearley*, 2 App. Cas. at 228.
6. 1972 App. Cas. 378 (H.L. Eng.).
7. *Id.*
8. *Kearley*, 2 App. Cas. at 247.
9. *See* Margaret A. Berger, *How Would or Should the Supreme Court Interpret the Definitions in Rule 801?*, 16 MISS. C. L. REV. 13 (1995); David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Continuing Quandary for Federal Courts*, 16 MISS. C. L. REV. 33 (1995).
10. Berger, *supra* note 9, at 13; Seidelson, *supra* note 9, at 33.
11. Berger, *supra* note 9, at 14-15; Seidelson, *supra* note 9, at 34.
12. Berger, *supra* note 9, at 18; Seidelson, *supra* note 9, at 35.
13. Berger, *supra* note 9, at 18; Seidelson, *supra* note 9, at 46-47.
14. Berger, *supra* note 9, at 16-18.
15. Berger, *supra* note 9, at 19.
16. Berger, *supra* note 9, at 19-20.
17. Seidelson, *supra* note 9, at 33.
18. Seidelson, *supra* note 9, at 52.

This kind of statutory interpretation argument is made often, and it actually raises the kind of problems we are discussing with implied assertions — can we draw reliable inferences about the speaker's intent when it is not expressed directly and the speaker is not subject to cross-examination? Professor Seidelson notes a way out through another argumentative strategy — focusing on the burden of proof.[19] He quotes Justice Kennedy's use of this strategy in *Tome v. United States*, "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such change."[20] Resorting to this strategy in hard cases will always result in the status quo, just as the Advisory Committee's decision to give the objecting party the burden of proof that a statement was "intended" as an assertion will result in a finding that the statement is nonhearsay in close cases. Using this strategy to construe Rule 801 thus results in a finding that the common law on implied assertions survived the creation of the Federal Rules of Evidence.

Professors Berger and Seidelson do not take the easy way out. They do not declare that the text of the rule has a "plain meaning," as our current United States Supreme Court often does, nor do they try to show that the application of logic to precedent "demands" a certain outcome, as some of the Lords in *Kearley* did, as Professor Allen points out.[21] Putting Professor Berger's and Professor Seidelson's arguments together provides a solid basis for the meaning of Rule 801 in borderline cases. To use another evidence analogy: resorting to the text of an evidence rule or a "controlling" precedent alone for the meaning of a rule is like allowing a jury to consider only direct evidence of a crime. Maybe this will do in the vast majority of "open and shut" cases, but it would needlessly hamstring us in hard cases. The process of practical reasoning is the process of putting together the best circumstantial evidence you have — pointing out the consistencies and trying to explain or discredit the inconsistencies.

Professor Stein made a valid point about discretionary rules, ones that require balancing; they add expense and uncertainty to the trial process.[22] I think the practical reasoning approach is susceptible to this critique. However, I agree with Professor Allen that certainty and predictability are often illusory in the adversarial setting.[23] We wish for them, but we do not always get our wish. Professor Park is correct that the majority of cases will not pose this kind of interpretative difficulty for courts.[24] But in the hard cases, those that result in Supreme Court opinions, it seems that the Justices would do better to engage in the kind of analysis described here than in spending their time just looking things up in the dictionary.

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19. Seidelson, *supra* note 9, at 51-52.

20. Seidelson, *supra* note 9, at 51-52 (quoting Tome v. United States, 115 S. Ct. 696, 703 (1995) (citations omitted)).

21. Ronald J. Allen, *Rules, Logic, and Judgment*, 16 MISS. C. L. REV. 61, 62 (1995).

22. Alex Stein, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 93 (1995) (responding to Ronald J. Allen).

23. Allen, *supra* note 21, at 72.

24. Roger C. Park, *The Definition of Hearsay: To Each Its Own*, 16 MISS. C. L. REV. 125, 129 (1995).

On first reading *Kearley*, the confrontation problem stood out to me clearly, although the Lords do not really discuss it explicitly. Professor Nancy King was kind enough to refer to my interpretation of the Confrontation Clause problem.[25] While that article does discuss the societal dimension of confrontation, I argued for a practical reasoning approach to the Confrontation Clause, requiring consideration of all of its dimensions in a given situation — the reliability (also called the evidentiary) dimension, the procedural dimension (discussed by Professors Berger and Kirst)[26] as well as the societal dimension.[27]

How would this work in the *Kearley* situation? The reliability dimension is a problem; while Professor Allen and some of the Lords believe the defendant is clearly or "obviously" guilty,[28] I like to put myself in the shoes of the accused's lawyer — are there weaknesses or avenues that I would like to explore on cross-examination? I certainly would here. As some have suggested, I would have liked to ask whether the declarants were operating on the basis of rumor they had heard about "Chippie." This theory does not seem implausible to me (I do note that one of the opinions makes reference to a previous drug transaction with Chippie, but that raises a separate problem of character evidence as well as reliability issues).

This reliability problem is compounded by the procedural dimension. The witnesses against the accused in *Kearley* were police officers who intercepted the calls and visitors.[29] Like Lord Ackner in *Kearley*, I am not as confident in the integrity of the British law enforcement community after the IRA terrorist cases in which evidence was apparently coerced, manufactured and orchestrated by the government.[30] In theory, cross-examination of the police officers on the stand should expose any insincerity. However, despite my desire to engage them in cross-examination, I am not confident that it is a cure-all. Indeed, as a series in the *New York Times* last year revealed, perjury among New York police officers is so common that they have a term for it themselves: "testilying."[31] The threat of cross-examination has not stopped these officers or exposed their insincerity. Professor Berger's solution of requiring that the police officers tape the calls is creative,[32] but given the high-tech capacity to alter audio and video tapes, I am not comfortable allowing the police officer (or fellow officers) to lay the foundation for the authenticity of the tape. I think her solution of requiring the prosecution to produce the declarant or show why they could not after a reasonable effort

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25. *See* Nancy J. King, Electronic Discussion *in The Reach and Reason of the Hearsay Rule: How Would (or Should) the Supreme Court Decide the Kearley Case?*, 16 MISS. C. L. REV. 100, 102 (1995) (citing Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992)).

26 *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 572-78 (1992); Roger W. Kirst, *The Procedural Dimension of the Confrontation Doctrine*, 66 MINN. L. REV. 485 (1987).

27. Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 635-636 (1992).

28. Allen, *supra* note 21, at 71.

29. Regina v. Kearley, 2 App. Cas. 228, 236 (H.L. Eng. 1992).

30. *Id.* at 258.

31. *See* Joe Sexton, *New York Police Often Lie Under Oath Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1.

32. Berger, *supra* note 9, at 20.

is the better solution to the procedural dimension of confrontation.[33] In *Kearley*, the prosecution made no apparent effort to produce the declarants or to explain why they could not produce the declarants.[34]

I have argued that in addition to reliability and procedural functions, confrontation has a societal dimension. The societal dimension is concerned with respect in the relationships between the accused and the individual witness-accuser, and the accused and the state as accuser. I help my students see this dimension by asking them to put themselves in the shoes of an accused. Then, I ask them whether, if they were sure that the testimony was accurate or that the witness would be able to testify convincingly, although lying or mistaken (in short, if reliability was not an issue), and if they were sure that the government had not manufactured the evidence against them (no procedural concern), they would still want to face their accuser. Virtually all of them say yes, but they have a hard time explaining why, except to resort to the maxim "if you're going to say that about me, say it to my face." This maxim expresses the desire for respect in the dual relationships the accused has with an individual accuser and the state. I argue, and as I believe Professor Toni Massaro has argued,[35] that this respect is essential to the perception of our system as fair or just. Without an explanation of why the prosecution was unable or unwilling to call the declarants in *Kearley*, the societal dimension of confrontation is not satisfied.

Also note that the practical reasoning approach does not call for an absolute right to confrontation. We have always dispensed with confrontation where there is an adequate showing of necessity (for example, dying declarations). I argued in my earlier article that we might not provide confrontation in some child abuse cases.[36] However, in those cases, we ought to require the prosecution to prove the necessity for dispensing with confrontation, which provides additional assurance that the procedural concerns are unwarranted, and provides the respect demanded by the societal dimension. Moreover, as others have pointed out, the right to confrontation can be waived by the defendant's attempt to misuse confrontation. A defendant's attempt to intimidate or threaten an accuser results in forfeiture of that right. Nevertheless, I see no reason to dispense with confrontation in *Kearley*.

Professor Friedman and I had an interesting private exchange via "snail mail" a while ago about the dimensions of confrontation. He argued there, if memory serves me, that reliability is a due process concern, rather than a confrontation concern. He convinced me at the time, but now I hold fast to my original position, albeit with a provocative twist. I do not think that the reliability, procedural, and societal dimensions can be separated in practice, although they can be analytically and artificially severed for discussion. In other words, the same confrontation that serves societal values, also provides reassurance that the govern-

33. *See* Berger, *supra* note 9, at 20.
34. Regina v. Kearley, 2 App. Cas. 228, 236 (H.L. Eng. 1992).
35. Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 FLA. L. REV. 863, 910 (1988).
36. Scallen, *supra* note 27, at 653.

ment has not manufactured the evidence and provides additional basis for testing the reliability of the testimony. It is not necessary to segregate the reliability, procedural, and societal dimensions, assigning reliability to the Due Process Clauses and leaving the other dimensions to the Confrontation Clause. I agree that the reliability dimension is embodied in due process, but here is the twist: perhaps the other dimensions (procedural and societal) are part of due process as well. This might mean, as I believe Professor Ed Imwinkelried has already suggested,[37] that there is some type of right to confrontation in civil cases as a part of the Due Process Clauses of the Fifth and Fourteenth Amendments.

I have been disturbed by the ease with which some commentators would resolve the problem of implied assertions by eliminating the hearsay rule in civil cases. There is a large category of actions that are civil proceedings, but that can have criminal overtones, such as civil Racketeering Influenced and Corrupt Organizations Act,[38] civil securities fraud,[39] civil rights claims under section 1983,[40] and immigration cases. Some degree of confrontation seems especially important in these cases, where "trial by affidavit" may not result in actual imprisonment, but can have devastating financial consequences (in the form of compensatory and punitive damages), produce social stigma, and, in immigration cases, result in the loss of a different kind of liberty. I know this injects an additional level of discretion and balancing into civil cases, which Professor Stein and others would deplore, but the question is not whether there will be additional expense, but whether the additional expense is justified. In an ordinary civil case, the hearsay rule (perhaps purged of some of its more unwarranted exceptions, such as excited utterances), might provide enough of a balance of reliability and necessity to pass any constitutional objection. In the category of "quasi-criminal" cases, however, heightened scrutiny of the three dimensions of confrontation is warranted, although the procedural dimension will collapse into the reliability dimension where the state is not a party. (While any manufactured evidence violates the reliability dimension, I read Professors Berger and Kirst as expressing increased revulsion when the powers of the state are used to fabricate or alter evidence.)[41]

After reading *Kearley*, I am again grateful for our written Bill of Rights, which would have provided an explicit additional basis for the Lords' decision in that case. However, it would be a pity if our written Constitution leads us to fixate on one of its sections (the Sixth Amendment) and refuse to explore whether similar values are embodied in other sections (the Fifth and Fourteenth Amendments).

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37. Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521, 539 (1992).
38. 18 U.S.C. §§ 1961-1968 (1988).
39. 15 U.S.C. §§ 77(k)-(m) (1988).
40. 42 U.S.C. § 1983 (1988).
41. *See* Berger, *supra* note 26, at 606-07; Kirst, *supra* note 26, at 492-94.