Chapter 10

PROTECTING THE ADVERSARY SYSTEM: THE HEARSAY RULE AND THE CONFRONTATION CLAUSE

§ 10.01 CHAPTER CHECKLIST

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§ 10.02 RELEVANT FEDERAL RULES OF EVIDENCE

Rule 801. Definitions (partial text)

The following definitions apply under this article:

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

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

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

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

United States Constitution. Sixth Amendment

"In all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

§ 10.03 INTRODUCTION

While some evidentiary rules are narrow and technical, others (such as those limiting the admissibility of character evidence) embody the U.S. conception of a fair trial. The hearsay rule, the basic principles of which are the focus of this chapter, is at the core of this conception. Reinforced in criminal cases by the U.S. Constitution's 6th Amendment (the Confrontation Clause), the hearsay rule is virtually synonymous with the adversary system of trial because it protects parties' rights to cross examine adverse witnesses.

The hearsay rule reflects a centuries-old distrust of second-hand information. For example, early in the 16th century, famed Swiss alchemist Paracelsus wrote that he was not the creator of the Philosopher's Stone, and so could speak of it only from hearsay.[1] And a few years later, soon after Queen Anne Boleyn's beheading in 1536, palace governess Lady Bryan wrote a letter stating that she didn't know the current whereabouts of the Queen's daughter Elizabeth "except by hearsay."[2] The long-standing suspicious attitude towards hearsay underlies Rule 802, which provides in part that "[h]earsay is not admissible except as provided by these rules."

Under Rule 801, a hearsay statement is one made orally or in writing at a time or place other than on the witness stand during the trial or hearing in which the statement is offered into evidence. Judges and lawyers often reduce this definition to the shorthand term, "out-of-court statement." For example, Bob would be offering Joan's out-of-court statement into evidence in the following situations:

- Bob testifies that "Soon after the accident, Joan told me that she saw the car that collided with mine run a red light."
- Bob seeks to read into the trial record Joan's deposition testimony that "I saw the car that collided with Bob's run a red light."

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[1] M. Pachter, *Paracelsus: Magic Into Science* 133 (1951).

[2] (1) Joan Glasheen, *The Secret People of the Palaces* 40 (BT Batsford, 1998).

- Bob offers into evidence an affidavit signed under oath by Joan during pretrial discovery proceedings stating that "I saw the car that collided with Bob's run a red light."
- Bob offers into evidence a portion of the transcript from an earlier trial in which Joan testified under oath that "I saw the car that collided with Bob's run a red light."

Each excerpt of Bob's testimony refers to an out-of-court statement by Joan, because Joan made each statement other than "while testifying at the trial or hearing" in which Bob offered Joan's statement into evidence.

Any hearsay that you picked up about the hearsay rule before enrolling in the Evidence course may be more confusing than helpful. For one thing, not all out-of-court statements constitute hearsay. Under Rule 801, an out-of-court statement constitutes hearsay only if it is "offered in evidence to prove the truth of the matter asserted." Thus, a statement that is offered for a legitimate "non-hearsay purpose" (a purpose that does not depend on an out-of-court statement's accuracy) is not barred by Rule 802. Second, even if a party does offer an out-of-court statement into evidence for the truth of what it asserts, it may well be admissible under one or more of the gaggle of exemptions and exceptions "provided by these rules," most notably by Rules 801, 803, 804, and 807. Finally, even if a hearsay statement is admissible under an exemption or exception, the Confrontation Clause might bar a prosecutor from offering it into evidence against a criminal defendant.

This chapter begins hearsay analysis by focusing on Rule 801's definition of hearsay, and on the reason that the hearsay status of out-of-court statements depends on the purpose for which parties offer them into evidence. To keep your eyes on the forest of admissibility as you go through the individual definitional trees, keep the following "5-Step Hearsay Matrix" in mind. The questions set forth in the matrix provide a helpful approach for analyzing hearsay issues.

5-Step Hearsay Matrix

- Step One: Does evidence constitute an out-of-court statement?
- Step Two: If so, for what purpose does the offering (or "proferring") party offer the out-of-court statement?
- Step Three: If the offering party offers an out-of-court statement for a non-hearsay purpose (that is, for a purpose that does not depend on the statement's accuracy), is that purpose relevant and if so is its probative value substantially outweighed by the risk of unfair prejudice or the other factors set forth in Rule 403?
- Step Four: If the offering party offers an out-of-court statement for its truth, can the party satisfy the foundational requirements of any of the numerous exemptions or exceptions to the hearsay rule?
- Step Five (necessary only when prosecutors offer hearsay statements into evidence against criminal defendants): Even if an out-of-court statement is admissible for purposes of the hearsay rule, does

the Confrontation Clause require its exclusion? This chapter concludes with an analysis of Confrontation Clause issues.

Note: This chapter introduces you to the definitional concepts that determine whether proferred evidence constitutes hearsay as defined in Rule 801. A conclusion that evidence is hearsay does not necessarily mean that the evidence is inadmissible at trial. Keep in mind that hearsay may be admissible under one or more of the exemptions and exceptions explained in other chapters, most notably chapters 11 through 15.

§ 10.04 HEARSAY DEFINED

Under Rule 801 (c), an out-of-court statement is hearsay when:

- A "declarant" makes an
- out-of-court
- oral, written or non-verbal "statement" that is offered to prove
- "the truth of the matter asserted."

Before considering the meaning of "declarants," "statements," and "out of court," focus on the language "for the truth of the matter asserted." This is the crucial definitional element that most commonly determines whether out-of-court statements are hearsay. A party offers an out-of-court statement for its truth if the statement must be accurate to be relevant. If the purpose for which a party offers a statement makes the statement relevant without regard to its accuracy, the statement is non-hearsay. Thus, the very same statement can be either hearsay or non-hearsay, depending on the point that the offering party attempts to prove.

Example 1

Jean is present when Melissa tells her friend Joe that "The bank where I work has decided to substitute blanks for real bullets in its guards' guns." If Jean were asked to testify to Melissa's statement in a trial, the testimony might be hearsay. Melissa is a declarant, and her statement to Joe was made out-of-court. But whether or not the statement is hearsay depends on what it's offered to prove. Melissa's statement would be:

Hearsay if Joe were injured in a robbery that took place in the bank where Melissa works and sues the bank for not adequately protecting its customers, and if Joe's attorney offers Melissa's out-of-court statement as evidence that the banks' guards were armed only with blanks. Joe's attorney would then be offering Melissa's statement "for its truth," because Melissa's statement would be relevant to prove that the guards' guns were filled with blanks only if it were accurate.

Non-hearsay if Joe is charged with robbing the bank, and the prosecution offers Melissa's statement to prove that a motive for the robbery was that Joe didn't fear being shot by the guards. Melissa's statement would now be relevant even if it were inaccurate — that is, even if the guards were in fact armed with real bullets. Hearing Melissa's statement could have led Joe to *believe* that the guards only had blanks. Joe's belief permits an inference that

Joe would not be fearful of being shot during a robbery attempt, which strengthens an inference that Joe robbed the bank.

Chapter 11 examines common non-hearsay uses for out-of-court statements. Realize, however, that finding a non-hearsay use for out-of-court statements is not an automatic ticket to admissibility. The admissibility of an out-court statement as non-hearsay depends on its relationship to the material facts in dispute and the factual contentions of the parties. As suggested by Step Three of the Hearsay Matrix, judges may exclude out-of-court statements if their claimed non-hearsay use is irrelevant, or if the danger that jurors will improperly accept an out-of-court statement for its truth substantially outweighs the probative value of the statement's legitimate non-hearsay use (Rule 403).

Example 2

Joe is charged with robbing the bank in which Melissa works. Joe's defense is mistaken identity. The prosecutor's direct examination of Melissa proceeds as follows:

PROSECUTOR: Melissa, do you know a teller in your bank by the name of Jean?

A: Sure. Jean often works at the window next to mine.

PROSECUTOR: Do you recall Jean talking to you about bank robberies a day before this robbery took place?

A: I do.

PROSECUTOR: And what did Jean tell you in this conversation?

A: Jean told me that most bank robbers are professionals who will go on committing bank robberies until they're apprehended.

DEFENDANT'S ATTORNEY: Objection and move to strike, hearsay.

[In practice, the defense attorney should object after the question and before the answer.]

JUDGE: Prosecutor, any response?

PROSECUTOR: I'm not offering Jean's statement for its truth, Your Honor. I'm offering it for the limited purpose of showing that at the time the robbery took place, a day after Jean spoke to Melissa, Melissa had a motive to focus especially closely on the person who robbed her. Hearing Jean's statement made Melissa especially anxious to make sure that the robber was caught.

JUDGE: Defense counsel, response?

DEFENDANT'S ATTORNEY: Yes, I object to the non-hearsay use under Rules 402 and 403. The claimed non-hearsay use is irrelevant because any bank teller has a desire to see a bank robber apprehended. And a substantial danger exists that despite any limiting instruction Your Honor may give, the jury will use the statement as evidence that my client is a professional bank robber.

[This colloquy would in all likelihood take place at sidebar, out of the jurors' hearing.]

JUDGE: Objection sustained. I strike the witness' last answer under Rule 403 and instruct the jurors to disregard it.

The next section explains the policies underlying the hearsay rule and describes why offering out-of-court statements for a "non-hearsay purpose" generally obviates the concerns giving rise to the rule.

§ 10.05 THE HEARSAY RULE AND THE ADVERSARY SYSTEM

[A] Hearsay Rule Protects Right to Cross-Examine

The primary reason that out-of-court statements are hearsay only when parties offer them for "the truth of the matter asserted" is the close connection between the hearsay rule and the adversary system of justice. The adversary system relies heavily on cross-examination as a method of ferreting out truth, and the hearsay rule protects a party's right to cross-examine adverse witnesses. In other words, the hearsay rule's primary purpose is to protect a party from the use of evidence from speakers (hearsay declarants) who the party cannot cross-examine. In the words of the great Evidence scholar John Wigmore, "The hearsay rule . . . signifies *a rule rejecting assertions . . . which have not been in some way subjected to the test of cross-examination.*[3] Thus, the hearsay rule is the legal equivalent of the common expression, "Tell it to the judge (or jury)." The rule reflects a belief that in an adversarial system of justice, witnesses ought to tell their stories in court, where judges and jurors can observe and evaluate them and adverse parties can cross-examine them.

If the purpose of the hearsay rule is to allow cross-examination of speakers whose out-of-court statements are offered into evidence, why aren't all out-of-court statements treated equally? Why does the bar of the hearsay rule disappear when out-of-court assertions are offered for "non-hearsay purposes?" The answer is that when an out-of-court statement is offered for a non-hearsay use, the declarant's presence on the witness stand is not necessary for meaningful cross-examination to occur. When a statement is offered as non-hearsay, the credibility issue concerns the in-court witness who serves as the "conduit" of the out-of-court statement, not the declarant. And of course, the adversary can cross-examine and test the credibility of the in-court witness.

By contrast, when an out-of-court statement is offered for its truth, the important credibility issues generally revolve around the *hearsay declarant*, not the "conduit" witness. That is why a hearsay declarant's testimony at trial is almost always necessary for an opportunity for meaningful cross-examination to occur.

To understand why the admission of hearsay from non-testifying speakers typically precludes adversaries from testing its credibility, recognize that accepting the accuracy of hearsay gives rise to four "hearsay dangers."

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[3] Vol. 5, Wigmore on Evidence-Chadbourn Revision § 1362 (1974) (emphasis in original).

Depriving parties of the opportunity to cross-examine hearsay declarants prevents them from demonstrating that the presence of one or more of these dangers renders hearsay inaccurate or incomplete. The subsection below explains the four hearsay dangers and then illustrates how the opportunity for meaningful cross-examination depends on whether a statement is offered for its truth or for a non-hearsay purpose.

[B] The "Hearsay Dangers"

The factors that cross-examiners are unable to probe when hearsay substitutes for in-court testimony are as follows:

- *Sincerity*. Does a hearsay declarant's out-of-court statement actually reflect the declarant's belief? For example, was Graham intending to be accurate when he told his neighbor Beverly the day after a collision that "the Beemer ran a red light?" Beverly's testifying to Graham's out-of-court statement at trial is likely to foreclose a cross-examiner from probing Graham's sincerity and perhaps showing that Graham had a motive to make an intentionally false statement. Common motives that cross-examiners pursue at trial include a witness' financial stake in a trial's outcome, close personal relationship with the adversary, or bad feelings towards the cross-examiner's client. Or, a cross-examiner might be able to show that Graham's demeanor and manner of answering questions under oath (e.g., shifty eyes, sweaty palms) demonstrate that he is insincere.
- *Perception*. Even if a hearsay declarant was sincere, did the declarant have an adequate opportunity to observe the events to which the hearsay statement refers? For example, how well could Graham observe the Beemer that he said ran the red light? Beverly's testifying to Graham's out-of-court statement at trial is likely to foreclose a cross-examiner from probing Graham's perception and perhaps showing that Graham was too far away to observe accurately, or that the intersection was badly lit, or that Graham was preoccupied and therefore not paying close attention to the Beemer.
- *Memory*. Even if a hearsay declarant was sincere and had an adequate opportunity to observe events, how well did the declarant recall those events at the time the hearsay statement was made? For example, how well did Graham recall the color of the light and the Beemer's location at the time he said that the car ran the light? Beverly's testifying to Graham's out-of-court statement at trial is likely to foreclose a cross-examiner from probing Graham's memory and perhaps showing that Graham is unable to recall other important details, or that he has given conflicting accounts of the event.
- *Communication Difficulties*. Even if a hearsay declarant was sincere, had an adequate opportunity to observe events, and adequately recalled those events, how accurately does a declarant's choice of words describe those events? For example, did Graham misspeak? Beverly's testifying to Graham's out-of-court statement at trial is likely to foreclose a cross-examiner from probing Graham's use of language at trial and perhaps showing that Graham

meant to say that a Toyota ran the red light. Also, admission of Graham's hearsay is likely to prevent a cross-examiner from showing that Graham uses language in an idiosyncratic way. For example, perhaps the cross-examiner could show by questioning Graham that he is especially cautious and considers any driver whose car is in an intersection when a light turns red to have "run a red light."

"ROTC" is a military mnemonic that may help you to remember the hearsay dangers. Cross-examination tests a witness' ability to Remember; Observe; Tell the Truth; and Communicate.

The following samples of testimony illustrate the linkage between the hearsay rule and cross-examination. The first testimonial excerpt demonstrates how the admission of hearsay is likely to negate the opportunity for meaningful cross-examination. Assume that Melinda is a defendant in an auto accident case. Dave, the plaintiff, claims that Melinda negligently drove her Ford automobile through a red light and ran into Dave's car. To prove that Melinda was negligent, Dave is allowed to testify that, "About 10 minutes after the collision, a bystander came up to me and said, 'I saw what happened. The driver of the Ford that ran into your car ran a red light.'" Since Dave has not produced the bystander (the hearsay declarant) as a witness, Melinda's attorney has to try to undermine the bystander's credibility by cross-examining Dave. A portion of the cross-examination might go as follows:

DEFENDANT'S ATTORNEY: A bystander told you that the Ford ran the red light?

A: That's correct.

DEFENDANT'S ATTORNEY: Do you know whether the bystander was acquainted with my client? (sincerity question)

A: No, I don't.

DEFENDANT'S ATTORNEY: Do you know whether the bystander had ever made negative statements about people who drive Ford automobiles? (sincerity question)

A: No, I'd never met or talked to the bystander before the collision.

DEFENDANT'S ATTORNEY: Do you know whether the bystander would be squirming uncomfortably if the bystander had to respond to my questions in court, under oath? (sincerity question)

A: Sorry, haven't a clue.

DEFENDANT'S ATTORNEY: What was the bystander's physical location at the time that the bystander claims to have seen the Ford run the red light? (perception question)

A: I don't know.

DEFENDANT'S ATTORNEY: Do you know whether the bystander was facing towards or away from the sun at the time the bystander claims to have seen the Ford run the red light? (perception question)

A: No, I don't know.

DEFENDANT'S ATTORNEY: Do you know whether the bystander was concentrating on work or family problems at the time the bystander claims to have seen the Ford run the red light? (perception question)

A: I don't know. Look, why are you asking me all these questions? All I know is what the bystander told me after the collision.

DEFENDANT'S ATTORNEY: I understand. But I suspect that this cross-examination is going to be used as an example in an Evidence book, so I need to show readers how use of the bystander's assertion for its truth really frustrates my opportunity to conduct meaningful cross-examination. Does the bystander now recall how fast the Ford was going when it allegedly ran the red light? (memory question)

A: I don't know.

DEFENDANT'S ATTORNEY: Well, can the bystander recall how fast your car was going when it collided with my client's car? (memory question)

A: How the heck would I know?

DEFENDANT'S ATTORNEY: Can the bystander tell us what the weather wa like at the time of the collision? (memory question)

A: I have no idea.

DEFENDANT'S ATTORNEY: Has the bystander given a conflicting account of what happened to anyone else? (memory question)

A: I don't know.

DEFENDANT'S ATTORNEY: Do you know whether the bystander can accurately distinguish a Ford automobile from other makes of car? (ambiguity question)

A: I don't know.

DEFENDANT'S ATTORNEY: Do you know whether the bystander meant that the light turned red before or during the time the Ford was in the intersection? (ambiguity question)

A: I don't know.

As you can see, the admissibility of hearsay largely obviates the defense attorney's opportunity for meaningful cross-examination. The bystander's out-of-court statement might be subject to any of the four dangers, but the substitution of the hearsay assertion for the bystander's in-court testimony prevents the attorney from exploring them.

If the distinction between hearsay and non-hearsay makes any sense, then an opportunity for meaningful cross-examination should be available when a party offers an out-of-court statement for a non-hearsay purpose. To test this, consider a second sample of testimony from a revised version of the previous case. As in the previous example, Melinda is a defendant in an auto accident case. And as before, Dave, the plaintiff, claims that Melinda negligently drove her Ford automobile through a red light and ran into Dave's car. In this version, to counter Melinda's affirmative defense that Dave and not her ran the red light, Dave testifies that moments before the collision, Chuck, a passenger in Dave's car, told Dave to "Be careful at this intersection. Cops are always around and people get tickets for running red lights here all the time." Chuck's statement, Dave testifies, made him especially wary and careful not to go through a red light.

In this example, Dave offers Chuck's statement for a non-hearsay use. Even if what Chuck said about cops ticketing motorists is inaccurate, the statement is relevant because Dave claims that Chuck's remark affected how Dave drove as he approached the intersection where the collision occurred. Thus, if the hearsay/non-hearsay distinction makes sense, Melinda's attorney should have a reasonable chance to cross examine Dave:

DEFENDANT'S ATTORNEY: You say that moments before the collision, Chuck told you that cops often ticket motorists for running red lights at that intersection, right?

A: That's correct.

DEFENDANT'S ATTORNEY: We only have your word for this and not Chuck's, right? (sincerity question)

A: That's true.

DEFENDANT'S ATTORNEY: Do you recall anything else that Chuck said to you during the five minutes prior to the collision? (memory question)

A: No.

DEFENDANT'S ATTORNEY: Do you recall what if anything you and Chuck had been discussing when Chuck made this statement to you? (memory question)

A: No.

DEFENDANT'S ATTORNEY: Has Chuck previously been a passenger in your car?

A: Yes, often.

DEFENDANT'S ATTORNEY: On any prior occasion, has Chuck ever given you a warning about the presence of police officers? (memory/sincerity question)

A: Not that I can remember.

DEFENDANT'S ATTORNEY: You didn't personally see any police officers at the intersection, did you? (perception question)

A: No.

DEFENDANT'S ATTORNEY: Have you driven through that intersection previously? (memory question)

A: Sure.

DEFENDANT'S ATTORNEY: Can you estimate for us how many times in the six months prior to the events giving rise to this lawsuit that you drove through that intersection? (memory question)

A: Oh, I can't be sure. Let's say 15-20 times.

DEFENDANT'S ATTORNEY: And you'd never been stopped by a police officer for any reason connected to that intersection, isn't that true? (memory/sincerity question)

A: I guess that's right.

DEFENDANT'S ATTORNEY: You talked to Police Officer Jones about what happened about 15-20 minutes are the accident, is that right?

A: That's about right.

DEFENDANT'S ATTORNEY: And you didn't mention to Officer Jones that Chuck had made this statement to you, did you? (sincerity/memory question)

A: No.

DEFENDANT'S ATTORNEY: Before approaching the intersection where the collision took place, you had been driving with Chuck in your car for about 15 minutes, right?

A: That's true.

DEFENDANT'S ATTORNEY: And Chuck might have made this statement earlier in the drive, isn't that right? (perception question)

A: I'm pretty sure that he said it right before the accident.

DEFENDANT'S ATTORNEY: How much time elapsed between the time Chuck said this to you and the collision took place? (memory question)

A: I'm not exactly sure. A few seconds, I'd say.

DEFENDANT'S ATTORNEY: And did you ask him how he knew that cops often ticketed drivers in that area? (sincerity question)

A: No.

DEFENDANT'S ATTORNEY: Yet you immediately slowed down after hearing Chuck say this?

A; Yes.

DEFENDANT'S ATTORNEY: At the time you claim that Chuck made this statement to you, you were talking on your mobile phone to your sales manager about an important customer you were going to see later in the day, isn't that right? (memory/perception question)

A: Yes.

DEFENDANT'S ATTORNEY: So you weren't paying close attention to what Chuck might have said to you, isn't that right? (sincerity/perception question)

A: I could do both things.

As may be apparent, Dave's offering Chuck's statement for a non-hearsay use allows Melinda's attorney to conduct meaningful cross examination. What is relevant to the case is whether Chuck made the statement, whether Dave heard it, and if so how the statement might have affected Dave's driving. These non-hearsay uses provide Melinda's attorney with a fair opportunity to test Dave's sincerity, memory and perception.

Practice Tip: Identifying non-hearsay uses. Out-of-court statements do not come neatly packaged with tags listing "possible non-hearsay uses" attached. If you become a litigator, your pretrial preparation is often likely to include developing arguments supporting non-hearsay uses for helpful out-of-court statements that you cannot offer under a hearsay exemption or exception. Anticipating potential objections, you will also commonly develop arguments that the non-hearsay purposes you have identified are relevant and that the

statements' probative value outweighs the risk that jurors will improperly consider them for their truth. For more on non-hearsay uses, see Chapter 11.

[C] Why Not Admit Hearsay "For What It's Worth?"

You might concede that the admission of hearsay is apt to frustrate cross-examination, yet argue that Rule 802's general policy of excluding hearsay is unwarranted. After all, if it accomplishes nothing else, the first cross-examination above should serve as a warning to a sensible judge or juror that the accuracy of the bystander's hearsay assertion is untested. You could support your argument with the results of empirical evidence, admittedly based on simulated jury studies, suggesting that jurors are wary of untested hearsay.[4]

If this is so, why not routinely admit hearsay (at least in "small cap" cases) and rely on judges and jurors to discount its weight according to the circumstances? If we trust them to evaluate the probative worth of other evidence, shouldn't we also trust them to evaluate the probative worth of hearsay? Moreover, trial judges would retain the power under Rule 403 to exclude hearsay when particular circumstances wouldn't allow for a reasonable assessment of hearsay's probative value; in such situations, the hearsay's probative value might be substantially outweighed by the likelihood of confusion or undue consumption of time. Also, a rule of general admissibility would be much more coherent and easier for judges and lawyers to apply in the heat of battle than a rule of exclusion accompanied by a bewildering array of non-hearsay uses and hearsay exemptions and exceptions. And the resultant time that students would save in the Evidence course could be profitably devoted to the study of oil and gas leases!

If this is your attitude, you're not alone. In fact, you can point to the support of an entire country — England's adversary system very much resembles our own, yet in the Civil Evidence Act of 1968 the English Parliament largely abolished the hearsay rule in civil cases. However, American rule-makers have thus far been unwilling to reverse the general policy of excluding hearsay. They would probably respond to an "admit hearsay for what it's worth" argument as follows:

- In many circumstances, judges and especially jurors are unable to rationally assess hearsay's probative value. They'd be guessing, based on unarticulated and untested assumptions, and in general would probably be inclined to accord hearsay assertions more weight than they are "really" worth.
- If hearsay were generally admissible, crafty lawyers would "witness shop," producing impressive witnesses who could repeat the hearsay assertions of percipient witnesses of questionable demeanor or background.
- The hearsay rule as presently constituted enables lawyers to predict with at least a fair amount of accuracy whether an out-of-court

[4] (3) *See, e.g.*, Margaret Covers, Roger Park & Steven Penrod, *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 Minn. L. Rev. 703 (1992).

assertion will be admitted into evidence. This predictability helps lawyers plan trial strategies, and may also foster pretrial settlements.

- The hearsay rule protects cross-examination, a fundamental trial right that is too important to be left to the uncertain whims of judges and jurors with varying degrees of judgment, experience and common sense.
- The current format of the hearsay rule is flexible enough to satisfy those who think that hearsay ought to be generally admissible. First, rule-makers can craft new exceptions as they deem warranted, and have done so.
    - *Example*: Many states have in recent years enacted a "tender years" hearsay exception for young children's out-of-court assertions of abuse.
    - *Example*: In response to the exclusion of prosecution evidence in the famous 1995 murder trial of O.J. Simpson, California enacted a new hearsay exception (Cal. Evid. Code Sec. 1370) for statements describing physical injuries made by victims who are unavailable to testify at trial.

Second, Rule 807's residual ("catch-all") exception allows judges to admit hearsay that they deem reliable even if it doesn't fall into one of the pre-existing exceptions. If these changes don't go as far as some would like, they perhaps relieve the pressure for a general change of hearsay policy.

[D] "Hearsay Policy" Problems

Problem 10-1: The Telephone Game

True or False: The primary risk that the hearsay rule is designed to prevent is exemplified by "The Telephone Game," in which a message tends to change as it's whispered from one person to the next. That is, the hearsay rule exists because of worry that witnesses will inaccurately report out-of-court assertions.

Problem 10-2: Beyond Question?

Slip and fall case. To prove that she slipped on a wet spot in a restaurant, Lynn Oleum offers into evidence signed and sworn affidavits from three community religious leaders who happened to be dining in the restaurant that night. Each affidavit declares under oath that the affiant saw Lynn's foot slip on a wet spot on the floor. The restaurant objects that the affidavits are hearsay. Lynn argues that the affidavits are not barred by Rule 802 because like in-court testimony they were made under oath and because the stature and number of the declarants renders the hearsay dangers negligible. *Ruling?*

Problem 10-3: What's The Use?

Bart Harbour is charged with illegally poaching seals on Seal Rock in Acadia Cove. Bart's defense is that he was unaware that it was against the law to

capture seals. (Assume that this is a legitimate defense to the charge.) The prosecution calls Davy Jones and elicits testimony that he is Acadia's Covemaster. The examination continues as follows:

PROSECUTOR: Are you familiar with a location known as Seal Rock?

A: I am. Seal Rock is in Acadia Cove, about 50 yards offshore. It's a large oval-shaped rock about 25 yards in length and about 10 yards across where seals breed and are commonly present.

PROSECUTOR: Are there any notices posted on Seal Rock?

A: Yes indeed. There are 2 signs on the Rock with large dark letters at the top saying "Illegal to Hunt or Harm Seals" and indicating that both federal and state laws forbid human contact with seals.

DEFENDANT'S ATTORNEY: Objection, hearsay, move to strike the last answer. The notices are out-of-court statements offered for their truth.

PROSECUTOR: *How will you respond to the objection?*

Problem 10-4: Hearsay Expert

You are speaking to the Hearsay Rule Sub-Committee of the Congressional Federal Rules of Evidence Oversight Committee. They have asked for your views on a proposal that the Rule 801 definition of hearsay be retained, but that Rule 802 be amended to provide that "The admissibility of hearsay is committed to the discretion of the trial judge, and trial judges' rulings shall be final except for manifestly unjust rulings that are likely to have affected a verdict. Existing hearsay exceptions shall serve only as factors that trial judges may take into account when making their rulings." *What advice will you give the Sub-Committee as to the wisdom of this proposal?*

§ 10.06 WHO ARE "DECLARANTS?"

[A] Definitions and Examples

The next portions of the chapter examine the three additional elements of Rule 801's definition of hearsay. Begin with the term "declarant," the maker of an out-of-court statement. The typical hearsay situation involves two people: the declarant (the speaker who makes the statement) and the witness (who testifies to the statement in court).

Example 1

PLAINTIFF'S ATTORNEY: What happened after the defendant's car collided with yours?

A: A bystander walked over to me and said that the car that hit mine ran the red light.

Here, the declarant is the bystander; the driver is the witness.

The hearsay definition limits declarants to "persons." Pity the animals; not only are most all of them barred from restaurants, but also they can't be

declarants. Likewise, the output of mechanical devices like thermometers and speedometers is not hearsay.

Example 2

A prosecution witness in a murder case testifies as follows:

PROSECUTOR: What time did you hear the gunshots?

A: It was 3:00 P.M.

PROSECUTOR: And how do you know that the shots were fired at 3:00 P.M?

A: Because I looked at my watch as soon as I heard the gunshots, and according to my watch it was 3:00.

No hearsay declarant exists. The watch is a mechanical device and cannot "assert" that the time was 3:00.

Example 3

A landlord in an eviction case testifies as follows:

PLAINTIFF'S ATTORNEY: And what is it that wakes you up every morning?

A: I hear roosters crowing in the tenant's backyard.

No hearsay declarant exists; roosters are not declarants. (The cross-examination justification for the hearsay rule suggests that this aspect of the rule makes good sense, preventing attorneys from making demands such as, "Get those roosters into this courtroom so I can cross-examine the living daylights out of them.")

[B] "Declarant" Problems

Problem 10-5: Where's The Declarant?

Are there hearsay declarants in these scenarios?

1. As evidence that a statement was made by a computer store employee, the plaintiff seeks to testify that "I phoned the number that was listed for the computer store in my telephone book."

2. To prove the magnitude of her damages in a personal injury case, professional basketball player Shirley Knott offers into evidence the "Statistics" section from the daily newspaper, showing that she was leading the league in blocked shots on the day of her injury.

3. To prove that the Fizzy Cola Co. owned and operated a truck that was involved in an accident, a bystander seeks to testify that painted on the side of the truck was a logo that read, "Fizzy Cola — The Healthy Cola."

4. Yon is called as a witness and testifies that "My name is Yon Yonsin, I come from Wisconsin."

Problem 10-6: Bloody Glove

Lerna Hand is charged with murder. To prove Lerna's identity as the murderer, the prosecution calls Police Officer Tracy, who testifies as follows:

PROSECUTOR: What led you to arrest Lerna?

A: I held the bloody glove that I found at the murder scene up to the nose of Cinders, the police bloodhound I've personally trained. Cinders sniffed the glove for a few moments and followed a scent directly to Lerna.

DEFENDANT'S ATTORNEY: Objection, hearsay. Cinders' behavior is the equivalent of the out-of-court statement, "Lerna was the murderer." I also object that the evidence of the dog's behavior is irrelevant.

PROSECUTOR: (*How can you respond to these objections?*) Assume that the judge summons counsel to the bench and asks you for an "offer of proof" concerning the foundational testimony that you will elicit from Officer Tracy to support the relevance of Cinders' behavior. (*What will your offer of proof consist of?*)

Problem 10-7: Polly Wants A Conviction

Laurel is charged with murdering Hardy; Laurel's defense is an alibi. To prove Laurel's identity as the murderer, the prosecution calls Police Officer Tracy, who testifies as follows:

PROSECUTOR: When did you arrive at Hardy's apartment?

A: Approximately 5 minutes after receiving the call reporting that gunshots had been heard coming from the apartment.

PROSECUTOR: What did you see when you entered the apartment?

A: I saw Hardy lying in a pool of blood on the floor, and a parrot in a cage in the same room.

PROSECUTOR: What if anything did the parrot do while you were in the room?

A: The parrot repeatedly squawked, "Laurel, why'd you do it? Laurel, why'd you do it?"

DEFENDANT'S ATTORNEY: Objection, hearsay.

PROSECUTOR: No hearsay is involved, Your Honor, because the parrot is not a declarant.

JUDGE: (*What is your response to the prosecutor's argument?*)

Problem 10-8: News To Me

Ethel is charged with murdering Fred in the apartment they shared. To prove the time of the killing, the prosecution calls next-door neighbor Lucy, who testifies as follows:

PROSECUTOR: What time did you hear the gunshots?

A: I heard them at 3:00 P.M.

PROSECUTOR: And how do you know that?

A: Because I had been listening to the radio and I heard the shots right after the announcer said "Here's the 3:00 news." At the same time, I was looking out the window of my apartment, and I saw Quasimodo, the village's long-time

bell-ringer, climb the church tower and by pulling the rope he rang the church bells three times.

DEFENDANT'S ATTORNEY: Objection, hearsay.

PROSECUTOR: No hearsay is involved, Your Honor. The radio and the church bells are mechanical devices.

JUDGE: (*What is your response to the prosecutor's argument?*)

Problem 10-9: Photo Finish

Auto accident case. To prove the extent of the damages to his car, plaintiff Phil offers into evidence a photograph of the car, taken shortly after the accident. Defendant Dean objects that the photo is hearsay because it constitutes an assertion about the car's condition. *Is this a valid argument*

Plaintiff's counsel: If the hearsay objection is overruled, offer the photograph into evidence after laying a proper foundation through the testimony of Phil.

Problem 10-10: Print — Out?

Auto accident case. To prove the value of her car that was totaled in the accident, plaintiff Paula's attorney makes the following request:

> "Your Honor, I ask that Plaintiff's Exhibit #1 be received in evidence. Exhibit #1 is a computer printout taken from the Used Car Dealers Internet Website, indicating the fair market value for plaintiff's make and model of car."

In response to defendant Deena's hearsay objection, plaintiff states that the printout is machine-generated, so no declarant is involved. *How should the judge rule?*

Problem 10-11: My Better Side

Kay Mart is charged with armed robbery of a department store. The prosecution offers into evidence a videotape taken by the store's security camera, showing Kay in profile pointing a gun at the store clerk and grabbing cash out of the register. In response to Kay's hearsay objection, the prosecution responds that the video camera that is the source of the videotape is not a hearsay declarant. *How should the judge rule?*

Problem 10-12: Just the Ticket

Romero is on trial for speeding. Officer Ward testifies that at around 2 p.m. on October 12, she was assigned to traffic detail on Cyclone Ave., a residential street with a speed limit of 30 m.p.h. She was standing outside her patrol vehicle when she observed Romero's Camaro coming in her direction. Her testimony continues as follows:

PROSECUTOR: Officer Ward, what happened after you first observed Romero's Camaro?

A: I raised my radar gun and pointed it in the direction of the Camaro. I focused the radar gun on the car until a reading appeared on the screen indicating the speed of the car.

PROSECUTOR: And what was that speed?

A: 53 m.p.h.

DEFENDANT'S ATTORNEY: Objection, hearsay. The radar gun reading is an out-of-court assertion because it resulted from the officer's pointing it in the direction of the Camaro.

PROSECUTOR: (*What is your response to defense counsel's argument?*)

§ 10.07 WAS THE STATEMENT MADE "OUT-OF-COURT?"

[A] General Rule

A statement is made "out-of-court" if it is made any time other than by a witness during the trial in which the statement is offered. Even if a statement has been given under oath and in a courtroom proceeding, for purposes of the hearsay rule it is an out-of-court statement if it was not made during the trial in which it is offered.

[B] "Out-of-Court" Problems

Problem 10-13: On My Word

Pola sues Dana for personal injuries growing out of an auto accident. During the trial, in an effort to prove that Dana ran a stop sign, counsel for Pola makes the following request:

> Your Honor, I ask that Pola's Exhibit # 2 be received in evidence. Exhibit # 2 is an excerpt from the transcript of the testimony that Stan gave when Dana's attorney took Stan's deposition. In this deposition excerpt, Stan testified that Dana's car ran a stop sign before colliding with Pola's car.

Does the deposition excerpt constitute an out-of-court statement?"

Problem 10-14: On My Word Again

In Problem 10-13, counsel for Pola makes the following request:

> Your Honor, I ask that Pola's Exhibit #3 be received in evidence. Exhibit #3 is an excerpt from the transcript of the prior trial of this case, which resulted in a mistrial. In this excerpt from the prior trial, Stan testified that Dana's car ran a stop sign before colliding with Pola's car.

Does the trial excerpt constitute an out-of-court statement?

Problem 10-15: Big Mouth

In Problem 10-13, counsel for defendant Dana cross-examines plaintiff Pola as follows:

DEFENDANT'S ATTORNEY: You had just finished talking on your cellular phone when the collision occurred, correct?

A: I wouldn't say that. I'd finished talking at least 3 – 4 minutes before the collision.

DEFENDANT'S ATTORNEY: You talked about this case with a friend in the back of the courtroom during the court's morning recess, didn't you?

A: Just a little bit.

DEFENDANT'S ATTORNEY: Didn't you tell your friend during this recess that you'd finished the call just moments before the collision?

Is defense counsel's last question an attempt to offer evidence of an out-of-court statement?

Problem 10-16: Same Ol', Same Ol'

In Problem 10-13, plaintiff Pola testifies as follows:

PLAINTIFF'S ATTORNEY: What speed were you driving just before the collision occurred?

A: Exactly as I told the police officer who showed up soon after the accident, I was driving no more than 25 m.p.h.

Has the plaintiff testified to an out-of-court statement?

§ 10.08 WHAT IS A "STATEMENT?"

[A] Definition and Examples

With this definitional underbrush behind you, consider Step One of the 5 Step Hearsay Matrix: "Does evidence constitute an out-of-court statement?" No matter what it's offered to prove, an out-of-court utterance can constitute hearsay only if it qualifies as a "statement." This term generally poses no problem under Rule 801(a), as it applies broadly to all intentional or purposeful oral or written assertions.

Example 1

PLAINTIFF'S ATTORNEY: What happened after the collision?

A: A bystander walked over to my car and said that the car that hit me had run a red light.

The bystander's post-collision remark is an assertive statement concerning a past event.

Example 2

PLAINTIFF'S ATTORNEY: What happened next?

A: Ann told me that she was going to go to Joe's office and sign the contract.

Ann's remark is an assertive statement concerning an intended future act.

Example 3

PLAINTIFF'S ATTORNEY: Police Officer Tracy, did you observe the traffic collision?

A: I did.

PLAINTIFF'S ATTORNEY: Prior to the collision, did you observe the defendant's BMW?

A: Yes.

PLAINTIFF'S ATTORNEY: And did you prepare a written Accident Report afterwards?

A: I did.

PLAINTIFF'S ATTORNEY: And does that Accident Report refer to the defendant's BMW?

A: Yes. The Accident Report states that the blue BMW ran the red light.

The statement in the Accident Report is a written assertion.

Subdivision (a) of the Advisory Committee's Note to Rule 801 states that "The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or non-verbal, not intended as an assertion." Because the definition equates the term "statement" with "intent to assert," a verbal remark constitutes hearsay only if the speaker intended to make the assertion that the statement is offered to prove.

Example 6

Testimony of plaintiff in a negligence action:

PLAINTIFF'S ATTORNEY: And what happened after you got out of your car following the collision?

A: I grabbed the back of my neck and yelled, "Ouch."

"Ouch" constitutes a non-assertive verbal reflex reaction admissible to prove that the plaintiff was in pain. Because the statement is reflexive, it is not the equivalent of the plaintiff's purposeful assertion, "My neck hurts."

[B] Hidden Statements

Rule 801's formulaic definition of hearsay as a statement offered "to prove the truth of the matter asserted" would produce unjust anomalies were it to be applied mechanically to speakers' literal words. People can express the same thought in a myriad of ways. If the hearsay rule is to be fair and sensible,

decisions about whether a statement is hearsay should depend on what people intend to communicate, and not merely on the happenstance of their chosen words. Similarly, people may communicate through behavior instead of or in addition to making statements, and when they do it makes sense to treat behavior as assertions.

The subsections below describe common situations in which statements are hearsay even though the words are not offered for their literal truth.

[1] Sub-Assertions

A party might try to avoid the hearsay rule by offering a statement into evidence for the truth of a sub-assertion. The party might claim that "There's no hearsay problem because since I'm not relying on the truth of the entire statement, but only on the accuracy of a sub-assertion, I'm not offering the statement for its literal truth." However, this argument doesn't work because a declarant's intent extends to sub-assertions.

Example

Jill is charged with a murder that occurred at the top of a hill around 3 p.m. To prove that Jill had the opportunity to commit the murder, the prosecutor calls a witness to testify that at around 4 p.m. on the day of the murder, a friend told the witness, "About an hour ago, I saw Jack and Jill run up the hill to fetch a pail of water." In response to the defense attorney's hearsay objection, the prosecutor argues that "I'm offering the statement only to prove that Jill ran up the hill at around 3 p.m. I'm not offering the portion of the statement referring to the pail of water. Since I'm not offering the entire statement for its literal truth, it's not hearsay." The argument fails because the declarant's intent extends to the sub-assertion about the time of day, and the sub-assertion's relevance depends on its accuracy.

[2] Linked Assertions

You often have to go "outside" the boundaries of a speaker's specific remark to decide whether it constitutes an assertion and if so, what it asserts. That is, you often have to link a speaker's statement to the context in which it is made to determine whether it constitutes an assertion for hearsay purposes. For example, assume that a conversation between Al and Ed includes the following question and answer:

Al: Did Jenni run the red light?

Ed: Yes.

Here, Ed's statement has meaning only if you link it to Al's question. Ed's linked assertion is that "Jenni ran the red light."

The context that demonstrates assertiveness may consist not only of a linked remark, but also of a linked eveat. For example, assume that after watching a golfer sink a hole-in-one, Monica says with a sigh, "Someday maybe that will be me." The context suggests that Monica has asserted that "I have never had a hole-in-one."

[3] Invisible Assertions

An assertion may be implied even though neither the question nor the answer refers to it explicitly. This commonly occurs when information is presented as based on a witness' own perceptions, when in reality the witness is simply a conduit for information supplied by an invisible declarant.

Example 1

PLAINTIFF'S ATTORNEY: Following the accident, did you talk to the plaintiff?

A: I did.

PLAINTIFF'S ATTORNEY: After talking to the plaintiff, what was your belief as to whether the defendant had run a red light?

A: I had the firm impression that the defendant had run a red light.

Here, neither the questions nor the answers explicitly refer to an out-of-court assertion. Yet it's obvious that the witness' "firm impression" is based on the plaintiff's out-of-court assertion that the defendant ran the red light. Since that explicit out-of-court assertion would be hearsay, so is the witness' "firm impression."

Invisible assertions are not always as apparent as in the example above. Consider this next testimonial excerpt.

Example 2

PLAINTIFF'S ATTORNEY: Did your spouse talk to the landlord?

A: Yes.

Here, the dialogue itself furnishes no clue as to whether the answer represents the witness' first-hand knowledge, or information imparted to the witness by the spouse (or by someone else). If the cross examiner has reason to believe the latter, the cross examiner may ask the judge for "permission to take the witness on *voir dire* for the purpose of asking foundational questions." If the judge grants permission and the foundational questioning reveals a previously invisible assertion, the cross examiner may be able to exclude the testimony on hearsay grounds. The process might unfold as in the following example.

Example 3

PLAINTIFF'S ATTORNEY: Did your spouse talk to the landlord?

DEFENDANT'S ATTORNEY: Excuse me, Your Honor, permission to ask a few *voir dire* questions?

JUDGE: For what reason, Counsel?

DEFENDANT'S ATTORNEY: For the purpose of showing that the witness' answer is hearsay.

JUDGE: Well, I'll permit just a few questions. The jury may remain in the courtroom.

* Judges have discretion to permit mid-examination interruptions for foundational questioning. Depending on the likely length of the voir dire questioning and the risk that the voir dire questioning will disclose to the jury important information that the judge might later determine is inadmissible, the judge also has discretion to decide whether the voir dire questioning should be conducted out of the jury's hearing. *See* Rule 104 (c).

DEFENDANT'S ATTORNEY: Were you personally present when your spouse talked to the landlord?

A: No.

DEFENDANT'S ATTORNEY: So is it fair to assume that your awareness whether your spouse talked to the landlord is based on your spouse havi told you that such a conversation took place?

A: Yes, that's right.

DEFENDANT'S ATTORNEY: Based on the witness' testimony, I object based on hearsay grounds to the witness' testifying to whether the spouse talked to the landlord.

JUDGE: I'll sustain that objection. Let's resume direct examination.

In *United States v. Brown*,[5] an income tax preparer was charged with tax fraud for overstating deductions on nearly all the tax returns he prepared. At trial, a government agent testified that she had examined the tax returns prepared by the defendant and had found that they consistently overstated deductions. The government agent never referred to out-of-court assertions during her testimony. However, the court concluded that the agent could only have known that deductions were overstated on the tax returns if the agent had talked to the taxpayers for whom the returns were prepared and been told by the taxpayers what information they had supplied to the defendant. Since the government agent's testimony "had to have been based" on out-of-court assertions, the court held that the agent's testimony was improper hearsay and reversed the conviction.

[4] Vicarious Assertions

A vicarious assertion consists of a statement made by a declarant that is treated as though it had been made by a different person, who typically is a party to the lawsuit in which the assertion is offered. Rule 801(d)(2) enumerates four types of vicarious assertions, and Chapter 13 examines each of them.

Example

Butch and Sundance are charged with robbing the Last National Bank. The prosecution offers evidence that Sundance and Butch drove to the bank

[5] 548 F.2d 1194 (6th Cir. 1977).

together, that Sundance waited in the car outside the bank with the motor running while Butch ran into the bank and held it up at gunpoint, and that Butch then ran out of the bank and jumped into the car as Sundance sped off. While inside the bank, Butch told the teller that "We've got guns and we're prepared to shoot if necessary." In Sundance's trial, under Rule 801(d)(2)(e) a judge would treat Butch's assertion as though Sundance had made it because they conspired together to rob the bank and the statement was made in the course of the robbery.

[5] Assertive Conduct

As defined in Rule 801(a), a statement includes "nonverbal conduct of a person, if it is intended by the person as an assertion." When a person uses non-verbal conduct as a substitute for verbal expression, treating the conduct as hearsay makes sense. The hearsay dangers are virtually the same, whether declarants communicate through words or conduct.

Example 1

PROSECUTOR: Police Officer Tracy, what happened after you took the defendant to the police station?

A: We conducted a lineup.

PROSECUTOR: Was Vic Timm present to observe the lineup?

A: Yes.

PROSECUTOR: And what happened?

A: I asked Vic if he recognized any of the people in the lineup as the person who held up the convenience store. Vic pointed to Number 3.

For hearsay purposes, Vic's act of pointing is a statement, the equivalent of a verbal assertion, "Number 3 is the robber." A conclusion that No. 3 robbed the store depends on Vic's sincerity as well as on the accuracy of his perception and memory. Even a form of the narrative danger remains. For example, did Vic point at the person he meant to identify?

By contrast, non-verbal conduct that does *not* reflect an intent to assert is not hearsay. "Pure conduct" (that is, conduct not intended as an assertion) is not hearsay because it is not communicative and therefore does not invoke the hearsay dangers.

Example 2

Testimony of Bystander in an auto accident case:

PLAINTIFF'S ATTORNEY: What happened before you saw the defendant's car collide with the plaintiff's car?

A: I saw the defendant's car swerving back and forth.

PLAINTIFF'S ATTORNEY: Did anything else happen before the collision?

A: Yes. A pedestrian who had started to cross the street when the light changed to green had to dive back to the corner to avoid being hit by the defendant's car.

Both the car's swerving and the pedestrian's reactions constitute non-assertive (pure) conduct tending to prove that the defendant was driving dangerously. The defendant's driving cannot reasonably be regarded as the defendant's chosen means of communicating the idea that "I am driving dangerously." Nor are the pedestrian's reactions an intended way of asserting that "the defendant is driving dangerously" or "I'm frightened." The defendant is driving and the pedestrian is diving for cover; neither is engaged in communicative conduct.

While non-assertive conduct may not raise *hearsay* concerns, conduct may be ambiguous and if so its admission may raise *relevance* concerns. Assume, for example, that a party seeks to prove that a ship was seaworthy. The party's witness is an onlooker standing on a dock who testifies that an experienced ship captain looked over the ship from stem to stern, then set out to sea in it. The captain's behavior appears to be non-assertive conduct from which a judge or juror may infer that the ship was in good condition.

However, because the captain did not verbally explain what he was doing, the relevance of his behavior is uncertain. Perhaps the captain was not conducting a safety inspection, but instead was looking for the piece of chewing gum that he had stuck onto the side of the ship a few days earlier. Or, perhaps the captain was suicidal and sailed off despite recognizing that the ship was likely to sink. The point is that behavior unaccompanied by verbal explanations may be ambiguous. If this fact does not render the evidence of conduct irrelevant, it may reduce its probative value and hence make a judge more likely to exclude it under Rule 403.

[6] Implied Assertions

The concept of "implied assertions" raises issues that Rule 801's definition of hearsay cannot necessarily resolve. Implying an assertion presents no difficulty when declarants' words do not literally express their intended meaning. Again, people can express the same thought in many different ways. To prevent unfair outcomes based on insignificant and random variations in declarants' particular word choices, judges need only apply the hearsay rule as though the intended meanings had been expressed explicitly.

For example, assume that Pedro is a plaintiff in an auto accident case. If Pedro were to testify that a bystander told Pedro, "Dan's car ran the stop sign," the bystander's assertion would be hearsay if offered to prove that Dan drove negligently. But assume that Pedro testifies that the bystander had made one of these remarks:

- "I can't believe that Dan didn't notice the stop sign."
- "Dan's car was an accident waiting to happen."
- "Look at how Dan was driving and tell me that we don't need more traffic cops on our streets."
- "Teen age daughter of mine, I don't ever want you driving like Dan."
- "Wow — what driving!"
- "Didn't Dan's car go through a stop sign?"

In each instance, Pedro might argue that the hearsay rule doesn't apply because he is not trying to prove that statements are literally accurate. For example, Pedro might say that "I'm not offering the third statement to prove that more traffic cops are needed on the streets. Therefore the remark is not hearsay." Similarly, Pedro might argue that "The last two utterances are not assertions-one is an exclamation and the other is a question." However, a judge could reasonably conclude that in each instance the bystander simply chose different ways of intentionally expressing the same idea: that Dan was driving carelessly. If so, it's fair to apply the hearsay rule to what the bystander intended to assert. Otherwise, hearsay rulings would turn on inconsequential variations in word choices.

When the relevance of a statement depends on the accuracy of a declarant's belief, many commentators continue to argue that the statement should be treated as hearsay regardless of the declarant's intent. The famous (to Evidence aficionados, anyway) English case of *Wright v. Tatham* exemplifies their argument.

Decided by the House of Lords in 1838, the case grew out of a will contest filed by Admiral Tatham (pronounced "Tatum"), the sole surviving heir of his wealthy uncle, the decedent John Marsden. Admiral Tatham's financial expectations were shattered when Uncle John left his entire estate to John's steward, Wright. Seeking what he no doubt considered his proper due, the Admiral sought to have Uncle John's will set aside on the ground that his uncle was mentally incompetent at the time he made the will. The hearsay issue involved a series of letters that Wright sought to offer into evidence to prove that Marsden was sane. Marsden had moved from England to America, and the letters at issue were written to Marsden by various acquaintances and relatives of his in England. The letters were quite ordinary. For example, one described a sea voyage that the letter writer had taken, and another asked Marsden to propose a settlement to help resolve a property dispute back in England. Wright's theory in offering the letters into evidence was that since people would not write such letters to a man who had lost his marbles, the letters constituted evidence that Marsden was competent when he signed his will. Moreover, since Wright was not offering the letters for the truth of what they asserted (for example, Wright was not trying to prove that the account of the sea voyage was accurate), the letters were not hearsay.

The majority of the House of Lords excluded the letters as improper hearsay. The reasoning was that just as the letters would have been hearsay had the letter writers directly asserted that "Marsden was sane," so should they be hearsay when a party asks for an inference of sanity to be drawn from the writers having corresponded with Marsden in a way that suggested that the writers believed him to be sane. In the words of Baron Parke, "The letters which are offered only to prove the competence of the testator, that is the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible."

From the standpoint of the hearsay dangers, the outcome in *Wright v. Tatham* seems justifiable. The declarants' (letter writers') statements allow an inference that Marsden was sane only if their belief that he was sane was

accurate. Thus, Admiral Tatham's lawyer could make a strong argument for needing to test the accuracy of their belief through cross examination. The Admiral's lawyer might have wanted to probe their *sincerity*: they may have only pretended to think that Marsden was competent, perhaps to curry favor in the hopes of being remembered in an eventual will. Similarly, the lawyer may have wanted to probe their *perception* and *memory*: had the letter writers had a sufficient opportunity to evaluate Marsden's competence in England? What did they know of his competence since he'd moved to America? And since Marsden had moved to America some time before the letters had been written, how accurate were the letter writers' memories of Marsden's competence?

The existence of the hearsay dangers leads many evidence scholars to consider the outcome in *Wright v. Tatham* to be "good" law.[6] But it is probably not "good law" under Rule 801. Remember that under Rule 801, the hearsay rule applies only to verbal or non-verbal language "intended as an assertion." Most judges ruling on the admissibility of the letters today would reason that they are not hearsay unless the letter writers intended to assert that "Marsden was sane." In the absence of such an intent, the letters constitute non-hearsay. Subdivision (a) of the Advisory Committee's Note to Rule 801 acknowledges that the credibility of such assertions is untested, but states that the "Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds."

U.S. v. Zenni (*see* Case Library) exemplifies Rule 801's approach to unintended assertions. In that case, police officers lawfully entered the defendant's residence to look for evidence of illegal bookmaking activity. While they were inside the premises, the officers answered the phone a number of times. The callers asked for bets to be placed on various sporting events, saying such things as "Put $50 on Dipsy Doodle in the 5th race at Hialeah." The prosecution offered the phone callers' statements into evidence to prove that the defendant had been engaged in bookmaking. In other words, just as Wright had offered the contents of letters as circumstantial evidence of the letter writers' beliefs that Marsden was sane, so the prosecutor in *Zenni* offered the contents of the phone calls as circumstantial evidence that the callers believed that they were calling a bookmaker, leading to a further inference that the defendant was a bookmaker. The *Zenni* court held that the calls were non-hearsay. Since it was "obvious that these persons did not intend to make an assertion" that the defendant was a bookmaker, the calls were not barred by Rules 801-802.

Zenni represents the majority approach to "implied assertions." When a declarant's out-of-court assertion is used as circumstantial evidence that a fact that is not directly asserted is true, the assertion is hearsay only if the judge concludes that the declarant intended to assert the fact. However, by making the outcome turn on judges' assessments of declarants' "intent," the *Zenni* approach to whether implied assertions constitute hearsay requires subjective judicial interpretation and thereby creates uncertainty as to the application of the hearsay rule.

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[6] *See, e.g.*, C. Mueller & L. Kirkpatrick, Evidence 717 (3d ed. 2003) ("If *Wright* arose today under Rule 801, how should the case be decided? The question is surprisingly hard, and two answers are both defensible.").

Practice Tip: Developing arguments that implied assertions are hearsay. The continuing debate over the application of the hearsay rule to implied assertions creates space for you to argue that a judge should consider an unintended assertion to be hearsay and therefore exclude it. The more difficult textual support for such an argument is that *Zenni* and cases like it have simply misinterpreted Rule 801(a)'s definition of what constitutes a "statement." *Zenni* reads the final phrase, "if it is intended by the person as an assertion," as applying both to "oral or written assertions" and to "nonverbal conduct." However, the placement of the comma in Rule 801(a) can give rise to a plausible argument that the phrase "if it is intended by the person as an assertion" applies only to "nonverbal conduct." Under this interpretation, the phrase "oral or written assertion" may encompass not only what a declarant intended to assert, but also the declarant's subjective beliefs that underlie the assertion, regardless of whether or not the declarant intended to assert those beliefs. You may also make a broader policy-based argument asking a judge to rule that an implied assertion is hearsay by stressing that the "hearsay dangers" exist when judges admit implied assertions into evidence as non-hearsay. For example, examine the phone callers' statements in *Zenni*. Statements such as "put $50 on Horse Hide to win the 3rd race at Aqueduct" are relevant to prove that the recipient of the phone call is a bookie *if* the caller was sincere about wanting to place a bet and *if* the caller correctly perceived and remembered that the phone number belonged to a bookie. If your argument persuades a judge that the presence of the hearsay dangers undermines the reliability of an unintended assertion, the judge might exclude an out-of-court statement as hearsay.

A Note on Terminology

The term "implied assertions" is unfortunately subject to the risk of ambiguity described earlier in the chapter. Some lawyers, scholars and judges who agree with the analysis above may use the label "implied assertion" to mean that a statement is *not* hearsay. You have to be careful to look behind the label to determine whether a judicial opinion or a lawyer or scholar who uses it means that a declarant intended to make an assertion.

[C] "Statement" Problems

The following problems focus on whether offered evidence constitutes a "statement." Evidence might constitute a statement yet ultimately be admissible for a non-hearsay purpose or under a hearsay exception.

Problem 10-17: Flight

Andy Amo is charged with murdering Smith. Prosecution witness Magoo is prepared to testify that Magoo heard gunshots and saw Amo running away from where the shots came from. Amo argues that as the prosecution will claim that Amo's running away shows that Amo was involved in the killing, evidence of his running constitutes testimony to an out-of-court assertion, "I'm the murderer." *Is this a valid argument?*

Problem 10-18: Knock Knock

Lucy is charged with shooting and killing Schroeder in his apartment on May 1 at around 2 a.m.; Lucy's defense is an alibi. Which if any of the following excerpts of testimony allow the prosecution to establish Lucy's presence at the scene of the shooting without offering evidence of an out-of-court assertion?

1. Charlie will testify that he was talking on the phone to Schroeder on May 1 at around 2 a.m. when he heard what sounded like a knock on a door. Shortly afterward, Charlie heard Schroeder say, "Hi, Lucy, come on in."

2. Charlie will testify that he was talking on the phone to Schroeder on May 1 at around 2 a.m. when he heard what sounded like a knock on a door. Shortly afterward, Charlie heard Schroeder say, "Lucy, you've never looked better."

3. Charlie will testify that he was talking on the phone to Schroeder on May 1 at around 2 a.m. when he heard what sounded like a knock on a door. Shortly afterward, Charlie heard Schroeder murmur, "Hmm, I wonder what Lucy is doing here?"

4. Charlie will testify that he was talking on the phone to Schroeder on May 1 at around 2 a.m. when he heard what sounded like a knock on a door. Charlie will further testify that Lucy always lets people know she's at the door by knocking in a way that imitates the theme of Beethoven's Fifth Symphony, and that's the sound of the knock that Charlie heard when he was talking to Schroeder.

5. Charlie will testify that "I visited Lucy three days after the shooting. I saw an open wall safe, looked inside and found a locked diary. I broke open the lock and looked through it, and I recognized the handwriting as Lucy's. I took it with me and gave it to the police." The prosecution offers the last entry of the diary into evidence; it reads, "May 1, 2 a.m.. Visited Schroeder's apartment."

6. None of the above involves out-of-court assertions.

7. All of the above involve out-of-court assertions.

Problem 10-19: Hard Landing I

Flora Walker sues McBroccoli's for personal injuries after she allegedly slipped and fell on a puddle of mustard that the restaurant had failed to clean up. To prove that the floor was unsafe, Flora testifies that while lying on the restaurant's floor after having slipped, Flora heard one nearby diner say to another, "Why are restaurant personnel so careless these days?" McBroccoli's objects that the diner's remark is hearsay. Flora responds that the utterance is non-hearsay as the diner's remark does not constitute an out-of-court assertion. *Is Flora's response valid?*

Problem 10-20: Hard Landing II

Same case as previous example. To prove that the floor was unsafe, Flora proposes to testify, "I'll say again what I've said all along, that there was a

huge blob of mustard on the floor." *Does Flora's testimony constitute an out-of-court assertion?*

Problem 10-21: Hard Landing III

Same case as previous example. To prove that the floor was unsafe, Flora proposes to testify, "Just before I slipped and fell, I noticed a McBroccoli's employee walking towards the spill holding a pail and a mop." *Is Flora testifying to an out-of-court assertion by the employee that "There's a spill on the restaurant's floor?"*

Problem 10-22: Help!

Caryl is charged with sexually assaulting Lorna in a car parked in a secluded spot. To counter Caryl's claim of consent, the prosecution seeks to have Lorna testify that she repeatedly honked the car's horn in an effort to summon help during the assault. *Is Lorna testifying to her own out-of-court statement?*

Problem 10-23: Take Notes

Breach of contract action filed by Cain against Abel. Never having testified in court before, Cain is very nervous. Therefore, in response to direct examination questions, Cain testifies by looking at the written notes he made before trial and paraphrasing what he had written. *Is Cain testifying to out-of-court statements?*

Problem 10-24: Raise a Glass

In the breach of contract action that Cain filed against Abel, Abel's defense is that the parties never finalized the contract. To prove that the parties reached an agreement during lunch at Denny's on September 22, Cain calls a Denny's server to testify that "I served lunch to Cain and Abel on September 22, and saw them toast each other with wine glasses at the conclusion of the lunch." *Is the server testifying to Cain's or Abel's out-of-court statement?*

Problem 10-25: Cell Phone

Jack Carr is charged with carjacking. Jack's defense is that he was walking down the street when a car pulled over and the driver, a stranger, asked Jack to circle the block once or twice so the stranger could pick up an order in a nearby store. When the car's owner hadn't returned after Jack circled the block once, Jack drove a few blocks away and was arrested. To prove that Jack stole the car, the prosecutor seeks to have the arresting officer testify to searching Jack incident to the arrest and finding a cell phone in his pocket. The phone rang and the officer answered it. The caller said, "The nearest chop shop is on Maple Avenue. Turn left on Maple and go about 10 blocks, then drive up the blue driveway on the right." (A "chop shop" quickly breaks down stolen cars for their parts.) *Is the caller's statement hearsay if offered against Jack? If offered against the caller?*

Problem 10-26: Loot Lips

Jekyll is charged with bank robbery on June 4. To prove Jekyll's guilt, the prosecution calls Louie to testify as follows:

PROSECUTOR: On June 5, who was in the apartment when you arrived?

A: Hekyll and Jekyll.

PROSECUTOR: Were they both in the same room as you?

A: Yes. We were all in the living room.

PROSECUTOR: What happened after you entered the living room?

A: I saw stacks of money on a coffee table. Hekyll said that the money was the take from the bank job that he and Jekyll had pulled off the day before. Jekyll then asked me if I wanted a cup of tea. I said no, and we all left to go to the art museum to see the Impressionists exhibit.

DEFENDANT'S ATTORNEY: Objection and move to strike the last answer as irrelevant because no statement of Jekyll's pertaining to the bank robbery has been offered.

JUDGE: (*What ruling?*)

Problem 10-27: Slippery Slope I

The parents of Josie, a developmentally disabled eight-year-old child, sue Josie's school after Josie allegedly broke her shoulder on September 22 when using an unreasonably dangerous slide on the schoolyard without adult supervision. Josie lacks the capacity to testify. However, to prove that Josie was injured while playing on the slide, her father Wilfrid seek to testify that a few days after the accident, he walked slowly around the schoolyard with Josie and that Josie suddenly began to cry hysterically as they approached the slide. The school district's attorney objects on the ground that Josie's behavior constitutes evidence of an out-of-court statement. *As the judge, would you sustain the school district's objection?*

Problem 10-28: Slippery Slope II

In the same case, the school district seeks to offer evidence that a few days before Josie was injured, the mother of Jeff, another child with similar developmental problems, examined the slide and then allowed Jeff to play on it.

- *Student # 1*: You are the attorney for Josie's parents. Identify the inference that the school district is likely to ask the jury to draw from the evidence of Jeff's mother's actions. Might you object to this evidence on the grounds of hearsay or lack of relevance? If so, present the argument you would make in support of your objection.
- *Student # 2*: You are the attorney for the school district. Support the admissibility of the evidence of Jeff's mother's actions with an argument that they are relevant and do not constitute out-of-court assertions.

Problem 10-29: Slippery Slope III

During the pre-trial discovery phase of the same case, the attorney for the school district takes the deposition of Josie's mother. During the deposition, Josie's mother testifies as follows:

> Q (by the school district's attorney): Do you know a father of a child in the school by the name of Max?
>
> A: Yes, Max Dietrich.
>
> Q: Did you ever talk to Max about Josie's injury?
>
> A: Yes.
>
> Q: And what did Max tell you about how Josie got hurt?
>
> Attorney for Josie: Objection, the question calls for hearsay.

What is the effect of this objection on the deponent? Can the plaintiff's attorney instruct the client/deponent not to answer the question? Why might the plointiff's attorney make this objection?

Problem 10-30: Slippery Slope IV

At the conclusion of pre-trial discovery in the same case, the school district submits a Motion for Summary Judgment. The Motion asks for the suit to be dismissed on the ground of lack of evidence that the school was responsible for Josie's injuries. Included in motion is an Affidavit of Leonard Vole. Vole's affidavit states in part that "My son attends the same school as Josie. I saw Josie in the schoolyard on September 22. When Josie left the schoolyard with her caregiver around 3 p.m., Josie was unhurt. On September 23, Max Dietrich, a father whose child attends the same school, told me that he was also in the schoolyard on September 22, and that he saw Josie leave the schoolyard unhurt on that day. Max further told me that as Josie and her caregiver crossed the street, Josie stumbled and fell to the ground. According to Max, Josie immediately grabbed her shoulder and began to cry loudly.

What if any portion of this Affidavit constitutes hearsay? If Josie's parents object on the ground of hearsay, should the judge sustain the objection? What are the consequences of the judge sustaining the objection?

Problem 10-31: Beersay

Tommy Ake sues The Microbrewery after he allegedly developed food poisoning as a result of drinking improperly brewed beer on the night of March 12. To prove that its beer was not the source of any symptoms that Tommy may have had, Microbrewery's manager offers to testify that the restaurant served 153 other patrons on the night of March 12 and that the manager received no other complaints about the beer. Tommy makes a hearsay objection on the ground that evidence of the lack of complaints is the equivalent of the other patrons' out-of-court assertion, "The beer was fine on March 12." *Is this a valid argument?*

Problem 10-32: Eye Message

Jerry is charged with armed robbery. Jerry's friend Tom is present when Jerry is arrested in his apartment. The prosecution seeks to have Officer Tracy testify that after the officer told Jerry why he was under arrest and administered the "Miranda" warnings, Jerry winked at Tom and said, "Don't you remember that I was with you at the time of the robbery?"

- The defense attorney objects to Officer Tracy's characterizing Jerry's eye movement as a wink. *As the judge, respond to this objection.*
- The defense attorney objects to Officer Tracy's testimony that, "The defendant's wink meant that he wanted Tom to agree to a phony alibi." *As the judge, respond to this objection.*
- The defense attorney objects to evidence of what Jerry said as hearsay. As the judge, you should rule that:

  1. The evidence is not hearsay because Jerry is asking Tom a question, not making an assertion.

  2. The evidence is not hearsay because Jerry did not make an assertion.

  3. Under the circumstances, the judge should consider Jerry's conduct as the equivalent of the out-of-court statement, "Tom, I want you to make up an alibi for me."

  4. The evidence is not hearsay because Jerry spoke in the presence of a police officer.

Problem 10-33: A Civil Action

Environmental suit by a citizens' action group against a factory owner for allegedly polluting a stream that runs by the factory. The plant manager testifies on the factory owner's behalf as follows:

DEFENDANT'S ATTORNEY: Why did you and the plant's owner walk to the stream?

A: We were giving a tour of the factory and the grounds to a group of foreign manufacturers' representatives.

DEFENDANT'S ATTORNEY: What happened when you got to the stream?

A: The owner dipped a cup into the stream and took a drink of water.

PLAINTIFF'S ATTORNEY: Objection, hearsay. Evidence that the owner drank water from the stream is the equivalent of the owner's assertion that the stream is not polluted.

JUDGE: Defense Counsel, any response?

DEFENDANT'S ATTORNEY: Yes, Your Honor, just briefly. The owner clearly did not intend an assertion. It's not like the owner drank water from the stream during a televised news conference. Drinking the water was simply non-assertive conduct, admissible as evidence that the water is safe.

JUDGE: (*Does the owner's conduct constitute the owner's out-of-court assertion?*)

Problem 10-34: Need Moe Money

Sally sues Moe Torist for personal injuries resulting from a car accident. To prove that Moe was at fault, Sally offers to testify that after the collision, Sally walked over to Moe and said, "This was all your fault." Moe responded by saying "let's just exchange insurance information and get out of here." *Has Moe made a tacit out-of-court statement that he was at fault?*

Problem 10-35: A Ticket, Attack It

Margarita received a ticket in the mail from City for running a red light. The ticket is accompanied by two photos taken by a camera posted at the intersection that automatically takes photos of cars that run red lights. One photo depicts the car entering the intersection, the other depicts the driver. Margarita decides to fight the ticket in court. *Can she exclude the photos on the ground that they constitute out-of-court statements?*

To show that the camera was functioning properly, City offers an Operating Report that the camera equipment produces when it records a car running the red light. *Can Margarita exclude the Operating Report on the ground that it constitutes an out-of-court statement?*

Problem 10-36: Brief Case I

Hawkeye is charged with possession of illegal drugs that were found in a briefcase. To prove that the briefcase in court is the one in which the illegal drugs were found, the prosecution calls Officer Marple to testify that "I recognize the briefcase as the same one because it has the name 'Hawkeye' embossed on the side." *Is the officer testifying to the briefcase owner's out-of-court statement?*

Problem 10-37: Brief Case II

Same case as Problem 10-36. To prove that the briefcase in which the illegal drugs were found belongs to Hawkeye, the prosecution calls Officer Marple to testify that "The briefcase in which I found the drugs had the name 'Hawkeye' embossed on the side." *Is the officer testifying to the briefcase owner's out-of-court statement?*

Problem 10-38: Alibi-Bye

Rosie Olla is charged with murder; her defense is an alibi. To disprove Rosie's alibi, the prosecution calls Officer Gomez to testify that the officer arrested Rosie in Rosie's mother's apartment on the afternoon of the murder. When informed of the charge, Rosie immediately said that she'd been with her mother all day long. At that point, Rosie's mom fainted. *Does the mother's fainting constitute an out-of-court assertion?*

Problem 10-39: At the Movies: Take Dictation

In the film *The Wrong Man,*[7] Manny goes into a loan office to seek a loan. The employees think that he is the man who robbed them about a month earlier using a note that instructed the employee to hand over the money in the cash drawer, but misspelled the last word as "drawer". A loan office employee calls the police, who arrest Manny. At the police station, a police officer twice dictates the handwritten note that the robber used in the course of the robbery, each time asking Manny to write down by hand what he dictates. The second time Manny writes down what the police officer says, Manny leaves the "er" off the final word, "drawer". Assume that Manny is charged with the robbery and the prosecution wants to offer into evidence the copies of the robbery note that Manny wrote from the police officer's dictation. *Do the copies constitute out-of-court statements by Manny?*

§ 10.09 COMMON HEARSAY MISCONCEPTIONS

In an effort to spare you some of the anguish felt by previous generations of law students, the subsections below clarify common hearsay misconceptions.

[A] "It's Not Hearsay If You Paraphrase"

One common misconception is that what the hearsay rule prevents is testimony to a declarant's exact words. Paraphrasing, then, seemingly avoids the hearsay problem. For example, a questioner seeking to introduce evidence that a bystander saw the defendant's car run a red light might try to avoid the hearsay rule by phrasing the question as follows:

Q: Without using the bystander's exact words, can you give us the gist of what the bystander said to you following the collision?

The ploy fails. No matter how loosely paraphrased a declarant's out-of-court assertion, the answer is hearsay if it's offered for the truth of its contents. In other words, the hearsay analysis of these answers would be identical:

a. "The bystander said, 'The Mercedes ran a red light.' "

b. "The bystander indicated that the light for the Mercedes was red."

c. "The bystander indicated that the Mercedes entered the intersection illegally, after the light had changed."

d. "The bystander indicated that the Mercedes driver failed to follow the driving laws."

[B] "It's Not Hearsay If the Witness Is Also the Declarant"

As mentioned earlier, the typical hearsay situation involves two people: the declarant, and the in-court witness who testifies to the declarant's out-of-court assertion. Perhaps a resulting misperception is that the hearsay rule is

[7] Universal Pictures (1956).

inapplicable when the declarant and the in-court witness are one and the same person. In reality, when a witness testifies to the witness' own out-of-court assertion, the hearsay analysis is identical. To be admissible, the out-of-court assertion must qualify either for a non-hearsay use or a hearsay exception. For example, consider this brief testimonial excerpt:

PLAINTIFF'S ATTORNEY: And on that date and time, what happened?

A: I saw two cars collide.

PLAINTIFF'S ATTORNEY: Did you speak to either of the drivers after the collision?

A: I did. I walked over and spoke to the driver of the blue car.

PLAINTIFF'S ATTORNEY: And what did you say to the driver of the blue car?

A: I told the driver that the Mercedes ran the red light.

In this example, if what the witness said to the driver of the blue car is hearsay, it is hearsay regardless of whether the driver or the witness testifies to the statement.[8]

This outcome seems to conflict with the earlier notion that hearsay protects a party's opportunity to cross-examine adverse witnesses. If the witness and the hearsay declarant are one and the same person, the adversary does in fact have an opportunity for cross-examination. In the example above, for example, the defense attorney can cross-examine the witness concerning what the witness said to the Mercedes driver. Therefore, you might argue, the hearsay bar should not apply when witnesses testify to their own out-of-court statements.

A technical response to this argument is that the hearsay rule provides the opportunity for *contemporaneous* cross-examination. In other words, the statement is hearsay because the cross-examiner did not have an opportunity to question the declarant *at the time the out-of-court statement was made.* This may not strike you as a compelling counter-argument, since cross-examination is never fully contemporaneous. Perhaps a better one is simply this: if the witness is in court, *the witness should testify to the event, not to the out-of-court statement.* Witnesses are supposed to provide judges and jurors with their best current recollections of past events, and they should testify to what they saw or heard, not to what they said out of court about what they saw or heard. Thus, no hearsay problem would arise had the testimony above gone as follows:

PLAINTIFF'S ATTORNEY: And on that date and time, what happened?

A: I saw two cars collide, a blue car and a Mercedes.

PLAINTIFF'S ATTORNEY: Did you notice either of the cars prior to the collision?

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[8] Rule 801(d)(1) does provide three categories of hearsay exceptions (though defined by the Federal Rules of Evidence as "non-hearsay") based on a declarant also testifying in court. Chapter 12 considers these "exceptions." At this point, it is enough that you realize that out-of-court statements are not routinely admissible simply because the people who made them also testify at trial.

A: Yes. I saw the Mercedes, and it ran the red light.

[C] "The Statement Isn't Hearsay If It's Circumstantial Evidence"

When an out-of-court statement is offered as the basis of an inference that the offering party wants the fact finder to draw, a common misperception is that the statement isn't offered for its truth because the fact asserted and the conclusion are different. In reality, *if the inference depends on the accuracy of the out-of-court statement*, the statement is hearsay.

Example

In a wrongful termination case, the plaintiff claims that she was illegally fired because of her physical disability. The plaintiff seeks to testify that, "Around the time I was fired, a co-worker told me that she had seen my boss painting over the handicapped parking symbols in the office parking lot." The plaintiff offers the testimony to prove that the boss was antagonistic to people with physical disabilities, from which the fact finder might further infer that the plaintiff's disability was the reason for the firing. The co-worker's statement is hearsay, because the plaintiff's desired inferences cannot be drawn unless the fact finder concludes that the co-worker's statement is accurate.

[D] "It's Not Hearsay If The Statement Was Made in a Police Officer's Presence"

A fourth misperception (sometimes known as the "Philadelphia" or the "Chicago" exception to the hearsay rule) is that anything said in the presence of a police officer is admissible in evidence. As you'll see, a police officer's presence can be a relevant factor in some hearsay situations. However, no general doctrine admits out-of-court statements simply because they were made in a police officer's presence.

Practice Tip: "Who would I need to cross-examine?" If you are uncertain as to whether something said out-of-court is a statement that is offered for its truth, you might ask yourself the question, "Who would I need to cross-examine at the time a statement is made?" If you cannot conduct meaningful cross-examination in the absence of the person whose words are offered into evidence, that is a signal that the words constitute hearsay.

§ 10.10 HEARSAY REVIEW PROBLEMS

Problem 10-40: Carded

Benny Han is charged with burglary in Denver, Colorado. Benny's defense is mistaken identity, and he testifies that he was in Georgia state at the time of the burglary. To substantiate this claim, Benny seeks to introduce into evidence a Credit Card Receipt from Clark's Shoe Shop for the purchase of

slippers. The Receipt indicates an address for Clark's in Atlanta, Georgia and is dated September 12, the day of the burglary. Benny's credit card number is on the receipt. *Does the Receipt constitute a statement for purposes of the hearsay rule? If your answer is "yes," identify the declarant and the out-of-court assertion.*

Problem 10-41: Loretta

Loretta has been sued by homeowner Dion Tology for fraudulently inducing Dion to sign a home improvement contract. *Which if any of the items of evidence below would constitute out-of-court assertions if offered by Dion to prove that Loretta made false statements to Dion about the terms of the contract?*

1. One of Loretta's business associates told Loretta that "At least I don't go around making false statements to customers."

2. The Better Business Bureau revoked Loretta's membership.

3. Loretta has been sued by three other customers for fraudulently inducing them to sign home improvement contracts.

4. One of Loretta's former customers said, "I'm never going to do business with Loretta again."

5. Loretta was fired by the home improvement company that had employed her as a salesperson.

6. Before Dion signed the contract, a neighbor told Dion to "be careful when dealing with Loretta."

7. Another neighbor asked Dion, "Is Loretta still doing business?"

8. Another neighbor told her husband, "Don't answer the door," when she looked out the window and saw it was Loretta who was ringing the bell.

9. Another neighbor looked out his window, saw it was Loretta ringing the bell, and refused to come to the door.

10. A citizen's action group set a pile of home improvement contracts on fire as part of a silent vigil in front of Loretta's office.

Problem 10-42: Stat!

The plaintiff in a medical malpractice case offers the following testimony of an operating room nurse to prove that the plaintiff had a life-threatening medical condition:

PLAINTIFF'S ATTORNEY: And what did the head nurse say just before the plaintiff's operation got underway?

A: The head nurse told me to order an additional three pints of blood.

DEFENDANT'S ATTORNEY: Objection, hearsay.

PLAINTIFF'S ATTORNEY: It's not hearsay because the head nurse's remark does not constitute an assertion under Rule 801. The head nurse was simply requesting additional blood, not intending an assertion about the plaintiff's medical condition.

JUDGE: (*Is this a valid response to the objection?*)

PLAINTIFF'S ATTORNEY: It's also not hearsay even if you rule that the nurse intended to assert that the plaintiff needed additional blood. I'd be offering that assertion only as the basis of an inference that the plaintiff had a life-threatening medical condition. Since I'd be offering the remark to prove something other than what it asserts, it's not hearsay.

JUDGE: (*Is this a valid response to the objection?*)

Problem 10-43: No Parking

Ruth seeks to prove that she paid a parking ticket by offering the items of evidence listed below. *Which if any of the items constitutes an out-of-court assertion that Ruth paid the ticket?*

1. Ruth's testimony that she went to the Department of Motor Vehicles two days after she received the ticket and paid it.

2. A Department of Motor Vehicles videotape depicting Ruth handing money to a Department employee.

3. A copy of the ticket, stamped "Paid" and dated two days after the ticket was issued.

4. The absence of Ruth's name on a list compiled by a Department of Motor Vehicles employee entitled "List of Vehicle Owners With Unpaid Parking Tickets."

5. None of the above.

6. All of the above.

Problem 10-44: Instant Replay

Walt Mart is charged with stealing a jacket from a department store. The prosecution offers into evidence a videotape made by the store security guard who observed the theft. The security guard testifies that she made the videotape moments after the defendant's arrest by having a store employee play the role of the defendant and re-create the theft. Following the security guard's instructions, the videotape depicts the employee walking up to the jackets, looking around, picking up a jacket and putting it on, and quickly walking out of the store. The defense makes a motion to exclude the videotape, claiming that it constitutes an out-of-court assertion. *Should the judge sustain the objection?*

Problem 10-45: Bettor Beware

In *Zenni*, the court ruled that phone callers' remarks such as "Put $50 on Ocean Wafer to win the 5th race at Pimlico" were not assertions when offered to prove that the location they were calling was used for bookmaking. The defendant to whom the phone number belonged is charged with illegal bookmaking and has pleaded not guilty.

Student # 1: You are the police officer who arrested the defendant. You answered the phone at least five times during the half hour period you were at the bookmaking site, and in each case the caller gave an account number

and placed bets of varying amounts on such events as horse racing, football, basketball, ice hockey and tiddlywinks. You responded only with comments such as "O.K." or "You're down." (You made notes of what the phone callers said immediately after each call, and the judge has given you permission to refer to those notes during cross-examination if necessary to answer the defense counsel's questions.)

Student # 2: You are the defense attorney, and will cross-examine the arresting officer. You'll try to undermine the probative value of the phone calls as evidence that your client was engaged in bookmaking.

Remainder of Class: You are jurors whose task is to evaluate the probative value of the phone call evidence. Also, consider whether the defense attorney had a reasonable opportunity to test the callers' sincerity, perceptions and memories.

§ 10.11 HEARSAY AND THE CONFRONTATION CLAUSE

Both the hearsay rule and the Sixth Amendment's Confrontation Clause further the goals of the adversary system by protecting a criminal defendant's right to cross-examine adverse witnesses. If the hearsay rule excludes prosecution evidence, then of course the evidence is inadmissible against a criminal defendant. However, if a hearsay exception renders prosecution evidence admissible, might it nevertheless be excludable under the Confrontation Clause? Step 5 of the Hearsay Matrix raises this question, and over the years the U.S. Supreme Court has answered it in conflicting ways.

A good place to start is the U.S. Supreme Court's 1970 decision in *California v. Green*.[9] In *Green*, the prosecutor called a witness who testified to a remarkable inability to recall any of the events tying the defendant to the charged crime. The judge then allowed the prosecution to offer into evidence the statement that the witness had given to a police officer soon after the crime. The statement conflicted with the witness' in-court inability to recall by providing ample evidence of the defendant's guilt. Under the California rule, the witness' statement to the police officer was admissible for the truth of its contents and the defendant was convicted largely on the basis of that statement. The Court ruled that admission of the out-of-court inconsistent statement for the truth of its contents did not violate the Confrontation Clause, because the witness' presence at the trial assured the defendant of full and effective cross examination.

The Court expanded on *Green* in a line of cases deciding that the Confrontation Clause did not necessarily require prosecutors to produce witnesses whose hearsay statements were offered into evidence against defendants. In *Ohio v. Roberts*,[10] the Court ruled that the Confrontation Clause was satisfied whenever hearsay was admissible under a "firmly rooted" hearsay exception. That is, if hearsay was admissible under a firmly rooted hearsay exception, it was also admissible against criminal defendants under the Confrontation

[9] 399 U.S. 199 (1970).

[10] 448 U.S. 56; 100 S. Ct. 2531 (1980).

Clause. Because many of the hearsay exceptions that prosecutors commonly relied upon were held to be "firmly rooted," the Confrontation Clause normally imposed no greater burdens on prosecutors than those imposed by Rules 803 and 804. The only hearsay that most courts would ordinarily admit against defendants fit the standard exceptions and passed constitutional muster almost automatically.

Further narrowing the scope of the Confrontation Clause, the same line of cases determined that the Clause did not necessarily bar hearsay that prosecutors offered pursuant to non-firmly rooted hearsay exceptions (such as Rule 807, the residual exception). Prosecutors could offer hearsay that satisfied the foundational requirements of non-firmly rooted exceptions against criminal defendants so long as the declarants were unavailable and their statements had "indicia of reliability." Under these cases, Confrontation Clause analysis revolved around determining the reliability of hearsay assertions offered pursuant to non-firmly rooted exceptions.[11]

Crawford v. Washington (2004) literally yanked out these principles by their roots. *Crawford* (*see* Case Library) re-planted the constitutional soil with a principle that admissibility for Confrontation Clause purposes turns on whether hearsay assertions are *testimonial*. *Crawford* held that testimonial statements made by non-testifying declarants can be admitted against a criminal defendant only if the defendant has had a previous opportunity to cross-examine the declarant. If a defendant has not had an opportunity to cross-examine, the hearsay is inadmissible, no matter how reliable it may appear to be and no matter how firmly rooted a hearsay exception is.

In *Crawford*, the defendant was charged with attempting to kill a man who had allegedly tried to rape his wife, Sylvia. Police officers interviewed Sylvia following the altercation. At trial, the defendant prevented Sylvia from testifying by taking advantage of a "spousal privilege." (*See* Chapter 17). The prosecution offered a tape recording of Sylvia's statement to the police into evidence under Rule 804(b)(3) because it undermined Crawford's self-defense claim. *Crawford* decided that Sylvia's statement should have been excluded because it was "testimonial." Protection against the use of testimonial assertions, said the Court, was the core of the Confrontation Clause. Thus, testimonial statements made by non-testifying declarants can be admitted against a criminal defendant only if the defendant has had a previous opportunity to cross-examine the declarant. As Crawford had not had a formal opportunity to question Sylvia concerning the information in her tape-recorded statement (even though his own privilege claim prevented her from testifying), the Confrontation Clause rendered the statement inadmissible.

The *Crawford* opinion did not offer a comprehensive definition of testimonial statements. Grounding the concept on the constitutional Framers' presumed understanding of what the right to confrontation entailed, the opinion opted for examples. According to the opinion, testimonial statements include affidavits, statements given to police officers in the course of custodial interrogations, depositions, courtroom testimony, and "statements that were made

[11] Courts had to evaluate "indicia of reliability" by considering only the circumstances under which hearsay statements were made, and could not point to statements' consistency with other facts to conclude that the statements were reliable.

under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

By limiting the reach of the Confrontation Clause to testimonial hearsay, the Court insured that the clause sometimes will play a lesser role under *Crawford* than under the line of cases that it overruled. After all, those earlier cases meant that a hearsay statement made by one private party to another and offered under a non-firmly rooted exception had to have "indicia of reliability" to be admissible. Under *Crawford*, by contrast, private party conversations are not state-generated and therefore are unlikely to implicate the Confrontation Clause. Admissibility of such statements, then, rests exclusively on hearsay principles.

At the same time, when the state seeks to offer testimonial hearsay into evidence against criminal defendants, *Crawford* affords defendants far greater protection than prior law. *Crawford* allows no leeway for judges to substitute "indicia of reliability" or any other factor for cross-examination. If a declarant does not testify at trial, testimonial hearsay is inadmissible unless the defendant has previously had an opportunity to cross-examine the declarant.

Two years after *Crawford*, the Supreme Court again wrestled with the testimonial concept when it decided the companion cases of *Davis v. Washington* and *Hammon v. Indiana*. (*See* Case Library). In *Davis*, domestic violence victim Michelle McCottry called a 911 operator and reported that her boyfriend had beaten her and had just run out the door. The Court held that McCottry's statements were not testimonial because they were not the result of a police interrogation concerning a past crime. Rather, the 911 operator sought to resolve an ongoing emergency. Thus McCottry was not a *witness providing testimony*, but instead was a frightened victim seeking police assistance to assure her safety. In *Hammon*, the Court ruled that domestic violence victim Amy Hammon's statements to police officers were testimonial because the violence had ended by the time the police arrived and spoke to her. Thus "the interrogation [by the police officer] was part of an investigation into possibly criminal past conduct" and "there was no emergency in progress" when the police interrogated her. Summarizing the two situations, the Court stated its reasoning as follows:

> Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The upshot of *Crawford*, *Davis* and *Hammon* is that the Confrontation Clause excludes only testimonial hearsay. Its reach thus rests on how extensively judges interpret the term testimonial. In *Crawford*, the Court criticized the "indicia of reliability" criterion established by *Roberts* and its progeny as a vague and empty standard. Whether courts are able to develop greater uncertainty around concepts such as "emergency situation" and "primary purpose" remains to be seen. (*Crawford* would not have changed the

outcome of *Green*. While the hearsay statement offered into evidence in *Green* was clearly testimonial as *Crawford* uses the term, the declarant in that case personally testified at trial.)

Practice Tip: The Difficulty of Prosecuting Domestic Violence Cases. More than coincidence accounts for the fact that *Davis* and *Hammon* both involved domestic violence. Intimidated domestic violence victims frequently refuse to cooperate with prosecutors and often absent themselves from their abusers' trials. As a result, to secure convictions prosecutors often need to offer victims' hearsay statements into evidence. In *Davis,* the Court acknowledged that in these situations "the Confrontation Cause gives the criminal a windfall," but refused to "vitiate constitutional guarantees." At the same time, the Court pointed to a possible way out for prosecutors: the forfeiture provision of Rule 804(b)(6). If prosecutors can demonstrate that an abuser intimidated his victim into refusing to testify, the abuser "forfeits the constitutional right to confrontation." See Chapter 15 for further discussion of Rule 804(b)(6).

Practice Tip: Pretrial Depositions to Satisfy Crawford. Prosecutors might react to *Crawford's* interpretation of the Confrontation Clause by making witnesses who have made out-of-court statements that are admissible under the hearsay rule available for cross examination prior to trial. Since confrontation either at or before trial satisfies *Crawford*, scheduling depositions at which defense lawyers can question witnesses might allow prosecutors to offer hearsay into evidence at trial should the witnesses later become unavailable. Of course, witnesses who make themselves unavailable for trial might try to make themselves equally unavailable for pre-trial depositions. However, when formal pretrial questioning is feasible and the importance of the case and the feared unavailability of the witness at trial combine to outweigh the time and expense, depositions are one way that prosecutors can satisfy *Crawford.*

In jurisdictions in which defendants are bound over for trial based on preliminary hearings rather than Grand Jury proceedings, prosecutors can satisfy *Crawford* by questioning witnesses at preliminary hearings. The reason is that defendants have an opportunity to question government witnesses at preliminary hearings. However, defendants are not present at Grand Jury proceedings and of course have no opportunity to question witnesses who testify before grand juries. Thus, pretrial depositions may be of particular value in jurisdictions that rely on Grand Jury proceedings.

Problem 10-46: Scarred

Ross Marshall is charged with armed robbery of a department store. Just after the culprit ran out of the store, a customer ran over to the victimized clerk and said, "I got a good look at the robber. He had a big scar on his right cheek." The prosecutor calls the clerk to testify to the customer's statement to prove that Marshall, who has a facial scar, was the robber. Assume that the customer's statement would be admissible under the "excited utterance" exception to the hearsay rule (*see* Chapter 14). *The effect of the Confrontation Clause is that*:

1. The customer's statement is testimonial, and if the customer is unavailable to testify at trial the customer's statement is inadmissible unless Marshall has had a previous opportunity to cross examine the customer.

2. Even if the customer's statement is testimonial and the customer is unavailable to testify, the statement is admissible if it has "indicia of reliability."

3. Since the customer's statement is non-testimonial, its admissibility is not affected by the Confrontation Clause.

4. The Confrontation Clause allows the prosecution to offer the customer's statement into evidence only if the customer testifies at Marshall's trial.

Problem 10-47: Tender Years

Wilson Narita is charged with sexually molesting his four year old stepdaughter, Claire. The judge rules without conducting a hearing that "Four year old children are too young to testify. They can't really understand the duty to tell the truth and the courtroom experience would be psychologically damaging. Therefore I rule that Claire is unavailable as a witness."

1. *Is the judge's determination proper?*

With Claire having been deemed unavailable to testify at Narita's trial, the prosecution calls Antonia, a child protective services worker who works for the county, to testify to a statement that Claire made to her. Antonia testifies at a foundational mini-trial that Claire told her that "My daddy keeps putting his thing on my pee pee." Antonia talked to Claire privately at Claire's preschool, in response to a call from Claire's teacher reporting that Claire had been unusually lethargic and non-responsive for a few days. Antonia further testifies in the mini-trial that after a few minutes of conversation about the pre-school, Antonia asked Claire if anything was wrong. Claire then made the statement about her father. The prosecution offers Claire's statement into evidence under the jurisdiction's "tender years" hearsay exception, which applies to statements made by children under the age of 12 describing acts of sexual abuse or neglect.

2. *Is Claire's statement testimonial? If so, what are the consequences of its being testimonial?*

3. *Might the answer to No. 2 be different if Claire's statement had been made to her babysitter rather than to a child protective services worker?*

Problem 10-48: The Volunteer

Thayer is charged with attempted murder growing out of a drive-by shooting. The government offers evidence that Thayer and the victim, Morgan, belonged to rival violent gangs. Thayer denies any involvement in the shooting. The State seeks to offer into evidence a statement made by Rev. Jim Summers to a police officer shortly before the shooting. Summers, a minister who works to rehabilitate street gang members, voluntarily called a friend who is part of the police gang unit to say that "Better get some cops on the street. I just overheard Thayer say that he's going to take out Morgan." Assume that Thayer's and Summers' statements are both admissible under exceptions to the hearsay rule. *If Summers is unavailable to testify at Thayer's trial and Thayer has not previously had an opportunity to cross examine Summers, can the prosecutor call the police officer to testify to Summers' statement?*

Problem 10-49: It's Not What You Say, It's Where You Say It

Devin Michaels is charged with armed robbery. The prosecutor seeks to offer into evidence a hearsay statement made by Edna O'Toole stating that O'Toole saw the defendant with loot taken in the robbery. Assume that O'Toole's statement would be admissible as a matter of hearsay law. If O'Toole is unavailable to testify at Michaels' trial, the prosecution could offer her hearsay statement into evidence under the Confrontation Clause if:

1. O'Toole made the statement while testifying under oath to the Grand Jury that indicted Michaels.

2. O'Toole made the statement while testifying at Michaels' preliminary hearing. Michaels represented himself at the preliminary hearing and had a chance to but did not cross examine O'Toole at that time.

3. After reading a story about the armed robbery in her local newspaper, O'Toole voluntarily called the Police Department "Hot Line" and recorded a message describing what she had seen.

4. O'Toole made the statement while testifying for the prosecution in the trial of Michael's co-conspirator, Sally Welch. Welch was tried separately prior to Michaels, and Welch's lawyer thoroughly cross-examined O'Toole in the earlier trial.

Problem 10-50: There Goes the Neighbor Hood

1. Hope is charged with selling illegal drugs. Hope's partner in the illegal business was Benny, and the prosecution seeks to offer into evidence against Hope a conversation that Benny had with Diller. In the conversation Benny described how he and Hope did business because he believed that Diller planned to join the partnership. In fact, Diller was an undercover police officer who recorded the conversation. When Benny refuses to testify against Hope, the prosecution offers into evidence the recording of Benny's conversation with Diller. Assume that Benny's statements would be admissible in evidence against Hope under the co-conspirator exception to the hearsay rule (*see* Chapter 13). *Are Benny's statements to Diller testimonial for purposes of the Confrontation Clause?*

2. Change the forgoing problem as follows: (a) Benny is on trial for selling illegal drugs; (b) Benny's statements to Diller that the prosecution seeks to offer into evidence were made after Diller arrested and interrogated Benny. Assume that as a matter of hearsay law, Benny's statements are admissible as party admissions (see Chapter 13). *How should the judge rule on the following argument of Benny's attorney:*

> *Your Honor, I object to the admission of Benny's statements to Officer Diller. Those statements are clearly testimonial. Moreover, my client intends to exercise the constitutional right to remain silent by not testifying at trial. The statements are thus inadmissible under* Crawford, *because Benny's exercise of the right to remain silent means that the defense has no opportunity to question or cross examine Benny. To admit Benny's statements inta evidence would improperly punish Benny for exercising a constitutional privilege.*

Arthur Kirkland (Al Pacino) can't take it any more in . . . *And Justice For All.**

Problem 10-51: Brothers in Law-lessness

The Urban Police Department (UPD) has created a special task force in an effort to cripple a violent street gang, the 17th Street Crisps, headed by the Sam brothers, Flot and Jett. The UPD has distributed Fill-In-The-Blank Witness Sheets to residents and merchants in the gang's area. The witness sheets ask people to "join in the Crisps Crackdown" by filling out a sheet as soon as they become aware that a crime is in progress. They are to fax the sheets to a special phone number. When a police dispatcher receives a fax, the dispatcher immediately notifies gang unit officers, who are generally on patrol in the area.

In this case, Flot and Jett are charged with murder. The prosecutor seeks to offer into evidence a Witness Sheet prepared by Molly McGovern. McGovern wrote: "Flot and Jett — hiding in the neighbor's bushes, loading handguns. Wearing dark clothes. Pointing guns at dark sedan. Shots fired. F. and J. jump into blue sedan, driving away south on 17th." The police dispatcher received the fax at 10:02 a.m., a few moments after the time other witnesses reported hearing shots fired.

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With McGovern unavailable as a witness, the prosecutor offers her Witness Sheet into evidence. *Are the statements on the Witness Sheet testimonial? Was it prepared in the course of an ongoing emergency? What was the UPD's primary purpose in asking people to fill out Witness Sheets, and what is the significance of that purpose for admissibility?*

Problem 10-52: About Time

John Ramirez is charged with murder that took place about two decades earlier. Ramirez was a fugitive from justice during this period. A search incident to Ramirez's arrest produced a knife with a distinctive cutting pattern. Based on the medical examiner's 20 year old report describing the victim's fatal wounds, prosecution expert witness Lorena Edwards is prepared to testify to an opinion that a high probability exists that the knife found in the defendant's possession when he was arrested is the type of knife that caused the fatal wounds. Having passed away during the period when Ramirez was a fugitive from justice, the medical examiner is not available for cross examination. *Is Edwards' testimony admissible over a Confrontation Clause objection?*

Problem 10-53: Potpourri

Consider the admissibility of hearsay evidence under the Confrontation Clause in the following circumstances:

1. James is charged with DUI. Officer Ahmadi is prepared to testify that she administered a "breathalyzer" test to James and that according to the readout James' blood alcohol level was .15, well over the state's legal limit of .08. (*Is the readout of the breathalyzer machine testimonial?*) To prove that the breathalyzer machine was working properly at the time of the test, the prosecutor seeks to offer into evidence a document titled Breathalyzer Test Record. The Record was prepared by an employee of a private company that regularly tests police department equipment, and it states that the breathalyzer was tested the day before James' arrest and that it was at that time in proper working order. *Assume that the Breathalyzer Test Record would be admissible in evidence as a matter of hearsay law. Does the Record constitute a testimonial statement?*

2. Milt is charged with assaulting Nguyen with a deadly weapon. Officer Ahmadi finds Nguyen lying dazed and bleeding in an alley. The officer asks Nguyen, "What happened? Are you OK? Should I call an ambulance?" Nguyen then says to the officer, "Thank God! Don't know why, somebody wearing a Star Wars mask ran out of the back door of a store and slugged me with a metal pipe. My head hurts so bad." *Assume that Nguyen's statement would be admissible in evidence as a matter of hearsay law. Is the statement testimonial?*

3. Green is charged with the premeditated murder of Venutti. Supporting Green's defense of insanity is Dr. Loeb, who testifies that Green suffered from schizophrenia and that because Green had not been taking his prescribed antipsychotic medications, Green was incapable of planning or understanding that he could harm another human being. In rebuttal, the prosecutor calls Dr.

Leopold. Dr. Leopold's opinion is that Green suffers only from a mild form of schizophrenia, and that Green committed the murder to prove that he is a superior human being who can get away with crime. Dr. Leopold arrived at this opinion after extensively examining Green and interviewing Green's parents. *If Green's parents are unavailable to testify and Green has not previously had an opportunity to cross examine them, would the Confrontation Clause prevent Dr. Leopold from testifying to their statements?*

4. Marian is called by the prosecutor to testify in a bank robbery prosecution in which the defense is mistaken identity. Marian identifies the defendant as the person who ran past her as she walked towards the bank moments after it was robbed. Marian further testifies that she paid particularly close attention to the defendant because as she approached the bank she heard an unidentified person call out from the bank's door, "The bank's been robbed! There goes the guy who did it (pointing at the running man)!" Assume that the prosecutor does not offer the unidentified person's shout to prove that the running man robbed the bank, but instead to explain why Marian's identification is credible. *Is Marian's testimony to the statement that she says led her to pay close attention to the defendant admissible over the defense attorney's Confrontation Clause objection?*

§ 10.12 MULTIPLE CHOICE REVIEW PROBLEMS

Review Problem 10-A

Jones is charged with DUI (driving under the influence). The police officer who arrested Jones administered a blood alcohol test at the police station. The officer seeks to testify that Jones "blew" a reading of .13 on the breathalyzer machine, well over the legal limit of .08. Jones objects that the reading is hearsay. *The judge should:*

1. Sustain the objection because the machine's readout constitutes the arresting officer's out-of-court statement.

2. Overrule the objection because machines don't make hearsay assertions.

3. Sustain the objection because the machine's readout constitutes the breathalyzer machine manufacturer's out-of-court statement.

4. Sustain the objection because Jones' erratic driving is the equivalent of Jones' out-of-court assertion that "I drank too much alcohol."

Review Problem 10-B

Which item(s) of evidence below would be non-hearsay if offered by the plaintiff to prove that the sun was shining brightly at the time that a traffic accident took place?

1. The plaintiff's testimony that "As my spouse and I left the store and walked to our car about five minutes before the accident occurred, I asked my spouse, 'Do you have any of that sunblock lotion that you usually carry?' "

2. The plaintiff's testimony that "As my spouse and I left the store and walked to our car about five minutes before the accident occurred, my spouse

said, 'Can you believe that this morning's weather report said it was going to be cool and cloudy today?' "

3. The plaintiff's testimony that "As my spouse and I left the store and walked to our car about five minutes before the accident occurred, I saw a man walk outside the store, stop, apply lotion from a bottle labeled 'World's Best Sunblock,' then continue walking."

4. The plaintiff's testimony that "As my spouse and I left the store and walked to our car about five minutes before the accident occurred, my spouse said to me that 'I just saw a man walk outside the store, stop, apply lotion from a bottle labeled "World's Best Sunblock," then continue walking.' "

Review Problem 10-C

Which item(s) of evidence below would be non-hearsay if offered by the plaintiff to prove that a black-and-white Llasa Apso dog belonged to the defendant?

1. The plaintiff seeks to testify that "I saw the black-and-white Llasa Apso jump up on the defendant's lap and lick the defendant's face.

2. Same as #1, but the plaintiff also offers into evidence a passage from the book "Canine Behavior for Dummies" stating that "Llasa Apsos are extremely owner-loyal and will only lick the faces of their owners."

3. A receipt from the Furry Friends Pet Shop that indicates the date on which a black-and-white Llasa Apso was sold to the defendant, as well as the sales price.

4. A book entitled "How to Raise a Llasa Apso" was found on the nightstand next to the defendant's bed.

Review Problem 10-D

Which item(s) of evidence below would be non-hearsay if offered by the plaintiff to prove that a certain cell phone number belongs to Alex Graham?

1. The plaintiff seeks to testify that she called the phone number and heard a recorded message that said, "You've reached Alex Graham's message center. Please leave a message and I'll call you back if and when I feel like it."

2. A printout of the cell phone company's records indicating that the phone number is assigned to Alex Graham.

3. The plaintiff seeks to testify that "I stood near Alex Graham and dialed the phone number. When it rang, I saw a friend of Alex Graham pick the phone off a table and hand it to him.

4. The plaintiff seeks to testify that "I dialed the phone number, and a voice that I recognized as that of Alex Graham said, 'Alex Graham here.' "

§ 10.12 CASE LIBRARY: UNITED STATES v. ZENNI

UNITED STATES v. ZENNI

District Court of Kentucky
492 F. Supp. 464 (1980)

BERTELSMAN, J.

This prosecution for illegal bookmaking activities presents a classic problem in the law of evidence, namely, whether implied assertions are hearsay. The problem was a controversial one at common law, the discussion of which has filled many pages in the treatises and learned journals. Although the answer to the problem is clear under the Federal Rules of Evidence, there has been little judicial treatment of the matter, and many members of the bar are unfamiliar with the marked departure from the common law the Federal Rules have effected on this issue.

Facts

The relevant facts are simply stated. While conducting a search of the premises of the defendant, Ruby Humphrey, pursuant to a lawful search warrant which authorized a search for evidence of bookmaking activity, government agents answered the telephone several times. The unknown callers stated directions for the placing of bets on various sporting events. The government proposes to introduce this evidence to show that the callers believed that the premises were used in betting operations. The existence of such belief tends to prove that they were so used. The defendants object on the ground of hearsay.

Common Law Background

At common law, the hearsay rule applied "only to evidence of out-of-court statements offered for the purpose of proving that the facts are as asserted in the statement."

On the other hand, not all out-of-court expression is common law hearsay. For instance, an utterance offered to show the publication of a slander, or that a person was given notice of a fact, or orally entered into a contract, is not hearsay.

In the instant case, the utterances of the absent declarants are not offered for the truth of the words, and the mere fact that the words were uttered has no relevance of itself. (Footnote 7: That is, the utterance, "Put $ 2 to win on Paul Revere in the third at Pimlico," is a direction and not an assertion of any kind, and therefore can be neither true nor false.) Rather they are offered to show the declarants' belief in a fact sought to be proved. At common law this situation occupied a controversial no-man's land. It was argued on the one hand that the out-of-court utterance was not hearsay, because the evidence was not offered for any truth stated in it, but for the truth of some other proposition inferred from it. On the other hand, it was also argued that

the reasons for excluding hearsay applied, in that the evidence was being offered to show declarant's belief in the implied proposition, and he was not available to be cross-examined. Thus, the latter argument was that there existed strong policy reasons for ruling that such utterances were hearsay.

The classic case, which is discussed in virtually every textbook on evidence, is *Wright v. Tatham, 7 Adolph. & E. 313, 386, 112 Eng.Rep. 488 (Exch. Ch.1837),* and *5 Cl. & F. 670, 739,* 47 Rev.Rep. 136 (H.L.1838). Described as a "celebrated and hard-fought cause," *Wright v. Tatham* was a will contest, in which the will was sought to be set aside on the grounds of the incompetence of the testator at the time of its execution. The proponents of the will offered to introduce into evidence letters to the testator from certain absent individuals on various business and social matters. The purpose of the offer was to show that the writers of the letters believed the testator was able to make intelligent decisions concerning such matters, and thus was competent.

One of the illustrations advanced in the judicial opinions in *Wright v. Tatham* is perhaps even more famous than the case itself. This is Baron Parke's famous sea captain example. Is it hearsay to offer as proof of the seaworthiness of a vessel that its captain, after thoroughly inspecting it embarked on an ocean voyage upon it with his family?

The court in *Wright v. Tatham* held that implied assertions of this kind wer hearsay. The rationale, as stated by Baron Parke, was as follows:

> The conclusion at which I have arrived is, that proof of a particular fact which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would he of itself inadmissible; and, therefore, in this case the letters which are offered only to prove the competence of the testator, that is the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible.

This was the prevailing common law view, where the hearsay issue was recognized. But frequently, it was not recognized. Thus, two federal appellate cases involving facts virtually identical to those in the case at bar did not even discuss the hearsay issue, although the evidence admitted in them would have been objectionable hearsay under the common law view. (Footnote 14: *Reynolds v. United States, 225 F.2d 123 (5th Cir. 1955); Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394 (D.C.Cir.1950)).*

The Federal Rules of Evidence

The common law rule that implied assertions were subject to hearsay treatment was criticized by respected commentators for several reasons. A leading work on the Federal Rules of Evidence, referring to the hotly debated question whether an implied assertion stands on better ground with respect to the hearsay rule than an express assertion, states:

> By the time the federal rules were drafted, a number of eminent scholars and revisers had concluded that it does. Two principal

arguments were usually expressed for removing implied assertions from the scope of the hearsay rule. First, when a person acts in a way consistent with a belief but without intending by his act to communicate that belief, one of the principal reasons for the hearsay rule to exclude declarations whose veracity cannot be tested by cross-examination does not apply, because the declarant's sincerity is not then involved. In the second place, the underlying belief is in some cases self-verifying:

"There is frequently a guarantee of the trustworthiness of the inference to be drawn . . . because the actor has based his actions on the correctness of his belief, i.e. his actions speak louder than words.' (Footnote 15: Weinstein's Evidence Manual P 801(a)(01), at 801–55.)

The drafters of the Federal Rules agreed with the criticisms of the common law rule that implied assertions should be treated as hearsay and expressly abolished it. They did this by providing that no oral or written expression was to be considered as hearsay, unless it was an "assertion" concerning the matter sought to be proved and that no nonverbal conduct should be considered as hearsay, unless it was intended to be an "assertion" concerning said matter. The relevant provisions are:

Rule 801. (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

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

Rule 802. Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

"Assertion" is not defined in the rules, but has the connotation of a forceful or positive declaration.

The Advisory Committee note concerning this problem states:

The definition of 'statement' assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of 'statement.' Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a

statement. Other nonverbal conduct, 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. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," *62 Harv. L. Rev. 177, 214, 217 (1948),* and the elaboration in Finman, "Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence," *14 Stan. L. Rev. 682 (1962).* Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) 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 the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, "The 'Hear-Say' Rule as a 'See-Do' Rule: Evidence of Conduct," *33 Rocky Mt.L.Rev. 133 (1961).* Similar considerations govern 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)." (Emphasis added).

This court, therefore, holds that, Subdivision (a)(2) of Rule 801 removes implied assertions from the definition of statement and consequently from the operation of the hearsay rule.

Applying the principles discussed above to the case at bar, this court holds that the utterances of the betters telephoning in their bets were nonassertive verbal conduct, offered as relevant for an implied assertion to be inferred from them, namely that bets could be placed at the premises being telephoned. The language is not an assertion on its face, and it is obvious these persons did not intend to make an assertion about the fact sought to be proved or anything else.[9]

As an implied assertion, the proffered evidence is expressly excluded from the operation of the hearsay rule by Rule 801 of the Federal Rules of Evidence,

[9] A somewhat different type of analysis would be required by words non-assertive in form, but which under the circumstances might be intended as an assertion. For example, an inspector at an airport security station might run a metal detector over a passenger and say "go on through." In the absence of the inspector, would testimony of this event be objectionable hearsay, if offered for the proposition that the passenger did not have a gun on him at that time? Although Rule 801(a) does not seem to require a preliminary determination by the trial court whether verbal conduct is intended as an assertion, it is submitted that such a determination would be required in the example given. If an assertion were intended the evidence would be excluded. If not, it would be admissible. This result is implicit in the policy of the drafters of the Federal Rules of Evidence that the touchstone for hearsay is the intention to make an assertion. *See* S. Saltzburg and K. Redden, Federal Rules of Evidence Manual 456 (2d ed. 1977)).

and the objection thereto must be overruled. An order to that effect has previously been entered.

[B] Crawford v. Washington

CRAWFORD v. WASHINGTON

United States Supreme Court
541 U.S. 36 (2004)

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

I

On August 5, 1999, Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife *Miranda* warnings, detectives interrogated each of them twice. Petitioner eventually confessed that he and Sylvia had gone in search of Lee because he was upset over an earlier incident in which Lee had tried to rape her. The two had found Lee at his apartment, and a fight ensued in which Lee was stabbed in the torso and petitioner's hand was cut.

Petitioner gave the following account of the fight:

> Q. Okay. Did you ever see anything in [Lee's] hands?
>
> A. I think so, but I'm not positive.
>
> Q. Okay, when you think so, what do you mean by that?
>
> A. I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.

Sylvia generally corrohorated petitioner's story about the events leading up to the fight, but her account of the fight itself was arguably different — particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him:

Q. Did Kenny do anything to fight back from this assault?

A. (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.

Q. After he was stabbed?

A. He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).

Q. Okay, you, you gotta speak up.

A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).

Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?

A. Yeah, after, after the fact, yes.

Q. Did you see anything in his hands at that point?

A. (pausing) um um (no).

The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest.

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federnl constitutional right to be "confronted with the witnesses against him." According to our description of that right in *Ohio v. Roberts*, 448 U.S. 56 (1980), it does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.' " To meet that test, evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The trial court here admitted the statement reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or "justified reprisal"; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a "neutral" law enforcement officer. The prosecution played the tape for the jury and relied on it in closing, arguing that it was "damning evidence" that "completely refutes [petitioner's] claim of self-defense." The jury convicted petitioner of assault.

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause.

II

A

The Constitution's text does not alone resolve this case. One could plausibly read "witnesses against" a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between. We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one's accusers is a concept that dates back to Roman times. The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. See 3 W. Blackstone, Commentaries on the Laws of England 373-374 (1768).

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face." 1 J. Stephen, History of the Criminal Law of England 326 (1883). In some cases, these demands were refused. See 9 W. Holdsworth, History of English Law 216-217, 228 (3d ed. 1944).

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." D. Jardine, Criminal Trials 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "the Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ." 2 How. St. Tr., at 15-16. The judges refused, *id.*, at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," *id.*, at 15, the jury convicted, and Raleigh was sentenced to death.

One of Raleigh's trial judges later lamented that " 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.' " 1 Jardine, *supra*, at 520. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses.

B

Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having "privately issued several commissions to examine witnesses against particular men *ex parte*," complaining that "the person accused is not admitted to be confronted with, or defend himself against his defamers." A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed. 1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. Colonial representatives protested that the Act subverted their rights "by extending the jurisdiction of the courts of admiralty beyond its ancient limits." Resolutions of the Stamp Act Congress § 8th (Oct. 19, 1765), reprinted in Sources of Our Liberties 270, 271 (R. Perry & J. Cooper eds. 1959). John Adams, defending a merchant in a high-profile admiralty case, argued: "Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." Draft of Argument in *Sewall v. Hancock* (1768-1769), in 2 Legal Papers of John Adams 194, 207 (K. Wroth & H. Zobel eds. 1965).

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to civil-law practices: "The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told . . . . We shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition*." 2 Debates on the Federal Constitution 110-111 (J. Elliot 2d ed. 1863). Similarly, a prominent Anti-federalist writing under the pseudonym Federal Farmer criticized the use of "written evidence" while objecting to the omission of a vicinage right: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . . Written evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra*, at 469, 473. The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Early state decisions shed light upon the original understanding of the common-law right. *State v. Webb*, 2 N. C. 103 (1794) (*per curiam*), decided

a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.*

Similarly, in *State v. Campbell*, 1 S. C. 124 (1844), South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: "If we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are ex parte, and, therefore, utterly incompetent." *Id.* The court said that one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." *Ibid.*

III

This history supports two inferences about the meaning of the Sixth Amendment.

A

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397. Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused -in other words, those who "bear testimony."

1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent -that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" . . . . These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition — for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class. (Footnote 4: We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.)

B

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rnther, the "right . . . to be confronted with the witnesses against him" is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.

IV

Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. *Mattox v. United States*, 156 U.S. 237 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . ." *Id.*

Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio v. Roberts* admitted testimony from a preliminary hearing at which the defendant had examined the witness. *Lilly v. Virginia* excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily v. United States* admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement. (Footnote 8: One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois* which involved statements of a child victim to an investigating police officer admitted as spontaneous declarations. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediately upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K. B. 1694). In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded even *if* the witness was unavailable. We "[took] as a given . . . that the testimony properly falls within the relevant hearsay exceptions.")

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

V

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception;" or bears "particularized guarantees of trustworthiness." This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is

too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law -thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine -thus eliminating the excessive narrowness referred to above.

In *White*, we considered the first proposal and rejected it. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition. This case does, however, squarely implicate the second proposal.

A

Where testimonial statements are involved, we do not think the Framer meant to leave the Sixth Amendment's protection to the vagaries of the rule of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory, that they were not made in the heat of passion, and that they were not "extracted from [him] upon any hopes or promise of Pardon." It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

B

The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting." The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, while that same court, in another case, found a statement more reliable because two years had elapsed.

The unpardonable vice of the Roberts test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality's speculation in *Lilly* that it was "highly unlikely" that accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them. One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases -more than one-third of the time. Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia*, 53 Syracuse L. Rev. 87, 105 (2003).

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial. As noted earlier, one court relied on the fact that the witness's statement was made to police while in custody on pending charges -the theory being that this made the statement more clearly against penal interest and thus more reliable. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

C

Roberts' failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential

suspect in the case. Indeed, she had been told that whether she would be released "depended on how the investigation continues." In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts*' unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that she had "shut [her] eyes and . . . didn't really watch" part of the fight, and that she was "in shock." The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law enforcement, and, thus, the [questioner] is . . . neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination could reveal that.

The State Supreme Court gave dispositive weight to the interlocking nature of the two statements -that they were both ambiguous as to when and whether Lee had a weapon. The court's claim that the two statements were *equally* ambiguous is hard to accept. Petitioner's statement is ambiguous only in the sense that he had lingering doubts about his recollection: "A. I coulda swore I seen him goin' for somethin' before, right before everything happened . . . . But I'm not positive." Sylvia's statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked: "Q. Did Kenny do anything to fight back from this assault?" Moreover, Sylvia specifically said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that.

The prosecutor obviously did not share the court's view that Sylvia's statement was ambiguous -he called it "damning evidence" that "completely refutes [petitioner's] claim of self-defense." We have no way of knowing whether the jury agreed with the prosecutor or the court. Far from obviating the need for cross-examination, the "interlocking" ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.

We readily concede that we could resolve this case by simply reweighing the "reliability factors" under *Roberts* and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. Moreover, to reverse the Washington Supreme Court's

decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people. They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's -great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts*' providing any meaningful protection in those circumstances.

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

I dissent from the Court's decision to overrule *Ohio v. Roberts*. I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established

precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine. Under the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based. Testimonial statements such as accusatory statements to police officers likely would have been disapproved of in the 18th century, not necessarily because they resembled *ex parte* affidavits or depositions as the Court reasons, but more likely than not because they were not made under oath. Without an oath, one usually did not get to the second step of whether confrontation was required.

Thus, while I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements. As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.

I therefore see no reason why the distinction the Court draws is preferable to our precedent. Starting with Chief Justice Marshall's interpretation as a Circuit Justice in 1807, 16 years after the ratification of the Sixth Amendment, *United States v. Burr*, we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware. I see little value in trading our precedent for an imprecise approximation at this late date.

Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply "cannot be replicated, even if the declarant testifies to the same matters in court." *United States v. Inadi*. Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission "actually furthers the 'Confrontation Clause's very mission' which is to 'advance the accuracy of the truth-determining process in criminal trials.'" Similar reasons justify the introduction of spontaneous declarations, see *White*, statements made in the course of procuring medical services, dying declarations, and countless other hearsay exceptions. That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. "In a given instance [cross-examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free

enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." 5 Wigmore § 1420, at 251. In such a case, as we noted over 100 years ago, "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox*, 156 U.S., at 243. By creating an immutable category of excluded evidence, the Court adds little to a trial's truth-finding function and ignores this longstanding guidance.

In choosing the path it does, the Court of course overrules *Ohio v. Roberts*, a case decided nearly a quarter of a century ago. *Stare decisis* is not an inexorable command in the area of constitutional law, but by and large, it "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." And in making this appraisal, doubt that the new rule is indeed the "right" one should surely be weighed in the balance. Though there are no vested interests involved, unresolved questions for the future of everyday criminal trials throughout the country surely counsel the same sort of caution. The Court grandly declares that "we leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

To its credit, the Court's analysis of "testimony" excludes at least some hearsay exceptions, such as business records and official records. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process. Likewise to the Court's credit is its implicit recognition that the mistaken application of its new rule by courts which guess wrong as to the scope of the rule is subject to harmless-error analysis.

But these are palliatives to what I believe is a mistaken change of course. It is a change of course not in the least necessary to reverse the judgment of the Supreme Court of Washington in this case. The result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases. In *Idaho v. Wright*, we held that an out-of-court statement was not admissible simply because the truthfulness of that statement was corroborated by other evidence at trial. As the Court notes, the Supreme Court of Washington gave decisive weight to the "interlocking nature of the two statements." No re-weighing of the "reliability factors," which is hypothesized by the Court is required to reverse the judgment here. A citation to *Idaho v. Wright* would suffice. For the reasons stated, I believe that this would be a far preferable course for the Court to take here.

[C] Davis v. Washington

DAVIS v. WASHINGTON

United States Supreme Court
547 U.S. —, 126 S. Ct. 2266 (2006)

JUSTICE SCALIA delivered the opinion of the Court.

These cases require us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are "testimonial" and thus subject to the requirements of the Sixth Amendment's Confrontation Clause.

I

A

The relevant statements in *Davis* v. *Washington* were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. She reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in this case:

911 Operator: Hello. What's going on?

Complainant: He's here jumpin' on me again.

911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?

Complainant: I'm in a house.

911 Operator: Are there any weapons?

Complainant: No. He's usin' his fists.

911 Operator: Okay. Has he been drinking?

Complainant: No.

911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?

Complainant: I'm on the line.

911 Operator: Listen to me carefully. Do you know his last name?

Complainant: It's Davis.

911 Operator: Davis? Okay, what's his first name?

Complainant: Adran

911 Operator: What is it?

Complainant: Adrian.

911 Operator: Adrian?

Complainant: Yeah.

911 Operator: Okay. What's his middle initial?

Complainant: Martell. He's runnin' now."

As the conversation continued, the operator learned that Davis had "just r[un] out the door" after hitting McCottry, and that he was leaving in a car with someone else. McCottry started talking, but the operator cut her off, saying, "Stop talking and answer my questions." She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. McCottry described the context of the assault, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you."

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings and her children so that they could leave the residence."

The State charged Davis with felony violation of a domestic no-contact order. "The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries." McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis's objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him. The Washington Court of Appeals affirmed. The Supreme Court of Washington, with one dissenting justice, also affirmed, concluding that the portion of the 911 conversation in which McCottry identified Davis was not testimonial, and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt. We granted certiorari.

B

In *Hammon* v. *Indiana*, police responded late on the night of February 26, 2003, to a "reported domestic disturbance" at the home of Hershel and Amy Hammon. They found Amy alone on the front porch, appearing " 'somewhat frightened,' " but she told them that " 'nothing was the matter.' She gave them permission to enter the house, where an officer saw "a gas heating unit in the corner of the living room" that had "flames coming out of the . . . partial glass front. There were pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit."

Hershel, meanwhile, was in the kitchen. He told the police "that he and his wife had 'been in an argument' but 'everything was fine now' and the argument 'never became physical.' " By this point Amy had come back inside. One of the officers remained with Hershel; the other went to the living room to talk with Amy, and "again asked [her] what had occurred." Hershel made several attempts to participate in Amy's conversation with the police, but was rebuffed. The officer later testified that Hershel "became angry when I insisted

that [he] stay separated from Mrs. Hammon so that we can investigate what had happened." After hearing Amy's account, the officer "had her fill out and sign a battery affidavit." Amy handwrote the following: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter."

The State charged Hershel with domestic battery and with violating his probation. Amy was subpoenaed, but she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit. Hershel's counsel repeatedly objected to the admission of this evidence. At one point, after hearing the prosecutor defend the affidavit because it was made "under oath," defense counsel said, "That doesn't give us the opportunity to cross examine [the] person who allegedly drafted it. Makes me mad." Nonetheless, the trial court admitted the affidavit as a "present sense impression," and Amy's statements as "excited utterances" that "are expressly permitted in these kinds of cases even if the declarant is not available to testify." The officer thus testified that Amy

> informed me that she and Hershel had been in an argument. That he became irrate [*sic*] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater.

"She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe." The trial judge found Hershel guilty on both charges, and the Indiana Court of Appeals affirmed in relevant part. The Indiana Supreme Court also affirmed, concluding that Amy's statement was admissible for state-law purposes as an excited utterance, that "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings," where "the motivations of the questioner and declarant are the central concerns," and that Amy's oral statement was not "testimonial" under these standards, *id.* It also concluded that, although the affidavit was testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench. We granted certiorari.

II

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, we held that this provision bars "admission of testimonial statements of a witness who did not

appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Our opinion in *Crawford* set forth "[v]arious formulations" of the core class of " 'testimonial' " statements, *ibid.*, but found it unnecessary to endorse any of them, because "some statements qualify under any definition," Among those, we said, were "[s]tatements taken by police officers in the course of interrogations." The questioning that generated the deponent's statement in *Crawford* — which was made and recorded while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself — "qualifies under any conceivable definition" of an " 'interrogation,' " We therefore did not define that term, except to say that "[w]e use [it] . . . in its colloquial, rather than any technical legal, sense," and that "one can imagine various definitions . . ., and we need not select among them in this case." The character of the statements in the present cases is not as clear, and these cases require us to determine more precisely which police interrogations produce testimony.

Without attempting to produce an exhaustive classification of all conceivable statements — or even all conceivable statements in response to police interrogation — as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (Court's footnote: Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations — which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning. Raleigh's Case, 2How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.)

III

A

In *Crawford*,it sufficed for resolution of the case before us to determine that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." Moreover, as we have just described, the facts of that case spared us the need to define what we meant by "interrogations." The *Davis* case today does not permit us this luxury of indecision. The inquiries of a police operator in the course of a 911 call are an interrogation in one sense, but not in a sense that "qualifies under any conceivable definition." (Court's footnote: If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in Crawford v. Washington, 541 U. S. 36 (2004), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial.") We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

The answer to the first question was suggested in *Crawford,* even if not explicitly held:

> The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to "witnesses" against the accused — in other words, those who "bear testimony". 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically " solemn declaration or affirmation made for the purpose of establishing or proving some fact."*Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its "core," but its perimeter.

We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined. (citations omitted)

Even our later cases, conforming to the reasoning of *Ohio v. Roberts,* never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay, see *Crawford*, (citing cases), with one arguable exception (discussing *White v. Illinois*). Where our cases did dispense with those requirements — even under the *Roberts* approach—the statements at issue were clearly nontestimonial. *See, e.g., Bourjaily v. United States* (statements made unwittingly to a Government informant); *Dutton v. Evans* (statements from one prisoner to another).

Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort — sworn testimony in prior judicial proceedings or formal depositions under oath — which invites the argument that the scope of the Clause is limited to that very formal category. But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions. In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case — English or early American, state or federal — can be cited, that is it.

The question before us in *Davis*, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford* that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis*, McCottry was speaking about events *as they were actually happening*, rather than "describ[ing] past events. Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet

an ongoing emergency. She simply was not acting as a *witness;* she was not *testifying*. What she said was not "a weaker substitute for live testimony" at trial, like Lord Cobham's statements in *Raleigh's Case* or Sylvia Crawford's statement in *Crawford*. In each of those cases, the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King v. Brasier* (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

B

Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*. It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct — as, indeed, the testifying officer expressly acknowledged. There was no emergency in progress; the interrogating officer testified that he had heard

no arguments or crashing and saw no one throw or break anything, *id.*, at 25. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime — which is, of course, precisely what the officer *should* have done.

It is true that the *Crawford* interrogation was more formal. It followed a *Miranda* warning, was tape-recorded, and took place at the station house. While these features certainly strengthened the statements' testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events — none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigat[ion]." What we called the "striking resemblance" of the *Crawford* statement to civil-law *ex parte* examinations, is shared by Amy's statement here. Both declarants were actively separated from the defendant — officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial. (Court's footnote: The dissent criticizes our test for being "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause." As to the former: We have acknowledged that our holding is not an "exhaustive classification of all conceivable statements — or even all conceivable statements in response to police interrogation," but rather a resolution of the cases before us and those like them. For those cases, the test is objective and quite "workable." The dissent, in attempting to formulate an exhaustive classification of its own, has not provided anything that deserves the description "workable" — unless one thinks that the distinction between "formal" and "informal" statements qualifies. And the dissent even qualifies that vague distinction by acknowledging that the Confrontation Clause "also reaches the use of technically informal statements when used to evade the formalized process," and cautioning that the Clause would stop the State from "us[ing] out-of-court statements as a means of circumventing the literal right of confrontation." It is hard to see this as much more "predictable," than the rule we adopt for the narrow situations we address. (Indeed, under the dissent's approach it is eminently arguable that the dissent should agree, rather than disagree, with our disposition in *Hammon v. Indiana*. As for the charge that our holding is not a "targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," which the dissent describes as the depositions taken by Marian magistrates, characterized by a high degree of formality. We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers who perform

investigative and testimonial functions once performed by examining Marian magistrates. It imports sufficient formality, in our view, that lies to such officers are criminal offenses. Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.)

Both Indiana and the United States as *amicus curiae* argue that this case should be resolved much like *Davis*. For the reasons we find the comparison to *Crawford* compelling, we find the comparison to *Davis* unpersuasive. The statements in *Davis* were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry's present-tense statements showed immediacy; Amy's narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously."

Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, we do not hold the opposite — that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements. But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. (Court's footnote: Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.)

IV

Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases — domestic violence — requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not

require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford:* that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard. Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

We affirm the judgment of the Supreme Court of Washington in No. 05-5224. We reverse the judgment of the Supreme Court of Indiana in No. 05-5705, and remand the case to that Court for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

In *Crawford* v. *Washington*, we abandoned the general reliability inquiry we had long employed to judge the admissibility of hearsay evidence under the Confrontation Clause, describing that inquiry as "*inherently*, and therefore *permanently*, unpredictable."(emphasis in original). Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the "primary purpose" of police interrogations. Besides being difficult for courts to apply, this test characterizes as "testimonial," and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause. Because neither of the cases before the Court today would implicate the Confrontation Clause under an appropriately targeted standard, I concur only in the judgment in *Davis* v. *Washington*, and dissent from the Court's resolution of *Hammon* v. *Indiana*,.

I

A

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." We have recognized that the operative phrase in the Clause, "witnesses against him," could be interpreted narrowly, to reach only those witnesses who actually testify at trial, or more broadly, to reach many or all of those whose out-of-court statements are offered at trial. Because the narrowest interpretation of the Clause would conflict with both the history giving rise to the adoption of the Clause and this Court's precedent, we have rejected such a reading.

Rejection of the narrowest view of the Clause does not, however, require the broadest application of the Clause to exclude otherwise admissible hearsay evidence. The history surrounding the right to confrontation supports the conclusion that it was developed to target particular practices that occurre under the English bail and committal statutes passed during the reign Queen Mary, namely, the "civil-law mode of criminal procedure, and parti larly its use of *ex parte* examinations as evidence against the accused." T predominant purpose of the [Marian committal] statute was to institu *systematic* questioning of the accused and the witnesses." J. Langbein, Prosecuting Crime in the Renaissance 23 (1974) (emphasis added). The statute required an oral examination of the suspect and the accusers, transcription within two days of the examinations, and physical transmission to the judges hearing the case. These examinations came to be used as evidence in some cases, in lieu of a personal appearance by the witness. Many statements that would be inadmissible as a matter of hearsay law bear little resemblance to these evidentiary practices, which the Framers proposed the Confrontation Clause to prevent. Accordingly, it is unlikely that the Framers intended the word "witness" to be read so broadly as to include such statements.

In *Crawford*, we recognized that this history could be squared with the language of the Clause, giving rise to a workable, and more accurate, interpretation of the Clause. " '[W]itnesses,' " we said, are those who " 'bear testimony.' " And " '[t]estimony' " is " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " (quoting Webster, *supra*). Admittedly, we did not set forth a detailed framework for addressing whether a statement is "testimonial" and thus subject to the Confrontation Clause. But the plain terms of the "testimony" definition we endorsed necessarily require some degree of solemnity before a statement can be deemed "testimonial."

This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and,

accordingly, bear a "striking resemblance," *Crawford*, *supra*, at 52, to the examinations of the accused and accusers under the Marian statutes. (Footnote: Like the Court, I presume the acts of the 911 operator to be the acts of the police. Accordingly, I refer to both the operator in Davis and the officer in Hammon, and their counterparts in similar cases, collectively as "the police.")

Although the Court concedes that the early American cases invoking the right to confrontation or the Confrontation Clause itself all "clearly involve[d] testimony" as defined in *Crawford*, it fails to acknowledge that all of the cases it cites fall within the narrower category of formalized testimonial materials I have proposed. (footnote omitted) Interactions between the police and an accused (or witnesses) resemble Marian proceedings — and these early cases — only when the interactions are somehow rendered "formal." In *Crawford*, for example, the interrogation was custodial, taken after warnings given pursuant to *Miranda v. Arizona*, *Miranda* warnings, by their terms, inform a prospective defendant that " 'anything he says can be used against him in a court of law.' This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.(footnote omitted)

The Court all but concedes that no case can be cited for its conclusion that the Confrontation Clause also applies to informal police questioning under certain circumstances. Instead, the sole basis for the Court's conclusion is its apprehension that the Confrontation Clause will "readily be evaded" if it is only applicable to formalized testimonial materials. But the Court's proposed solution to the risk of evasion is needlessly over inclusive. Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process. That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation. In such a case, the Confrontation Clause could fairly be applied to exclude the hearsay statements offered by the prosecution, preventing evasion without simultaneously excluding evidence offered by the prosecution in good faith.

The Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law. In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. Assigning one of these two "largely unverifiable motives," primacy requires constructing a hierarchy of purpose that will rarely be present — and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.

The Court's repeated invocation of the word "objectiv[e]" to describe its test, however, suggests that the Court may not mean to reference purpose at all, but instead to inquire into the function served by the interrogation. Certainly

such a test would avoid the pitfalls that have led us repeatedly to reject tests dependent on the subjective intentions of police officers. (footnote omitted) It would do so, however, at the cost of being even more disconnected from the prosecutorial abuses targeted by the Confrontation Clause. Additionally, it would shift the ability to control whether a violation occurred from the police and prosecutor to the judge, whose determination as to the "primary purpose" of a particular interrogation would be unpredictable and not necessarily tethered to the actual purpose for which the police performed the interrogation.

B

Neither the 911 call at issue in *Davis* nor the police questioning at issue in *Hammon* is testimonial under the appropriate framework. Neither the call nor the questioning is itself a formalized dialogue. (Footnote: Although the police questioning in *Hammon* was ultimately reduced to an affidavit, all agree that the affidavit is inadmissible per se under our definition of the term "testimonial.") Nor do any circumstances surrounding the taking of the statements render those statements sufficiently formal to resemble the Marian examinations; the statements were neither Mirandized nor custodial nor accompanied by any similar indicia of formality. Finally, there is no suggestion that the prosecution attempted to offer the women's hearsay evidence at trial in order to evade confrontation. Accordingly, the statements at issue in both cases are nontestimonial and admissible under the Confrontation Clause.

The Court's determination that the evidence against Hammon must be excluded extends the Confrontation Clause far beyond the abuses it was intended to prevent. When combined with the Court's holding that the evidence against Davis is perfectly admissible, however, the Court's *Hammon* holding also reveals the difficulty of applying the Court's requirement that courts investigate the "primary purpose[s]" of the investigation. The Court draws a line between the two cases based on its explanation that *Hammon* involves "no emergency in progress," but instead, mere questioning as "part of an investigation into possibly criminal past conduct," and its explanation that *Davis* involves questioning for the "primary purpose" of "enabl[ing] police assistance to meet an ongoing emergency." But the fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers, and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as "past conduct" back into an "ongoing emergency." (Footnote: Some of the factors on which the Court relies to determine that the police questioning in *Hammon* was testimonial apply equally in *Davis*. For example, while Hammon was "actively separated from the [victim]" and thereby "prevented . . . from participating in the interrogation," Davis was apart from McCottry while she was questioned by the 911 operator and thus unable to participate in the questioning.

Similarly, "the events described [by McCottry] were over" by the time she recounted them to the 911 operator.) Nor does the mere fact that McCottry needed emergency aid shed light on whether the "primary purpose" of gathering, for example, the name of her assailant was to protect the police, to protect the victim, or to gather information for prosecution. In both of the cases before the Court, like many similar cases, pronouncement of the "primary" motive behind the interrogation calls for nothing more than a guess by courts.

II

Because the standard adopted by the Court today is neither workable nor a targeted attempt to reach the abuses forbidden by the Clause, I concur only in the judgment in *Davis v. Washington*, and respectfully dissent from the Court's resolution of *Hammon v. Indiana*.

Chapter 11

IDENTIFYING NON-HEARSAY PURPOSES FOR OUT-OF-COURT STATEMENTS

§ 11.01 CHAPTER CHECKLIST

1. Who determines what a statement is offered to prove?
2. What is an "assertion first" approach to case planning?
3. How is admissibility determined when a statement is offered for a non-hearsay use?
4. What is the meaning of the following common non-hearsay uses?
   a. Assertion offered as evidence of the speaker's state of mind.
   b. Assertion offered as evidence of the state of mind of a person who heard the assertion.
   c. Assertion offered as a "verbal act" or "words of independent legal significance."
   d. Assertion offered to contradict (impeach) in-court testimony.
   e. Assertion offered to provide context and meaning.

§ 11.02 RELEVANT FEDERAL RULES OF EVIDENCE

Rule 801. Definitions (partial text)

The following definitions apply under this article:

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

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

§ 11.03 INTRODUCTION

Chapter 10 reviewed various types of verbal and non-verbal behavior that constitute "statements" within the meaning of Rule 801, and explained that an out-of-court statement is barred by the hearsay rule only if it is offered for "the truth of the matter asserted." This chapter examines a variety of circumstances in which statements can be admissible for purposes that do not

rely on the statements' truth, or for what lawyers and judges commonly refer to as "non-hearsay purposes."

Recall the "5 Step Hearsay Matrix" set forth in Chapter 10:

- Step One: Does evidence constitute an out-of-court statement?
- Step Two: If so, what is the statement offered to prove?
- Step Three: If the statement is offered for a non-hearsay purpose, is that purpose relevant, and if so, is its probative value substantially outweighed by any of the factors set forth in Rule 403?
- Step Four: If the statement is offered for its truth, are any of the numerous exceptions to the hearsay rule available?"
- Step Five: Even if an out-of-court statement is admissible against a criminal defendant for purposes of the hearsay rule, does the Confrontation Clause require its exclusion?

Chapter 10 examined Steps One and Five of this Matrix; Steps Two and Three form the backbone of this chapter. When a party offers a statement for a purpose other than "the truth of the matter asserted," if that purpose is relevant the statement may be admissible despite Rule 802's ban of hearsay evidence.

§ 11.04 STEP TWO OF THE HEARSAY MATRIX: IDENTIFYING AN ASSERTION'S NON-HEARSAY PURPOSE

In our adversarial system, when a relevance issue arises with respect to an item of evidence, the burden is generally on the offering party to establish the connection between the evidence and the material fact (or credibility concern) that the offering party seeks to prove or disprove. Thus, it's up to the party who seeks to offer an out-of-court statement into evidence as non-hearsay to identify how the statement is relevant without regard to its accuracy.

A legitimate non-hearsay use for a statement may be apparent to an adversary. Nevertheless, to prevent jurors from using an out-of-court statement for its truth, the adversary may ask for a ruling on the record that limits the statement's admissibility to its non-hearsay use.

Example 1

Defendant Phil Abuster is charged with murdering Basil Leaf and calls Sue Asponte to support the self-defense plea. Sue's testimony proceeds in part as follows:

DEFENDANT'S ATTORNEY: What happened when you met up with Mr. Abuster, about an hour before Mr. Leaf was killed?

A: He started talking nervously about Basil Leaf.

DEFENDANT'S ATTORNEY: Do you know Basil Leaf?

A: Yes. He's someone that Phil and I used to play cards with.

DEFENDANT'S ATTORNEY: And what did Mr. Abuster say about Basil Leaf?

A: He said that Basil was a violent and vicious individual who always carried a gun and a knife.

PROSECUTOR: Your Honor, for the record I ask that admissibility of the witness' testimony concerning the defendant's statement be limited to the issue of the defendant's state of mind.

DEFENDANT'S ATTORNEY: No objection.

JUDGE: The record will reflect that the statement is admitted solely on the issue of the defendant's belief about Mr. Leaf. I instruct the jury to consider it only for that purpose and not as evidence that what Mr. Abuster said about Mr. Leaf was accurate.

In the example above, the defendant's assertion about Basil Leaf is relevant without regard to its truth. The defendant's assertion that Basil always carried a gun and a knife is circumstantial evidence that the defendant was afraid of Basil. From that fear, the jurors may infer that the defendant would not have attacked Basil, an inference that supports the defendant's self-defense claim. The prosecutor therefore does not object to the statement's admissibility, but also does not want the jurors to use the defendant's out-of-court assertion for its truth; that is, as evidence that Basil was violent and always carried a gun and a knife. Thus, the prosecutor asks for and obtains an instruction that the jury can use the defendant's assertion only for the non-hearsay purpose of reflecting the defendant's attitude towards Basil.

As this example suggests, out-of-court assertions admitted as non-hearsay resemble the shares of common stock often awarded as bonuses to corporate insiders — they are restricted. In the case of non-hearsay, lawyers and judges call the restriction a "limited purpose," meaning that a judge or juror can properly consider an assertion admitted as non-hearsay only for the limited use for which it was admitted. In jury trials, judges typically try to confine the use of non-hearsay to its limited purpose in a number of ways:

- As in the example above, a judge may give a "limiting instruction" immediately, admonishing jurors to consider the assertion only for its non-hearsay use.
- During final summation, a lawyer can refer to the non-hearsay assertion only for the limited purpose for which it'a been admitted. For example, the defense attorney in the example above could not say during closing argument that "We know from what Phil Abuster said that Basil Leaf was a violent and vicious individual who always carried a gun and a knife." By contrast, the defense attorney could legitimately argue that "We know from what Phil Abuster said that Abuster was afraid of Basil Leaf and therefore would not have acted aggressively towards him."
- A party cannot rely on an assertion admitted for a non-hearsay purpose to prove an element of a claim or defense when proof of

that element depends on the statement's accuracy. For example, change the Abuster/Leaf example so that Basil Leaf is charged with unlawfully carrying a weapon. The prosecution could not rely on Abuster's out-of-court assertion to Sue Asponte as proof of this fact.

Practice Tip: Credibility v. Admissibility Offering your clients' out-of-court statements as evidence of their state of mind may produce objections that the testimony is "unreliable" or "self-serving" and therefore inadmissible under Rule 403 because the statements' probative value is outweighed by the danger of unfair prejudice. For example, the prosecutor in the Abuster/Leaf example may object to Abuster's statement to Sue Asponte on the ground that Abuster might have been "planting a defense." That is, perhaps Abuster intended to kill Leaf all along, and told Sue (and possibly others) that Leaf was always armed to support a phony self-defense claim. You should respond to such objections by pointing out that they improperly conflate credibility with admissibility. Judges should not evaluate credibility when determining whether evidence is admissible under Rule 403. That is a jury function. If jurors can rationally conclude that Abuster believed that Leaf was always armed, the judge should admit Sue's testimony and leave the ultimate determination of his statement's credibility to the jury.

Identifying a legitimate non-hearsay use depends on your knowing the elements of the substantive rules that you are trying to prove or disprove. Only by tying a non-hearsay use to a particular element (or to the credibility of a witness) can you establish an assertion's relevance. Typically, trials involve claims and/or defenses with multiple elements, and an out-of-court assertion may constitute hearsay if you offer it to support one element but admissible non-hearsay if you offer it to support a different element.

Example 2

Julie is injured when she slips and falls in a supermarket, and sues the market for failing to clean up the wet spot on the floor that allegedly caused her fall. Under applicable substantive law, two of the elements that Julie has to prove are that (1) a wet spot made the floor unreasonably dangerous and (2) the supermarket knew of the dangerous condition. Julie calls Randy to testify that a few minutes before she fell, Randy had been shopping in the market and had told the store manager that "You've got a very slippery wet spot on the floor in Aisle 3." Randy's statement would be inadmissible hearsay were Julie to offer it to prove that the slippery wet spot existed. However, Randy's statement would be admissible as non-hearsay if Julie offers it to prove notice. Accurate or not, Randy's statement to the manager provided notice to the market of the possible existence of a dangerous condition. The judge would admit the statement for the limited purpose of notice, and admonish the jurors not to use it as evidence that the floor was dangerously wet. Julie would have to prove that the dangerous condition existed through some means other than Randy's statement to the manager.

Practice Tip: "Assertion-First" case planning. In order to maximize a presentation's persuasiveness, experienced litigators may take an "assertion first" approach to case planning. That is, a lawyer who is anxious to offer a very helpful assertion into evidence may try to develop a legal theory that creates a non-hearsay use for that assertion.

Example 3

You represent a pedestrian who was injured by an allegedly drunk driver who was driving a borrowed car with the owner's permission. You can prove that before the owner gave permission to the driver, a close friend of the driver had told the owner, "The driver is regularly stewed to the gills." This assertion would be hearsay and probably inadmissible if you offer it as evidence that the driver was drunk when your client was struck. However, the assertion is certainly one that you would want to offer into evidence on your client's behalf. You can create a non-hearsay use for the assertion if you sue not only the driver but also the owner for "negligent entrustment" of the car to a dangerous driver. The friend's assertion would probably then be admissible to prove that the owner was on notice that the driver had a propensity to drink

§ 11.05 STEP THREE OF THE HEARSAY MATRIX: DETERMINING THE RELEVANCE OF A CLAIMED "NON-HEARSAY USE"

In the abstract, there's no magic in being able to identify a non-hearsay use for an out-of-court assertion. Virtually any statement can give rise to a myriad of non-hearsay uses. For example, assume that in a personal injury case growing out of an auto accident, Mary is prepared to testify that "Patrick told me that the blue car ran a red light." You might offer this testimony as non-hearsay to prove such matters as:

- Mary is capable of hearing.
- Patrick is capable of speaking.
- Patrick is capable of distinguishing colors.
- Patrick is aware of traffic rules.
- Mary is acquainted with Patrick.

The drawback, of course, is that none of these potential non-hearsay uses is likely to have the slightest bearing on who was at fault for the accident. A claimed non-hearsay use for an out-of-court assertion can serve as a ticket to admissibility only if that use is relevant. Under the familiar relevance principle of Rule 401, this means that a non-hearsay use either must bear on a witness' credibility or must have a tendency to make a material fact more or less probable than it would be without the evidence.

Thus, once the offering party has identified a non-hearsay use for an out-of-court statement, often the next step is to determine whether that use has any bearing on material facts. As is always true when relevance issues arise, that

that element depends on the statement's accuracy. For example, change the Abuster/Leaf example so that Basil Leaf is charged with unlawfully carrying a weapon. The prosecution could not rely on Abuster's out-of-court assertion to Sue Asponte as proof of this fact.

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Thus, once the offering party has identified a non-hearsay use for an out-of-court statement, often the next step is to determine whether that use has any bearing on material facts. As is always true when relevance issues arise, that

determination depends not only on abstract legal elements, but on parties' specific factual contentions.

Example

Assume that Ginger is charged with murdering Fred. Ginger claims that two days before the alleged murder, her friend Gene told her, "Fred recently told me that you're a goner the next time he sees you." Gene's statement would be relevant as non-hearsay if Ginger's claim was that she killed Fred in self-defense. Whether or not what Gene said was accurate, hearing it might make Ginger afraid of Fred. If Ginger were afraid of Fred, arguably she wouldn't attack him, which lends credence to her self-defense claim. The direct examination of Ginger eliciting Gene's statement in support of her self-defense claim might go something like this:

DEFENDANT'S ATTORNEY: Ginger, when did you next see Gene?

A: It was two days before I saw Fred.

DEFENDANT'S ATTORNEY: And at that time, did you and Gene have a conversation?

A: Yes. I was alone outside a cafe, having coffee. Gene walked up to me and said, "Ginger, I hate to tell you this, but Fred recently told me that you're a goner the next time he sees you."

PROSECUTOR: Objection and move to strike, Your Honor. Hearsay.

> [In an actual trial, a prosecutor who anticipates Ginger's answer and thinks it improper would object after the question, before Ginger gave the answer. Delaying an objection until after an improper question is answered may lead a judge to rule that the objector has waived the objection.]

JUDGE: Defense counsel, any response? What is this statement being offered to prove?

DEFENDANT'S ATTORNEY: The testimony is relevant as non-hearsay to show that Ginger acted in self-defense. Even if Gene was joking or lying or just trying to scare Ginger, what Gene said is relevant to explain why Ginger was fearful of Fred, which in turn made it highly unlikely that she would attack him, leading to the conclusion that if she killed Fred she did so in self-defense. The only issue is whether Gene made the statement to Ginger, and Ginger can be cross examined as to that claim.

> [Of course, a judge or jury might instead conclude that Ginger's fear of Fred led her to "off" Fred at her earliest opportunity. As you know, however, the possibility of conflicting inferences is quite common and doesn't render evidence irrelevant.]

JUDGE: I'll admit the testimony as non-hearsay.

This non-hearsay argument would not succeed, however, if Ginger's defense were an alibi. For example, assume that Ginger's defense is that she was

watching an old musical at the Bijou Theater at the time Fred was killed. In this factual scenario, Ginger's fear of Fred would simply be irrelevant. If the defense attorney nevertheless did try to offer Gene's statement into evidence for this non-hearsay use, Ginger's testimony would probably go something like this:

DEFENDANT'S ATTORNEY: Ginger, when did you next see Gene?

A: It was two days before I saw Fred.

DEFENDANT'S ATTORNEY: And at that time, did you and Gene have a conversation?

A: Yes. I was alone outside a cafe, having coffee. Gene walked up to me and said, "Ginger, I hate to tell you this, but Fred recently told me that you're a goner the next time he sees you."

PROSECUTOR: Objection and move to strike, Your Honor. Hearsay.

[Again, in an actual trial the prosecutor would object after the question, before Ginger's answer.]

JUDGE: Defense counsel, any response? What is this statement offered to prove?

DEFENDANT'S ATTORNEY: I offer the testimony as non-hearsay to show that hearing Gene's statement made Ginger fearful of Fred.

JUDGE: Counsel, so what? There's no connection between your client's possible fear of Fred and your defense. Your client's fear might be relevant to prove how she might have reacted in the victim's presence, but since your client's claim is that she was nowhere near the victim at the time of his death, her fear is irrelevant. I'll sustain the objection, strike the response and instruct the jury to disregard it.

Again, nothing inherent in the words of an out-of-court assertion determines its relevance as non-hearsay. As with any other item of proffered evidence, you need to establish a connection between your desired non-hearsay use and a material fact or the credibility of a witness.

§ 11.06 PROBATIVE VALUE VERSUS UNFAIR PREJUDICE

Even if a party identifies a relevant non-hearsay use, the admissibility of an out-of-court assertion can (like any other type of evidence) be derailed by other evidentiary considerations. The primary evidence rule that comes into play with non-hearsay uses is Rule 403, the flip-side of the basic relevance rule set forth in Rule 401. Rule 403, as you recall, authorizes judges to exclude evidence when its probative value is substantially outweighed by such factors as the danger of unfair prejudice or undue consumption of time.[1] This section addresses Rule 403 in the context of out-of-court statements offered for non-hearsay uses.

[1] Chapter 4 examines Rule 403 in detail.

Offering an out-of-court assertion for a non-hearsay purpose always gives rise to a potential Rule 403 argument that the risk that a jury will improperly use the assertion for the truth of its contents outweighs the probative value of the non-hearsay use. Thus, as the proponent of non-hearsay, you may have to develop an argument not only supporting the probative value of the non-hearsay use but also minimizing the risk of improper use.

Example

Return to the example of Ginger, and assume that her defense to the charge that she murdered Fred is that she killed him in self-defense. Ginger seeks to offer evidence that two days before Fred was killed, Gene said to her, "Fred recently told me that you're a goner the next time he sees you." Once the defense attorney identifies the desired non-hearsay use (to show that Ginger had reason to fear Fred), the prosecutor may make a Rule 403 objection. If so, the arguments may go as follows:

PROSECUTOR: Your Honor, the government objects to the defendant's testimony concerning Gene's statement on Rule 403 grounds. The defense offers the statement as non-hearsay, to show that the defendant was fearful of Fred and therefore would be unlikely to attack him. I submit that the evidence has little probative value, because the jury would be justified in making the exact opposite inference, that if the defendant were afraid for her life, she might well attack Fred before he could harm her. And balanced against this minimal probative value is the significant risk that the jury will improperly accept Gene's statement for its truth, and infer that Fred had threatened to kill Ginger. This is exactly the reasoning that the hearsay rule is designed to prevent, so exclusion of the evidence is necessary to avoid unfairly prejudicing the government's case.

JUDGE: Defense counsel, any response?

DEFENDANT'S ATTORNEY: The government is arguing Ginger's credibility concerning her reaction to Gene's statement, and I submit that that's a matter for the jury to decide. This evidence is critical, because the jury can't possibly render a fair verdict unless it knows what was going through Ginger's mind at the time she killed Fred, and Gene's statement is the key to understanding her mental state. As for the possibility of misuse of the statement, the government has not identified any way in which the risk is greater in this case than in any other case in which non-hearsay is offered. Your Honor should admit the statement and admonish the jurors not to use the statement for its truth.

limiting instruction

JUDGE: I'll admit the statement and admonish the jury accordingly. Will the bailiff please ask the jurors to return to the courtroom?

With non-hearsay as with any other piece of evidence admitted for a limited purpose, there's no guarantee that jurors will obey a judge's admonishment. Evidence rules are more effective in controlling the information that reaches jurors than they are for controlling how jurors react to evidence once they've heard it. ("Amen to that," many commentators who view evidence rules as

unnecessary straightjackets on judicial discretion might respond.) For example, assume that during deliberations in the case of State v. Ginger, a couple of jurors argue that, "I can't believe that Gene would have told Ginger that Fred had threatened to kill her unless Fred had really made the threat. And I bet that Fred followed through and did try to kill her." These jurors would be improperly using Gene's statement for its truth. When such misuse occurs, most of the time the presiding judge and the lawyers don't find out about it at all. Jurors may not talk to them after deciding a case, and even when they do may not talk in detail about what was said during deliberations. Moreover, if the presiding judge and the lawyers do find out about misuse they usually do not do so until after a case has been decided. At that time, as you know, Rule 606 makes it nearly impossible to impeach a verdict on the ground that jurors misused evidence (*see* Chapter 7).

A fear that admonishing jurors not to use non-hearsay assertions for their truth may be asking jurors to perform a nearly-impossible mental task is a factor that some judges will consider when deciding whether to exclude non-hearsay under Rule 403.

§ 11.07 COMMON NON-HEARSAY USES

[A] Overview

No matter how thoroughly you pore over the Federal Rules of Evidence, you will not find a rule authorizing the use of out-of-court assertions for non-hearsay purposes or identifying permissible non-hearsay uses. Such rules are unnecessary. The admissibility of a statement as non-hearsay depends on the existence of a logical relationship between a claimed non-hearsay use and the legal, factual and credibility issues in a particular case, and thus is governed by relevance principles. However, certain non-hearsay uses appear routinely in trials, and the chapter explains those briefly below. These routine non-hearsay uses include:

- Assertion offered as evidence of a speaker's state of mind.
- Assertion offered as evidence of a listener's state of mind.
- Assertion offered as a "verbal act" or "words of independent legal significance."
- Assertion offered to contradict (impeach) in-court testimony.
- Assertion offered to provide context and meaning.

[B] Assertion Relevant to Declarant's State of Mind

As in the Abuster/Leaf example earlier in this chapter, declarants' assertions often reflect their subjective beliefs (states of mind). Whether or not the assertions are accurate, the subjective beliefs that spawned them may be relevant. Thus, an assertion may be admissible as non-hearsay when offered as circumstantial evidence of a declarant's subjective belief. A declarant's subjective belief can be relevant in two common circumstances:

- The declarant's belief is itself a material fact.

- The declarant's belief is circumstantial evidence of the declarant's behavior.

Example 1: State of Mind a Material Fact

In a will contest case involving a claim that the testator was mentally incompetent to make a will, the contesting party's attorney is questioning a witness who has testified that she was a close friend of the testator:

PLAINTIFF'S ATTORNEY: How often did you speak with the testator in the weeks before he signed the will?

A: Oh, at least every other day. I'd try to visit with him as often as I could.

PLAINTIFF'S ATTORNEY: Were these conversations in any way unusual?

A: Yes. One thing was that just about every time we'd get together, the testator would say a few times, "I am the walrus."

DEFENDANT'S ATTORNEY: Objection, hearsay.

JUDGE: Response from plaintiff's attorney?

PLAINTIFF'S ATTORNEY: The statement is offered as non-hearsay to prove that the testator was delusional and therefore incompetent to make a will, a material fact in this case. The making of statements claiming to be an animal is evidence of delusion.

JUDGE: Objection overruled. I'll admit the statement as circumstantial evidence of the defendant's mental state.

Example 2: State of Mind as Circumstantial Evidence of Behavior

Jill is charged with murdering her live-in boyfriend Barker; the defense is self-defense based on Battered Women's Syndrome. Jill's attorney examines Jill's close friend Madeleine:

DEFENDANT'S ATTORNEY: Do you recall a conversation with Jill that took place the day before Barker's death?

A: Yes, I do.

DEFENDANT'S ATTORNEY: How did you happen to be talking to Jill?

A: She called and asked me to come over to her apartment before Barker got there.

DEFENDANT'S ATTORNEY: How did Jill seem to be when you got to her apartment?

A: She seemed extremely nervous. She kept looking out the window. She kept repeating that Barker would be home any minute.

DEFENDANT'S ATTORNEY: Did Jill say anything else about Barker?

A: Yes. She said that Barker kept a gun hidden somewhere in the apartment, and that if she tried to leave he would find her and kill her.

PROSECUTOR: Objection, hearsay.

JUDGE: Defense attorney, any response?

DEFENDANT'S ATTORNEY: Yes. Jill's statement is offered as non-hearsay to prove that Jill was an abused woman who feared that Barker would kill her. Apart from the accuracy of her statements, what Jill said sheds light on how she experienced her relationship with Barker. Her statements support an inference that Jill suffered from Battered Women's Syndrome and that she felt trapped in the relationship and was forced to do what she did in order to survive.

JUDGE: Objection overruled.

Problem 11-1: Rocky Mountain High I

Jones' widow sues Life Insurance Co. to collect the proceeds of Jones' life insurance policy. To prove that the disfigured body found at the bottom of a steep cliff alongside Crooked Creek was Jones, the widow offers into evidence a letter written by Jones stating, "In a couple of days I'm going to head west to Crooked Creek." *Can the widow offer Jones' letter for a non-hearsay use?*

Problem 11-2: Rocky Mountain High II

Same case as previous problem. To prove that the disfigured body fo next to Crooked Creek was Jones, the widow offers into evidence a sec letter written by Jones stating, "Crooked Creek is like heaven on earth." *Ca the widow offer Jones' letter for a non-hearsay use?*

Problem 11-3: Mother and Child

Husband and Wife each seek custody of their five year old son, Child. To prove that it would be in Child's best interests for Wife to have custody, Wife seeks to testify that "Last week, Child told me that Husband is mean and often hits Child." *Can Wife offer Child's statement for a non-hearsay use?*

Problem 11-4: Mine!

Prosecution of Gates for assaulting Jobs, both of whom work for the same computer company. To prove that Gates had a motive to nttack Jobs, the prosecution calls Kevin to testify that a month before the alleged assault, Gates told Kevin that "I actually wrote the program that Jobs got the award for writing." *Can the prosecution offer Gates' testimony for a non-hearsay use?*

Problem 11-5: Backache

Pedro sues D'Amato for personal injuries growing out of an auto accident. To prove that he was in pain after the accident, Pedro calls Wilton to testify that "I was with Pedro on the night of the accident, and Pedro told me that his back was really stiff and sore." *Can Pedro offer his statement to Wilton for a non-hearsay use?*

Problem 11-6: At the Movies: The Boyfriend

The film *The Good Mother*[2] involves a custody battle between divorced parents. The couple's eight year daughter Molly lives with the mother and her live-in boyfriend, Leo. The father testifies that while Molly was visiting with him, she walked in on him just after he had finished showering, while he was clad only in a towel tied around his waist. The father further testifies that Molly asked him to "let me see it," and that "Leo always lets me see his penis." The mother's lawyer makes a hearsay objection to the father's testimony to Molly's statements. *Representing the father, for what if any non-hearsay use can you offer Molly's statements?*

Problem 11-7: At the Movies: Motive for Murder

In the film *Jagged Edge*[3] Jack Forrester is on trial for the murder of his wealthy wife Page. The prosecution's theory is that Forrester killed Page to prevent her from obtaining a divorce that would destroy his social and economic status. Virginia Howell, a prosecution witness who was Page's good friend, testifies that shortly before Page was killed, Page told Virginia that "my husband doesn't love me, he's been seeing other women, I'm going to divorce him." *In response to the defendant's hearsay objections to these statements, for what if any non-hearsay use can the prosecutor offer them?*

[C] Assertion Relevant to Listener's State of Mind

Just as statements can provide a window into a declarant's state of mind, so can hearing another's statement affect a listener's state of mind. When a listener's state of mind is *relevant*, the out-of-court statement that gave rise to that state of mind can qualify for admission as non-hearsay. As is true for a declarant's state of mind, a listener's state of mind may be relevant because it is itself a material fact, or because it constitutes circumstantial evidence of behavior.

Example 1: Listener's State of Mind as a Material Fact

Medical malpractice case in which plaintiff Petra claims that defendant Dr. Phibes gave Petra an overdose of X-rays and severely burned her leg. The substantive law in Petra's jurisdiction allows recovery of damages for "reasonable fear of developing cancer." Petra's attorney is questioning Petra:

PLAINTIFF'S ATTORNEY: Did you seek medical advice about the condition of your leg?

A: Yes, from Dr. Frank Enstein, a dermatologist.

PLAINTIFF'S ATTORNEY: What happened when you went to see Dr. Enstein?

A: Dr. Enstein examined my leg and told me that there's a very high risk that it's going to become cancerous in the future.

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[2] Warner Bros./Touchstone Pictures/Silver Screen Partners (1988).

[3] Colombia Pictures (1985).

DEFENSE ATTORNEY: Objection, hearsay.

PLAINTIFF'S ATTORNEY: Dr. Enstein's statement to Petra is offered as non-hearsay to prove that she reasonably feared developing cancer, a mental state which is itself a material fact on the issue of damages.

JUDGE: Objection overruled.

Example 2: Listener's State of Mind as Circumstantial Evidence of Behavior

Jill is charged with murdering her live-in boyfriend Barker; the defense is self-defense based on Battered Women's Syndrome. Jill's attorney examines Jill's close friend Madeleine:

DEFENDANT'S ATTORNEY: Do you recall a conversation with Jill that took place the day before Barker's death?

A: Yes, I do.

DEFENDANT'S ATTORNEY: How did you happen to be talking to Jill?

A: She called and asked me to come over to her apartment before Barker got there.

DEFENDANT'S ATTORNEY: How did Jill seem to be when you got to her apartment?

A: She seemed extremely nervous. She kept looking out the window. She kept repeating that Barker would be home any minute.

DEFENDANT'S ATTORNEY: Did you say anything to Jill about Barker?

A: Yes. I told her that about a week earlier, Barker had told me that he kept a gun hidden in the apartment, and that if Jill ever tried to leave him he would find her and kill her.

PROSECUTOR: Objection, hearsay.

JUDGE: Defense attorney, any response?

DEFENDANT'S ATTORNEY: Yes. Madeleine's statement is offered as non-hearsay to support Jill's belief that Barker would kill her if she tried to end the relationship. Apart from the accuracy of what Madeleine said, her statements support an inference that Jill felt trapped in the relationship and was forced to do what she did in order to survive.

Problem 11-8: Bagged

Debra is charged with possession of illegal drugs. To prove that Debra knew that the substance in the baggies found in Debra's home was contraband, the prosecution calls Seller to testify that "I assured Debra that the baggies contained Grade A-1 heroin."

1. Can the prosecution offer Seller's testimony as non-henrsay?

2. Is Seller's testimony admissible to prove that the baggies contained heroin?

Problem 11-9: Medical Mal

Sue Cherr sues Hospital for negligently employing Doctor Mal, who allegedly performed an unnecessary operation on Sue. To prove Hospital's negligence, Sue offers to prove that six months before Hospital hired Dr. Mal, the monthly issue of the state's Medical Quality Assurance Board Newsletter had rated the doctor as "unqualified to practice medicine or anything else, for that matter." *Can Sue offer the Newsletter's statement as non-hearsay?*

Problem 11-10: Hold the Dressing

Pei Pei slips and falls in the Cracked Barrel Restaurant on March 31, and sues the restaurant for negligently failing to clean up the spilled liquid which allegedly caused Pei Pei to fall. The restaurant's defense is that the floor was clean. Pei Pei calls Tal, who was eating in the restaurant on the night that Pei Pei fell, to testify to events that occurred prior to the time she fell. The defense (restaurant's) attorney and the judge should respond to the numbered portions of the transcript.

PLAINTIFF'S ATTORNEY: Do you recall where you were on the evening of March 31 last, at around 8 PM?

A: Yes, I was eating dinner with a companion in the Cracked Barrel Restaurant.

PLAINTIFF'S ATTORNEY: Do you know about an incident in which a small puddle of liquid in the restaurant caused Pei Pei to fall that night?

DEFENSE ATTORNEY: (*What if any, objection might you make to this question?*)

JUDGE: (*Rule on any objection*)

PLAINTIFF'S ATTORNEY: Well, let me ask you this. Did you notice anything unusual about the floor near where you were dining?

DEFENSE ATTORNEY: Objection, leading question.

JUDGE: Overruled. (*Is this ruling correct?*)

A: Yes.

PLAINTIFF'S ATTORNEY: What did you notice?

A: A few feet from where I was sitting, between me and the salad bar, there was a puddle of some kind of clear liquid on the floor. I couldn't tell what it was; it looked like salad oil that had been laying there for some time.

DEFENSE ATTORNEY: Objection, improper opinion.

JUDGE: Overruled. (*Is this ruling correct?*)

PLAINTIFF'S ATTORNEY: Did you discuss this puddle with your dining companion?

A: I did. I told my companion that the spill was a dangerous one and that someone could easily slip and fall in it and get hurt.

DEFENSE ATTORNEY: Objection, hearsay.

PLAINTIFF'S ATTORNEY: Your Honor, I'm offering the statement only to corroborate the witness' testimony that a spill was on the floor, so on that

basis it's not hearsay. I'll stipulate that the statement is not offered to prove that the spill was dangerous or that someone could get easily hurt.

JUDGE: (*What ruling on this response to the objection?*)

PLAINTIFF'S ATTORNEY: I also offer the statement for the non-hearsay purpose of its effect on the companion's state of mind. Hearing Tal's assertion gave the companion reason to believe that the spill was a dangerous one.

JUDGE: (*What ruling on this response to the objection?*)

PLAINTIFF'S ATTORNEY: Did you say anything else to your companion?

A: Yes, I said that I was going to notify an employee to clean it up.

DEFENSE ATTORNEY: Objection, hearsay.

PLAINTIFF'S ATTORNEY: Your Honor, I'm offering the statement to show notice to the restaurant, so it's not hearsay.

JUDGE: (*What ruling on the objection?*)

PLAINTIFF'S ATTORNEY: Did your companion respond to your comment?

A: Yes. My companion said, "You don't have to bother. I already mentioned it to the hostess."

DEFENSE ATTORNEY: Objection, hearsay.

PLAINTIFF'S ATTORNEY: Your Honor, I'm offering the statement only to prove notice to the restaurant, so it's not hearsay.

DEFENSE ATTORNEY: (*How would you respond to the plaintiff's argument?*)

JUDGE: (*Rule on the Defense Attorney's response*)

PLAINTIFF'S ATTORNEY: What happened next?

A: Just at that moment the hostess walked past the table. My companion told her, "Don't forget to take care of that spill over there near the salad bar."

DEFENSE ATTORNEY: Objection, hearsay.

PLAINTIFF'S ATTORNEY: The companion's statement is a command, not an assertion that a spill existed, and therefore is not hearsay. (*Is this a valid argument?*)

PLAINTIFF'S ATTORNEY: Also, the companion's statement is non-hearsay for the reason that it's admissible to show notice to the restaurant that a spill existed. (*Is this a valid argument?*)

Practice Tip: Non-Hearsay Uses and "State of Mind." Many substantive rules include "state of mind" elements such as "intent," "knowledge" and "willfully." As a result, one of the most common claimed non-hearsay uses for out-of-court statements involves state of mind. While having legal outcomes rest partly on state of mind elements may further important policy goals, the frequency with which they appear in substantive rules greatly expands the range of potential non-hearsay uses for out-of-court statements.

[D] Assertion Offered as a "Verbal Act" (aka "Words of Independent Legal Significance" or "Legally Operative Conduct")

An assertion is non-hearsay when the assertion itself constitutes direct evidence of a material fact. If this were not so, you'd have the absurdity of a substantive rule creating a legal right negated by an evidence rule preventing proof of a material fact establishing the legal right. As with the other non-hearsay uses, admitting out-of-court statements as "verbal acts" protects an adversary's opportunity for meaningful cross-examination. The issue is whether words constituting direct evidence were spoken or written, and the witness who testifies that they were is in court and subject to cross-examination.

Example 1

Faye sues Ray for defamation, claiming that Ray made a false statement to a group of people that damaged Faye's reputation. Faye's attorney is questioning Faye:

PLAINTIFF'S ATTORNEY: What took place during this meeting of the California Post-Modern Club?

A: I heard Ray tell a group of club members that I like red meat and that when I order a salad I don't ask for the salad dressing on the side.

DEFENSE ATTORNEY: Objection, hearsay.

PLAINTIFF'S ATTORNEY: Ray's statement is non-hearsay because it constitutes words of independent legal significance. Faye's testimony provides direct evidence that Ray spoke the words that we claim are defamatory. That is, Ray's uttering of those words satisfies a material fact that we have to prove to make out a case of defamation. We'll later offer evidence of other material facts, including the falsity of Ray's statement.

JUDGE: Objection overruled.

Example 2

Arnold Schwartz sues Vic Tanney for breach of contract, alleging that Vic refused to honor a written agreement to hire Arnold as a fitness trainer in Vic's gym. Arnold's attorney offers a written exhibit into evidence:

PLAINTIFF'S ATTORNEY: Your Honor, I offer into evidence a written contract which we will show was signed by Arnold and Vic in which Vic agrees to employ Arnold as a fitness trainer in Vic's fitness club.

DEFENSE ATTORNEY: Objection, hearsay.

PLAINTIFF'S ATTORNEY: The contents of the contract constitute non-hearsay words of independent legal significance, as the contents provide direct evidence of the terms of the agreement between Arnold and Vic, and thus satisfy a material fact in this breach of contract case.

JUDGE: Objection overruled.

Example 3

Kathy sues Lee for reneging on a legally enforceable gift. Kathy's attorney is examining Kathy:

PLAINTIFF'S ATTORNEY: And what happened when Lee talked to you at your 30th birthday party?

A: Lee handed me an ATM card and a small piece of paper with a PIN number written on it, and told me that the money in the account that she had set up for me was mine as thanks for all the kindnesses I'd shown to Lee.

DEFENSE ATTORNEY: Objection, hearsay.

PLAINTIFF'S ATTORNEY: What Lee told Kathy when giving her the ATM card and the PIN number constitutes non-hearsay verbal acts, as Lee's words establish that Lee made a gift to Kathy.

JUDGE: Objection overruled.

Similar considerations support the admissibility of "verbal parts of acts" a non-hearsay. When words and deeds are intertwined, and the words establish the legal character of the deed, the words are admissible as "the verbal part of the act."

Example 4

A county supervisor is charged with accepting bribes in exchange for votes. The prosecution offers evidence that the treasurer of a trash collection company handed the supervisor a cash-filled envelope and said, "This should take care of your vote on the trash collection contract." The treasurer's statements are non-hearsay because they establish the legal character of the act as a bribe rather than a loan or a donation to the supervisor's favorite charity.

Problem 11-11: Death and . . .

The Internal Revenue Service sues Dee Duction for failing to report the value of a Lexus automobile as earned income. Dee claims that the Lexus was a gift from Smith and not taxable income. To prove that the Lexus was a gift from Smith, Dee could call Wesson to testify that:

1. Smith told me, "I gave my Lexus as a gift to Dee Duction yesterday."

2. Smith told me, "I'm going to give my Lexus as a gift to Dee Duction tomorrow."

3. I was standing next to Dee and Smith when Smith said, "Dee, here are the keys to my Lexus. Accept it as my gift to you."

4. I was standing next to Dee and Smith when Dee said, "Smith, I still can't tell you how much I appreciate your giving me the Lexus yesterday."

5. All of the above.

Problem 11-12: Payback Time

George sues Gracie for failing to repay a loan of $5000. To prove that the loan was repaid, Gracie testifies that "I handed George five $1000 bills and told him that this was payment in full of the loan." *Is Gracie's statement to George hearsay?*

Problem 11-13: Cellar Dweller

Reggie is charged with being an "accessory after the fact" for helping Archie to evade capture after robbing a bank. The prosecutor calls Doug Head as a witness to testify that "I was visiting Reggie when Archie ran into the house and told us that he'd just robbed a bank and needed help. Reggie told Archie to hide in the cellar, that he'd be safe there. A few minutes after Archie had run into the cellar, a police officer knocked on the door and asked us if we'd seen Archie. Reggie told the officer that he had no idea of Archie's whereabouts." *What if any portions of this testimony constitute inadmissible hearsay?*

Problem 11-14: Protection

Nitti is charged with obtaining money from retailers through means of extortion. The prosecution calls Marcus Nieman, a small jewelry store owner, to testify that "Nitti came into my store and told me that he'd blow up my store if I didn't pay him $1000 a month." *Does Nitti's statement constitute a verbal act?*

Problem 11-15: Mea Culpa

Whit Lasch sues May Aculpa for injuries growing out of an auto accident. Whit offers to testify that a week after the accident, May called Whit and said, "I'm really sorry. The accident was all my fault." *Does May's statement constitute a verbal act?*

Problem 11-16: Up in Arms

Bonnie is charged with armed bank robbery. To prove that Bonnie was armed at the time of the robbery, the prosecution calls Officer Ness to testify that "I arrested Clyde for robbing the bank along with Bonnie. Clyde then told me that Bonnie had used a gun during the robbery." *Does Clyde's statement to the officer constitute a verbal act?*

[E] Assertion Offered to Contradict (Impeach) Testimony ("Prior Inconsistent Statement")

Evidence of a witness' out-of-court assertion that is inconsistent with the same witness' in-court testimony is admissible as non-hearsay. A judge or juror may regard a witness who "speaks with a forked tongue" to be lying, mistaken or a reptile. Thus, regardless of the out-of-court assertion's accuracy, the mere fact that a witness has made inconsistent statements is relevant for its possible impact on the witness' credibility.

Example

Miguel sues Dustin for personal injuries growing out of an auto accident. Miguel's witness Sara testified on direct examination that Dustin's car ran a stop sign. The defense attorney's cross-examination goes as follows:

DEFENSE ATTORNEY: Sara, you saw Dustin's car run the stop sign?

A: I did, that's what I testified to.

DEFENSE ATTORNEY: Yet the day after the accident, you talked about it with Maria, your supervisor at work, correct?

A: I'm sure I did. It was pretty unnerving.

DEFENSE ATTORNEY: And didn't you tell Maria that you thought that the driver of the car that collided with Dustin's car was to blame for the accident?

PLAINTIFF'S ATTORNEY: Objection, hearsay.

DEFENSE ATTORNEY: Sara's statement to Maria is offered as non-hearsay to contradict Sara's direct examination testimony. Sara's giving contradictory accounts of the same event may lead the jury to disbelieve Sara.

JUDGE: Objection overruled. The witness will answer the question.

Remember that even if Sara admits to making this statement to Maria, the defense attorney can't use the statement for the truth of its contents (i.e., that the plaintiff Miguel was at fault). Sara's out-of-court statement to Maria is admissible only for the limited purpose of impeachment, and the judge is likely to instruct the jurors not to use it as evidence that Mignel was at fault. (As you'll see in Chapter 12, Rule 801 (d)(1)(A) makes contradictory out-of-court assertions admissible for their truth when they are made under oath, perhaps in a deposition. Some jurisdictions, such as California, go even further and admit all self-contradictory statements for their truth. *See* Cal. Evid. Code Sec. 1235.)

Though a prior inconsistent statement may be non-hearsay, other rules may impact the "time, place and manner" of impeachment with a prior statement. For a discussion of those rules, please see Chapter 7.

Problem 11-17: Speed Test 1

In a personal injury case growing out of an auto accident, By Stander testifies on direct examination by the plaintiff that "The plaintiff's Mazda was traveling about 25 m.p.h. when it was struck by the defendant's Buick." Which if any of the following questions that the defense attorney might put to By on cross-examination constitute prior inconsistent statements?

1. "Didn't you tell the investigating officer that the plaintiff's Mazda wasn't going much faster than 20 m.p.h. just before the accident?"

2. "Didn't you tell the investigating officer that you couldn't remember how fast the plaintiff's Mazda was going just before the accident?"

3. "Isn't it true that Ahn Looker told the investigating officer that the plaintiff's Mazda was going at least 35 m.p.h. just before the accident?"

4. "Didn't you tell the investigating officer that you're not too good at judging the speed of cars?"

5. "Isn't it true that you lied about a year ago when you falsely reported to your insurance company that three laptop computers had been stolen from your car?"

6. "Didn't you tell the investigating officer that the defendant's Buick entered the intersection with the green light just before the accident?"

Problem 11-18: Speed Test 2

Same case as previous example. During the defense attorney's cross-examination of plaintiff's witness By Stander, the following testimony occurs:

DEFENSE ATTORNEY: By the way, how fast was the defendant's car going just before the accident?

A: I'm sorry, I don't remember.

DEFENSE ATTORNEY: Well, didn't you tell the investigating officer that the defendant's car was traveling no more than 30 m.p.h?

Does the defense attorney's last question constitute proper impeachment with a prior inconsistent statement?

[F] Assertions Offered to Provide Context and Meaning

In an effort to convince judges and jurors that testimony is accurate and that legal claims are valid, litigators typically strive to elicit testimony so that it portrays events in a way that makes the events appear real and memorable. Unless a witness is testifying to a performance by a mime, real-world incidents consist both of actions (e.g., "A robber entered the store carrying a gun") and words (e.g., "I heard someone say that we should run out the back door"). Thus, to help witnesses appear credible, attorneys normally ask witnesses to testify to stories that consist of statements that were part and parcel of the events to which they're testifying. Such statements often qualify as non-hearsay for the simple reason that they are not offered for their truth, but to portray a detailed and accurate version of events relevant to a litigated dispute. Of course, trial judges have the power under Rule 403 to exclude contextual assertions if the time necessary to recount them or their unfairly prejudicial impact outweighs their probative value.

Example

Huntz and Leo are charged with conspiring to distribute illegal drugs. The prosecutor is questioning Bobby, a former member of the conspiracy who has agreed to testify for the government concerning the conspirators' operations. Bobby is about to testify about what took place at a meeting in Leo's apartment:

PROSECUTOR: And what happened when you arrived at that location?

A: Huntz opened the door and we went into the living room. Leo was on the phone when I got there, so Huntz and I just talked about stuff for a few minutes until he was off the phone.

PROSECUTOR: Can you remember what you and Huntz talked about?

A: Nothing special. I think he told me that he hadn't been feeling well for the last few days, and that his family was really pressuring him to go back to school or get a job.

PROSECUTOR: Anything else happen before Leo got off the phone?

A: I remember telling Huntz that school wasn't such a bad idea, I was thinking along the same lines for myself. Oh, I told him I was sorry he didn't feel well, and that he looked OK to me, I think that's about it.

PROSECUTOR: Did Leo join you and Huntz at some point?

A: Yeah, he wasn't on the phone more than a few minutes. He said something about his sister having trouble with her kid, she hoped that Leo could talk to him.

PROSECUTOR: Then what happened?

A: Leo came over to where we were sitting and said that there was a problem with a meth delivery. . . .

In this example, the alleged conspirators' comments are non-hearsay because their relevance does not depend on their accuracy. The various statements are relevant because they demonstrate that Bobby was personally present and can recall what took place at a real event. Moreover, the testimony is too brief and non-emotive to raise Rule 403 concerns.

§ 11.08 CHAPTER REVIEW PROBLEMS

Problem 11-19: Summation

Darla is charged with murdering Spanky; her defense is self-defense. Darla's attorney offered evidence that a few days before Spanky's death, a friend of Darla's had told Darla that Spanky was usually armed to the teeth with weapons. The defense offered the friend's statement as non-hearsay to show that Darla had reason to fear Spanky. Based on the friend's statement, evaluate the propriety of this portion of the defense attorney's final summation:

> Ladies and gentlemen, the prosecution's argument that Darla attacked Spanky doesn't make any sense. Darla testified that she was afraid of Spanky, and we know that Darla had good reason to fear him since Spanky normally was fully armed with weapons.

Problem 11-20: My Case is Shot

Shot Gunn is a plnintiff in a case growing out of an accident in which Shot was a passenger in a car that collided with the defendant's car. At trial, the driver of the car in which Shot was riding as a passenger testifies on direct examination as follows:

PLAINTIFF'S ATTORNEY: And what happened next?

A: Well, just moments before the collision, I heard Shot say that I had better be careful because the defendant's car was traveling way over the speed limit and was constantly changing lanes.

DEFENSE ATTORNEY: Objection, hearsay, move to strike.

PLAINTIFF'S ATTORNEY: Your Honor, the statement is offered as non-hearsay to help explain why the driver of the car in which Shot was a passenger was driving with particular care.

JUDGE: Objection overruled. I'll admit the statement for that limited purpose.

PLAINTIFF'S ATTORNEY: And what if any effect did Shot's remark have on your own driving?

A: I slowed down and made sure that I stayed in my lane.

Assume that at the close of Shot's case, the above testimony is Shot's only evidence as to the defendant's driving. The defendant moves for a directed verdict, asking that the judge dismiss Shot's case. *How should the judge rule on the motion?*

Problem 11-21: Policy Argument

Hy Strung's heirs file suit against Life Insurance Company after the Company refuses to pay the policy proceeds after Hy's death. The Company claims that Hy obtained the policy by lying about his health history, particularly his history of high blood pressure. The Company offers into evidence Hy's written insurance application, in which Hy wrote "none" next to the question, "Do you have any history of elevated blood pressure?" Hy's heirs object to admission of the application on the ground of hearsay. *What result?*

Problem 11-22: Bad Heir Day 1

This is a will contest case in which plaintiff Aggie Tator, Tess Tator's daughter and sole heir, seeks to set aside Tess' will disinheriting Aggie on the ground that the will was a product of Tess' insane delusion that Aggie was a drug addict. The beneficiary of the will, the Friends of Crabgrass Society, seeks to call three witnesses to testify that within three weeks prior to the will's execution, each of the witnesses had independently told Tess that they had seen Aggie buying and injecting heroin. *Can the Friends of Crabgrass Society offer this testimony as non-hearsay?*

Problem 11-23: Bad Heir Day 2

In this will contest case plaintiff Darth Tator, Tess Tator's son and sole heir, seeks to set aside Tess' will disinheriting him on the ground that the will was a product of Tess' insane delusion that Darth was a drug addict. The beneficiary of the will, the Friends of Bluegrass Society, seeks to call as a witness Tess' friend Bill to testify as follows to a conversation that took place about a week before the will's execution:

DEFENSE ATTORNEY: Bill, do you have a friend by the name of Jim?

A: Yes, I do. Jim, I and Tess Tator had all been good friends.

DEFENSE ATTORNEY: And did you speak to Jim about Tess in mid-August, about a week before Tess signed her will?

A: Yes, I did.

DEFENSE ATTORNEY: And what did Jim tell you?

A: Jim said that he'd talked to Tess the day before our conversation. He said that he'd told her that he'd recently seen her son Darth buying and injecting heroin.

PLAINTIFF'S ATTORNEY: Objection, hearsay, move to strike.

DEFENSE ATTORNEY: I offer Jim's statement to Tess as non-hearsay to show that Tess had a rational reason to disinherit Darth.

JUDGE: (*What ruling?*)

Problem 11-24: Bad Heir Day 3

In this will contest case plaintiffs Aggie and Darth, Tess Tator's two children and sole heirs, seek to set aside Tess' will disinheriting them on the ground that the will was a product of Tess' insane delusion that they were drug addicts. The beneficiary of the will, the Friends of Greengrass Society, seeks to call Tess' friend Jim to testify as follows to a conversation that Jim had with Tess about a week before the will's execution:

DEFENSE ATTORNEY: Jim, what happened during your conversation with Tess?

A: Tess talked a little bit about Darth and Aggie, her children.

DEFENSE ATTORNEY: And what did Tess say about Darth and Aggie in this conversation?

A: Tess told me that three of Darth's and Aggie's friends had recently told her that they'd seen Darth and Aggie buying and injecting heroin.

PLAINTIFF'S ATTORNEY: Objection, hearsay, move to strike. The witness is testifying to what Tess said that some other declarants had told her.

DEFENSE ATTORNEY: The testimony is non-hearsay to show that Tess acted rationally in disinheriting her children.

JUDGE: (*What ruling?*)

Problem 11-25: Affordable Hearsay

Pavel sues Afford Motor Cars, his former employer, for wrongful termination. Afford had fired Pavel, an assistant manager, after receiving and investigating complaints from a number of female employees that Pavel had sexually harassed them. Assume that substantive law protects employers against wrongful termination suits if the employers investigate claims of employee wrongdoing and find a reasonable justification for termination. Afford commissioned an investigation, and offers into evidence the investigator's report that it allegedly considered before firing Pavel. The report recites employee accounts of Pavel's acts of sexual harassment, and concludes that

Pavel committed numerous acts of sexual harassment. *You represent the employer; for what if any non-hearsay purpose can you offer the report into evidence?*

Problem 11-26: Honeymoon Over

Alice sues Ed for wrongful death, alleging that Ed's negligent driving caused the death of Alice's husband Ralph. In such cases, the monetary value of the husband-wife relationship is itself an element of damages. Ed calls Alice's co-worker Trixie to testify, "A couple of weeks before Ralph was killed, Alice told me that Ralph had been cruel and indifferent to her throughout all the years of their marriage, and had repeatedly stuck his fist in her face and threatened to send her to the moon." *Can Ed offer Trixie's testimony into evidence for a legitimate non-hearsay purpose?*

Problem 11-27: Mind the Gap

Otis sues the Sears Tower Management Co. for personal injuries as a result of Otis' tripping when he got out of an elevator car that allegedly had stopped below the level of the floor. Al Urter is prepared to testify that he was riding in the elevator car at the same time as Otis and that when the elevator door opened and before Otis started to walk out, Al said to Otis, "Watch out for the gap between the elevator and the floor."

1. Otis offers Al's statement into evidence to prove that the elevator had stopped below the level of the floor. In response to Sears Tower's hearsay objection, Otis' attorney argues that "It's non-hearsay because Al's statement does not constitute an assertion that a gap existed between the elevator and the floor." *Ruling?*

2. Sears Tower offers Al's statement into evidence to prove that Otis' own carelessness contributed to his injuries. Otis makes a hearsay objection. *Ruling?*

Problem 11-28: Garden Variety Hearsay 1

Rose sues Fern alleging that Fern failed to make good on a promise to pay Rose $1000 to remove all the ivy from Fern's front yard. To prove that the parties entered into a contract on March 1, Rose testifies in part as follows:

PLAINTIFF'S ATTORNEY: And what was said in this March 1 conversation with Fern?

A: Fern asked how much I would charge to clear the ivy from her front yard. I said $1000, and Fern said that we had a deal.

DEFENSE ATTORNEY: Objection, hearsay.

JUDGE: (*What ruling?*)

Problem 11-29: Garden Variety Hearsay 2

Same case. To prove that Rose and Fern entered into a contract on March 1, Rose calls Fern's next-door neighbor Daisy, who testifies as follows:

PLAINTIFF'S ATTORNEY: And did you talk to Fern on February 28?

A: I did.

PLAINTIFF'S ATTORNEY: And what did Fern tell you?

A: Fern said that on the following day, she was going to offer Rose $1000 to remove all the ivy from her front yard.

DEFENSE ATTORNEY: Objection, hearsay.

JUDGE: (*What ruling?*)

Problem 11-30: Garden Variety Hearsay 3

Same case. To prove that Rose and Fern entered into a contract on March 1, Rose calls Fern's next-door neighbor Daisy, who testifies as follows:

PLAINTIFF'S ATTORNEY: And did you talk to Fern on February 28?

A: I did.

PLAINTIFF'S ATTORNEY: And what did you tell Fern?

A: I told Fern that she had better clear the ivy from her front yard or sl would have a terrible rat problem.

DEFENSE ATTORNEY: Objection and move to strike. Hearsay and irrelevant.

PLAINTIFF'S ATTORNEY: *Can you offer the testimony for a relevant non-hearsay use?*

Problem 11-31: Garden Variety Hearsay 4

Same case. To prove that Rose and Fern entered into a contract on March 1, Rose calls Fern's next-door neighbor Daisy, who testifies as follows:

PLAINTIFF'S ATTORNEY: Daisy, did you talk to the plaintiff, Rose, on March 3?

A: I did.

PLAINTIFF'S ATTORNEY: Where did that conversation take place?

A: In Fern's front yard, when Rose was clearing ivy from Fern's yard.

PLAINTIFF'S ATTORNEY: And what was said in this conversation?

A: I asked Rose how much she would charge to clear ivy from my yard. Rose said that Fern had agreed to pay her $1000 to clear the ivy from Fern's yard, so she'd charge me the same if the yards were about the same size.

DEFENSE ATTORNEY: Objection and move to strike, hearsay.

PLAINTIFF'S ATTORNEY: Rose's statement to Daisy is non-hearsay because it recites the terms of the agreement.

JUDGE: (*What ruling?*)

Problem 11-32: Alternate Defenses

Ojay Simpson is charged with murdering his ex-wife, Nicole Brown. The prosecution seeks to offer evidence from Nicole's friend Sara that three days

before Nicole was found stabbed to death, Nicole had told Sara that "My ex has been stalking me day and night and yesterday he vandalized my car. I'm really scared of him." Assume either that Ojay's defense is an alibi, or that his defense is that he killed his ex-wife in self-defense after she came at him with a hammer. *Discuss the impact of these alternative defenses on the hearsay status of Nicole's statement to Sara.*

Problem 11-33: Security Alert (Role Play)

Prosecution of Walter Denton, a teen age boy, for armed robbery of a convenience store. Walter's defense is an alibi, and the primary issue at trial is the credibility of Sharon, the security guard who was on duty the night of the robbery and who identifies Walter as the robber. A few days before the robbery, the store manager had posted an "Alert" in the employees' lounge which stated in part that "Police reports indicate that convenience stores such as ours are increasingly a target of violent robberies by teen age boys." A hearing will take place out of the jury's presence in which the prosecutor will seek a ruling that the contents of the Alert are admissible and the defense attorney will seek to have the contents excluded from evidence.

Student # 1: You are the prosecutor, and in the hearing will argue that you should be permitted to offer the contents of the "Alert" into evidence during Sharon's direct examination. Interview Sharon outside of class, and try to develop foundational evidence that Sharon can provide that allows you to offer the Alert's contents into evidence as non-hearsay. During the hearing, support your argument as to the admissibility of the Alert's contents as non-hearsay by making an "offer of proof" as to the foundational evidence that Sharon can provide, based on what you were told during the interview. With the judge's permission, you may also respond to the defense attorney's counter-argument if you think it necessary to do so.

Student # 2: You are Sharon, and will meet with the prosecutor outside of class to discuss the testimony you will give if you are permitted to testify. Like the prosecutor, try to think of what testimony you can give that will make the contents of the Alert admissible as non-hearsay, and then assume that such testimony is consistent with your duty to tell the truth.

Student # 3: You are the defense attorney who represents Walter. Try to anticipate the prosecutor's argument to support admissibility of the Alert's contents as non-hearsay, and argue against admissibility. After hearing the prosecutor's argument, you may argue that the Alert is irrelevant, or that the contents are unduly prejudicial, or both.

Student # 4: As the judge, preside over the hearing and rule on the admissibility of the Alert's contents.

Problem 11-34: Zoo Suit

Annie Malle has sued a zoo for personal injuries that she sustained as a result of being bitten by an iguana. While visiting the zoo, Annie had reported to Osa, a zoo employee, that she'd seen the iguana running loose, and Osa told Annie to "please show me where you last saw it." Annie pointed out a

spot on a dirt path on the far side of a sign that read "Danger; Employees Only," and told Osa that "the iguana ran into the bushes over there." Osa asked Annie to walk to where she'd last seen the iguana, saying "don't worry about that sign, it's perfectly safe." When Annie and Osa walked to the point on the path where Annie had last seen the iguana, Annie crouched down, pointed towards a bush and was bitten. The zoo claims that Annie's own carelessness contributed to her injuries.

The zoo's attorney makes a hearsay objection to Annie's testifying to the statements that she made to Osa and that Osa made to her. *Are any of these statements admissible as non-hearsay?*

Annie's attorney makes a hearsay objection to Osa's testifying to the message on the sign. *Is this message admissible as non-hearsay?*

Problem 11-35: Last Words (Role Play)

Sunny Von is charged with murdering her husband Claus by poisoning his tea. Sunny claims that Claus was depressed and took his own life. The prosecution calls the Von family housekeeper, Alan Dersh, to testify that the day before Claus died, Claus told Alan with his last words that "I think Sunny has been poisoning me." The judge will conduct a hearing (nut of the jury's presence) on the admissibility of Claus' statement to Alan. The hearing will go as follows:

Student # 1: As the prosecutor, identify a non-hearsay use for Claus' assertion and develop and present an argument in support of your proposed use. You may with the judge's permission respond to the defense attorney's argument.

Student # 2: As the defense attorney, try to anticipate the prosecutor's likely proposed non-hearsay use for Claus' assertion and develop and present an argument in opposition.

Student # 3: As the judge, preside over the hearing and rule on the assertion's admissibility.

Note: In the case of *Shepard v. United States,* 290 U.S. 96 (1933), Dr. Shepard was charged with murdering his wife. The government argued on appeal that the wife's statement, "Dr. Shepard has poisoned me," was admissible for the limited purpose of showing that the wife wanted to live and was not suicidal. Justice Cardozo dismissed the argument, for at trial the government offered the wife's statement for its truth, not for the limited purpose it belatedly put forward on appeal. However, Justice Cardozo's memorable words indicate how he would have ruled had the government offered the wife's statement for the limited purpose at trial:

> Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown out all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.

Justice's Cardozo's conclusion is not of course binding on the judge in this problem. His opinion was dictum, and the case pre-dated the Federal Rules of Evidence by decades.

Problem 11-36: Under Cover

To prove that Dana illegally solicited an act of prostitution, Police Officer Millhone offers to testify that Dana walked up to the officer's parked car. The officer said, "I'm feeling lonely tonight." Dana replied, "I'd be glad to help you out, but if you want to have sex with me, it'll cost you $100." *Are any of the statements hearsay?*

Problem 11-37: Rite to Trial

Irv has been sued for intentional infliction of emotional distress by Dinah, whose husband Bill was struck by a car just after he left the restaurant in which he and Dinah had been eating. Irv had walked out of the restaurant just after Bill did. Irv saw a car strike Bill, and then Irv watched as a Catholic priest ran over to Bill and began administering the last rites. At that point, Irv ran back into the restaurant and told Dinah, "I'm sorry to tell you this. The fellow you were eating with was just hit by a car and is going to die at any moment." Bill survived, and Dinah has sued Irv to recover for the emotional shock allegedly caused by his statement.

1. When Dinah seeks to testify to Irv's statement to her, Irv's attorney objects on the basis of hearsay. *Is this a valid objection?*

2. When Irv seeks to testify to the priest administering the last rites, Dinah objects that his actions constitute an out-of-court statement and are hearsay. *Is this a valid objection?*

Problem 11-38: Pre-School

Mack Martin is charged with sexually abusing a four year old child who was a student in Mack's preschool class. Mack denies the charges.

1. At trial, the child testifies hesitantly and incompletely. The prosecutor then calls Officer Millhone to testify to the explicit details concerning the sexual act allegedly perpetrated by Mack that the child provided to the officer in a pretrial interview. *Would the officer's testimony be admissible for a non-hearsay purpose?*

2. At trial, the child testifies to the explicit details concerning the sexual act allegedly perpetrated by Mack. The defense attorney then calls Officer Millhone to testify that in a pretrial interview conducted by the officer, the child described the sexual act allegedly perpetrated by Mack hesitantly and incompletely. *Would the officer's testimony be admissible for a non-hearsay purpose?*

3. At trial, the child testifies to the explicit details concerning the sexual act allegedly perpetrated by Mack. Mack's attorney then seeks to offer into evidence a videotape of a children's services worker's pretrial interviews of the child, which depicts the child initially denying that any sexual misconduct occurred, and after repeated insistence by the children's services worker that sexual abuse had occurred, recanting the denial and agreeing with the worker. *On what non-hearsay basis might the defense attorney seek to offer the videotape into evidence?*

Related Case Note: The "Triangle Shirtwaist Fire" was a watershed event in the U.S. labor movement. The fire occurred in 1911 in a lower Manhattan garment factory, and resulted in the deaths of over 100 mostly poor, immigrant female garment workers. The deaths were generally attributed to the factory owners' violating labor laws by keeping exit doors locked until quitting time. The owners were criminally charged with causing the death of one of the employees, who according to key prosecution witness Kate Altermann burned to death while trying to escape through a locked exit door. Defense attorney Max Steuer, representing the owners, used an unusual trial tactic when he cross-examined Altermann. Steuer asked Altermann to "describe what happened again," and her narrative response was nearly a verbatim match to the testimony she had given on direct examination. Steuer then asked Altermann to "describe what happened again," and she used the identical words when she again repeated her story. (When Steuer pointed out that she had changed one word, she quickly corrected herself.) Steuer then offered evidence of the very different language Altermann had used when she gave a statement to the prosecutor nine months prior to trial, soon after the fire. The contrast between Altermann's earlier courtroom accounts apparently undermined her credibility with the jurors, because the owners were acquitted. *What non-hearsay use did Steuer make of the out-of-court statement that Altermann gave to the prosecutor?*

Problem 11-39: Self Service

Otto Mobeel sues Van Dorr for personal injuries incurred as a result of Van's alleged physical assault on Otto after a dispute as to which of them had first arrived at a gas station pump. Van contends that if he struck Otto at all he did so only in self-defense.

1. Otto seeks to testify that after Van got out of his car and walked towards Otto brandishing the windshield cleaning tool, Otto said two or three times that "I don't want to fight, let's stop this nonsense." *Are Otto's statements admissible for a non-hearsay purpose?*

2. Otto seeks to testify that as Van was advancing towards him with the windshield cleaning tool, another patron pumping gas on the other side of the island said to Otto that, "It looks like that guy is going to attack you." In response to Van's hearsay objection, Otto responds that "I'm offering the statement for the non-hearsay purpose of proving that the patron believed that Van was the aggressor." *How should the judge rule on the objection?*

3. Van seeks to testify that a few minutes after Otto left the gas station, a gas station employee walked over to Van and said, "We'll never let that guy pump gas here again." Otto makes a hearsay objection; Van responds that the employee's statement is admissible because it is relevant to prove that Otto started the fight apart from the assertion's accuracy. *How should the judge rule?*

Problem 11-40: Parole Evidence

Carla and Trevor are charged with jointly planning and carrying out a bank robbery. Carla's defense is that she knew nothing about the robbery until

Trevor forced her at gunpoint to enter the bank with him and point a gun at the bank employees while he emptied their cash drawers. The prosecution seeks to offer testimony from David that a week before the bank robbery took place, he and Carla were in their parole officer's waiting room. While they were waiting for their monthly meetings to take place, Carla said to David that "Maybe you can live like this, but this guy Trevor and me are going to score a big hit on a bank soon and get out of here."

PROSECUTOR: (*Argue for the admissibility of David's testimony as non-hearsay.*)

DEFENSE ATTORNEY: (*Argue for the exclusion of all or a portion of David's testimony.*)

JUDGE: (*Preside over the arguments and rule on the admissibility of David's testimony.*)

Problem 11-41: 2-B or Not 2-B

Sherm is charged with possession of illegal drugs that a police officer found stuffed under a shirt in the corner of a closet after legally entering Apt. 2-B. Sherm's defense is that he lives in Apt. 3-B and knows nothing about the drugs in Apt. 2-B. To prove that Sherm lives in Apt. 2-B, the prosecutor calls the police officer who found the drugs to testify that the officer found an envelope and a letter in a pocket of the shirt under which the drugs were stuffed. The envelope was addressed to Sherm in Apt. 2-B; inside was a letter addressed to Sherm at the same address from Knight Law School, denying Sherm's application for admission. The defense attorney objects to the envelope and letter as hearsay. *How should the judge rule?*

Problem 11-42: At the Movies: Self-Defense

In the made-for-TV movie *Final Appeal*,[4] Christine is charged with murdering her husband Ed. Christine claims that she shot Ed when he confronted her and advanced towards her, and she thought that he was going to attack her. Christine seeks to testify to an incident that took place abut a week before the shooting, when Ed chased her through their house with a machete and said, "If I catch you spying on me again you'll die." *Would Christine's testimony to Ed's statement be admissible over the prosecution's hearsay objection?*

Problem 11-43: At the Movies: Addiction

In the same film as in Problem 11-42, the prosecution calls Police Officer Ayers to testify that he investigated Christine's complaint that her husband Ed had assaulted her with a machete, the day after the alleged attack. After denying that the incident had taken place, Ed told Officer Ayers that Christine was addicted to amphetamines and that she imagined many incidents that never took place. The judge strikes the testimony concerning Ed's statements as inadmissible hearsay. The judge's ruling is:

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[4] Republic Television (1993).

1. Improper if the prosecution's theory is that Christine killed Ed to prevent him from destroying her drug cache.

2. Improper if the prosecution's theory is that Christine killed Ed because he was about to file for a divorce that she opposed.

3. Improper if the prosecution's theory is that when Christine killed Ed she was under the influence of amphetamines.

4. Improper because Ed's statements explain why the officer failed to arrest Ed for assault with a deadly weapon.

5. Improper because Ed's statements tend to undermine Christine's claim that Ed would have confronted her and advanced on her on the day of the shooting.

Problem 11-44: Bad Call

Sue Ellen is charged with trafficking in illegal drugs. Officer Liu testi that she and other police officers raided a warehouse filled with illegal d The officers received a number of phone calls from callers who sought to drug purchases. Officer Liu testifies that two of the callers asked for pounds of your finest hashish and make sure that Sue Ellen prepares order, she always includes a little extra in a package." The prosecution offers the callers messages to prove that the warehouse was a place where drugs were being sold and that Sue Ellen was a seller. *How should the judge rule on the defense attorney's hearsay objection?*

Problem 11-45: Sold!

Auction House sues Bidder to enforce an agreement that was allegedly arrived at when its auctioneer accepted the last bid for a rare set of "Great Law Professor Trading Cards." The auctioneer seeks to testify that Bidder made the final and highest bid, after which the auctioneer said, "Sold." Bidder objects that the auctioneer's testimony is inadmissible hearsay. *How should the judge rule?*

Problem 11-46: At the Movies: The Shout

In the film *Let Him Have It*,[5] Derek Bentley and Chris Craig are charged with murdering a police officer who intervened in their attempt to burgle a warehouse. Craig fired the bullet that killed the police officer. Bentley was unarmed, but his culpability for the killing is based on the proposed testimony of a second police officer that when Craig pointed a weapon at the shooting victim, Bentley shouted, "Let him have it, Chris." *What is the relevance of Bentley's statement to the prosecution's case, and does it constitute hearsay? If Bentley does not testify at trial, should the judge sustain Craig's objection that Bentley's statement is barred by the Confrontation Clause?*

[5] Luc Roeg & Robert Warr (1991).

Problem 11-47: Probable Claus

Kris Kringle is on trial for robbery of a toy store. At trial, the store's owner was uncertain whether Kringle was the robber, but did testify that the robber was a heavy set older white male who had a long white beard and was dressed in a red suit. Officer Nunez pulled Kringle's car over shortly after the robbery took place, after noticing that Kringle matched the description of the robber broadcast on her police radio. After finding a white beard and red suit on the floor of Kringle's car, Nunez placed him under arrest. At trial, the prosecutor seeks to have Nunez testify to the information about the robbery and the robber that was broadcast on the police radio. However, the judge has ruled that the broadcast is not admissible for the non-hearsay purpose of demonstrating that Nunez had probable cause arrest Kringle, because probable cause issues are decided prior to trial.

Student # 1: As the prosecutor, identify another non-hearsay use for the information in the broadcast and argue for its admissibility.

Student # 2: As the defense attorney, you may respond to the prosecutor's argument by arguing that the information in the broadcast is inadmissible hearsay and that Nunez's testimony to the information would be unfairly prejudicial under Rule 403.

Student # 3: As the judge, preside over the hearing and make a ruling.

Problem 11-48: Transcript Analysis

Carrie is charged with murdering Fay Tallity; the defense is self-defense. The transcript below consists of the testimony of Robert, a defense witness. Please respond to the italicized portions of the transcript.

DEFENSE ATTORNEY: Robert, were you with Carrie on November 14?

A: Yes, along with another friend, Menky.

DEFENSE ATTORNEY: Did you happen to say anything about Fay Tallity on that date?

PROSECUTOR: Objection, leading.

JUDGE: Overruled. *(Is this ruling correct?)*

A: Yes.

DEFENSE ATTORNEY: Where were you when you mentioned Ms. Tallity?

A: The three of us were riding in Menky's car. Menky was driving, I was in the passenger seat in front and Carrie was in the back seat.

DEFENSE ATTORNEY: And how did you happen to be talking about Ms. Tallity?

A: Well, Menky was saying that we were going to be graduating soon and that there were lots of different kinds of kids we'd gone to school with.

PROSECUTOR: Objection to what Menky said and move to strike, hearsay.

JUDGE: *How should the judge rule? Why?*

DEFENSE ATTORNEY: Did you respond to Menky's comment?

A: Yeah. I'd transferred from Main High a couple of months earlier, and I said that Main really had some really nasty students in it.

PROSECUTOR: Objection, hearsay.

DEFENSE ATTORNEY: It's not hearsay because Robert is testifying to his own out-of-court statement.

JUDGE: (*Please respond to this argument.*)

DEFENSE ATTORNEY: It's also not hearsay because _____. *(Please read the through the remainder of the transcript and identify a non-hearsay use for this testimony.)*

JUDGE: I'll overrule the objection.

DEFENSE ATTORNEY: OK, what happened next?

A: My guess is that Menky asked if I was referring to anyone who Menky might know.

PROSECUTOR: Objection, speculation.

JUDGE: Sustained, that testimony is stricken. (*Is this ruling correct?*)

DEFENSE ATTORNEY: What's the next thing you remember?

PROSECUTOR: Your Honor, I think we're getting into an area where the defense plans to offer a statement that I'm going to object to as hearsay. I'd ask that the jury be excused so that Your Honor can rule on my objection before the statement is repeated in open court.

JUDGE: All right, I'll excuse the jury. (The jury exits stage left.) Defense counsel may continue the questioning.

DEFENSE ATTORNEY: All right, I'll ask you again. What's the next thing that you remember?

A: Right about then is when I told Menky that Fay, who we'd all seen at a party a couple of nights before, was one of the nasty people I was talking about.

DEFENSE ATTORNEY: What else if anything do you recall saying about Ms. Tallity?

A: I remember telling Menky that Fay was a member of a street gang called the South Street Bullies.

PROSEGUTOR: Objection, hearsay.

DEFENSE ATTORNEY: This is non-hearsay, not offered to prove that Ms. Tallity really was a member of a street gang, but to show that Carrie had reason to be fearful of Ms. Tallity and therefore wouldn't have attacked her.

JUDGE: Counsel, for the statement to be admissible on that basis I'll need to hear foundational evidence convincing me by a preponderance of the evidence that the defendant heard the witness' statement. Please inquire further. (*Is this ruling correct?*)

DEFENSE ATTORNEY: There were four of you in the car, correct?

PROSECUTOR: Objection, leading. (*Is this objection well-founded?*)

A: That's correct.

DEFENSE ATTORNEY: Can you please briefly describe the car?

A: Menky drives a Saturn, a two-door model.

DEFENSE ATTORNEY: About how far away from Carrie were you when the three of you were riding in the car?

A: Gee, it's a small car, no more than four feet I guess. Carrie was sitting behind me on the passenger side.

DEFENSE ATTORNEY: Was the radio on while you were talking to Menky about Ms. Tallity?

A: Yes, we were listening to a talk show host who was saying that the Internet was going to revolutionize the economy. (*Is the talk show host's statement hearsay?*)

DEFENSE ATTORNEY: And do you recall whether Carrie made any comments concerning your remarks about Fay Tallity?

A: I think she did; I'm not absolutely sure.

PROSECUTOR: Objection, speculation.

JUDGE: (*How should the judge rule? Why?*)

DEFENSE ATTORNEY: What tone of voice did you use when you made the statement about Ms. Tallity to Menky?

A: Normal voice, kind of like I'm talking here. I wasn't whispering or anything.

DEFENSE ATTORNEY: That's all on the foundational issue, Your Honor.

JUDGE: Prosecutor, any inquiries?

PROSECUTOR: None on the foundational issue. I submit that the evidence is insufficient as a matter of law to show that the defendant heard the witness' remark. It would be pure speculation to assume that someone sitting in the back seat of a car could hear what the passenger was saying to the driver, especially with the radio on.

JUDGE: In my opinion the defendant's evidence establishes that the defendant heard Robert's remark so I'm going to overrule the objection as to lack of foundation. But so both counsel will know my thinking on this, be advised that I plan to include in the jury instructions an instruction that it's up to the jurors to decide whether the defendant overheard the witness' remark about Ms. Tallity, and that they may disregard the witness' testimony concerning the remark if they conclude that the defendant didn't hear it. Anything else before I bring back the jury? (*Is this ruling and statement correct?*)

PROSECUTOR: Yes. Might I question the witness briefly as to my hearsay objection?

JUDGE: You may.

PROSECUTOR: Robert, did you say anything more about Ms. Tallity than what you've already testified to?

A: No.

PROSECUTOR: And did the defendant in any way respond specifically to your statement about Ms. Tallity?

A: No, not that I remember.

PROSECUTOR: No further questions at this time. Your Honor, on the hearsay issue, I object to admission of the remark as non-hearsay based on Rule 403. The probative value of the defendant's non-hearsay use is minimal. At most, the defendant overheard a single casual remark, and never asked about it or responded to it in any way. Thus, whether possibly overhearing the remark made the defendant in any way fearful of Ms. Tallity is highly doubtful. Balanced against this is the highly unfair prejudice of the risk that the jury will misuse the evidence to believe that Ms. Tallity was a gangster, who either attacked the defendant or whose life is unworthy of legal protection.

DEFENSE ATTORNEY: (*How might the defense attorney respond to the prosecutor's argument?*)

JUDGE: (*After hearing the defense attorney's response, please rule on the admissibility of Robert's statement as non-hearsay.*)

§ 11.09 MULTIPLE CHOICE REVIEW PROBLEMS

Review Problem 11-A

Ronald McDonald sues King Corp. for violating age discrimination law when it terminated his employment as an accountant. McDonald seeks to offer into evidence an email that he sent to his former co-workers in the accounting department stating that "King Corp. terminated my employment today as part of its effort to save money by firing older workers and bringing in new ones at much lower salaries." Assume that McDonald properly authenticates the email. Which statement below is accurate?

1. The portion of the email stating that King Corp. fired McDonald is non-hearsay, admissible as "words of independent legal significance" because termination of employment is a material fact that McDonald has to prove.

2. The entire email is non-hearsay, admissible as "words of independent legal significance" because both termination of employment and age discrimination are material facts that McDonald has to prove.

3. The entire email is admissible as non-hearsay because McDonald, the maker of the statement, testifies and is subject to cross-examination.

4. The entire email is admissible as non-hearsay to show that McDonald's former co-workers' belief that McDonald was improperly terminated is reasonable.

5. The email is inadmissible hearsay.

Review Problem 11-B

In a traffic accident case, to prove that the defendant drove negligently the plaintiff can offer evidence that:

1. Just prior to the accident, the passenger in the defendant's car said, "There's a sharp turn up ahead, you should probably slow down."

2. Shortly after the accident, the passenger in the defendant's car said, "That was a sharp turn back there, you should have slowed down."

3. Just prior to the accident, the passenger in the plaintiff's car said, "There's a sharp turn up ahead, that car coming the other way needs to slow down."

4. Shortly after the accident, the passenger in the plaintiff's car said, "That was a sharp turn back there, that car coming the other way should have slowed down."

Review Problem 11-C

Police Officer Sara O'Hara places Miggins under arrest for burglary. Miggins momentarily manages to break free and run away, but O'Hara recaptures Miggins quickly. At Miggins' trial for burglary, the prosecution seeks to offer evidence of Miggins' escape attempt. The judge should rule that the evidence of the escape attempt is:

1. Irrelevant to the issue of Miggins' guilt, since many people might try to avoid arrest regardless of whether they have committed a crime.

2. Inadmissible character evidence, tending to prove only that Miggins committed the crime of "attempted escape" and therefore has a propensity to violate the law.

3. Admissible to prove Miggins' guilt.

4. Hearsay, since Miggins' escape attempt constitutes an implied assertion, "I am guilty."

Review Problem 11-D

Miggins sues Police Officer Sara O'Hara for false arrest. At trial, Officer O'Hara seeks to offer evidence that she responded to an alarm at the home of Lemieux, who pointed in the direction of Miggins and said, "That's the guy who broke into my house." Evidence of Lemieux's statement is:

1. Admissible to show that the officer reasonably believed that Miggins had committed the burglary.

2. Admissible as non-hearsay to prove that Miggins did commit the burglary, because the statement explains why Lemieux pointed in Miggins' direction.

3. Inadmissible hearsay.

4. Admissible to prove that Lemieux believed that Miggins committed the burglary.

Review Problem 11-E

Kramden is charged with assaulting Norton; Kramden contends that Norton was the aggressor and that Kramden acted in self-defense. Kramden seeks to have Alice testify that the day before the alleged assault, Kramden told her, "That guy Norton is as mean and vicious as they come." Kramden's statement to Alice is:

1. Admissible to prove that Norton is mean and vicious and therefore was the aggressor.

2. Admissible to prove Kramden's fear of Norton, from which it can be inferred that Kramden would not have attacked Norton.

3. Inadmissible evidence of Norton's propensity for violence.

4. Inadmissible unless, pursuant to Rule 104(b), Kramden offers foundational evidence sufficient to support a finding that Norton had previously engaged in violent conduct.