MEANING, INTENTION, AND THE HEARSAY RULE

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INTRODUCTION

Hearsay problems are language problems. The hearsay rule proscribes the repetition in court of out-of-court statements offered "to prove the truth of the matter asserted." To determine whether a statement is being offered to prove the truth of the matter it asserts, a court must determine what the statement means. In this respect, applying the hearsay rule is similar to interpreting a statute or a contract: in each case, the court must interpret language at a remove from the context of its utterance. Scholars have long recognized that questions about statutory and contract interpretation are questions about meaning, and they have effectively used linguistic analysis to elucidate these and other interpretive questions. Surprisingly, however, relatively little effort has been made to apply linguistic principles in the study of the hearsay rule.

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1. FED. R. EVID. 801(c) ("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.").


3. One example of the use of language philosophy in the analysis of the hearsay rule is Craig Callen's use of Paul Grice's cooperative principle as an aid in understanding the purposes motivating the rule and in distinguishing hearsay from nonhearsay. See Craig R. Callen, Hearsay and Informal Reasoning, 47 VAND. L. REV. 43 (1994). Professor Callen argues that an out-of-court statement should be considered hearsay
   (i) if the proponent offers it to establish any inference that the actor generally
In this Article, I draw on insights from the linguistic discipline of pragmatics to offer another way to understand and apply the definition of hearsay in the Federal Rules of Evidence. Pragmatics is concerned with how we use language in real-world contexts to accomplish various objectives. By identifying the conventions that govern language usage, pragmatics provides ways to analyze what a speaker means when he says something and how meaning is conveyed through language. Pragmatics thus has obvious utility for the study of hearsay.

The philosopher Paul Grice looms over the field of pragmatics. His theory of conversational implicature revolutionized linguists' understanding of how we communicate. It is Grice's pragmatic theory of meaning, however, that has the greatest import for me. Meaning is an extraordinarily difficult concept. No single theory of meaning has been accepted for all purposes. I will argue, however, that the definition of hearsay in Federal Rule of Evidence 801 (Rule 801) requires an inquiry into what linguists call "speaker's meaning." I will then offer a formula for identifying hearsay based on Grice's theory of speaker's meaning. Finally, I will apply my approach both to basic situations and to a number of hearsay problem areas to demonstrate how it can facilitate the resolution of even the most intractable hearsay issues while effecting the rationale underlying the hearsay rule.

My objectives are twofold. First, by showing how hearsay problems fit into an established linguistic framework, I hope to respond to some of the criticism of the prevailing understanding of

would have intended the audience to draw from the communication, and (ii) if assessment of the degree of accuracy of the actor's implicit claim of co-operation would be essential to a thoughtful, unprejudiced factfinder's determination of the inference's reliability.

Id. at 86-87 (footnotes omitted).

4. STEPHEN C. LEVINSON, PRAGMATICS 5 (1983) ("[J]ust as, traditionally, syntax is taken to be the study of the combinatorial properties of words and their parts, and semantics to be the study of meaning, so pragmatics is the study of language usage.").

5. Id. at 53 (describing pragmatics as the study of language users' ability to "compute out of sequences of utterances, taken together with background assumptions about language usage, highly detailed inferences about the nature of the assumptions participants are making, and the purposes for which utterances are being used").

6. Id. at 97 ("The notion of conversational implicature is one of the single most important ideas in pragmatics ....").
the hearsay rule. I attempt to show that, contrary to that criticism, the definition of hearsay in Rule 801 can be consistently and rationally applied even in difficult cases. Second, I propose a hearsay formula that I hope can assist judges in resolving real-world hearsay problems. Specifically, I will argue that judges should focus on the communicative intention motivating the statement, and that recognizing that intention requires a focus on preexisting understandings between the declarant and her audience.

I. THE DEFINITION OF HEARSAY IN RULE 801

A. The Implied Assertion Problem

A prerequisite to understanding the modern hearsay rule is understanding the historical debate about the scope of the rule. This debate has its origin in the celebrated nineteenth-century case of *Wright v. Tatham.* A Dickensian epic that meandered through England’s courts for the better part of a decade, *Wright* was a suit by an heir at law to recover land from a devisee under a will. The case turned on the validity of the will, specifically on the testator’s mental capacity. As evidence of the testator’s capacity, the defendant offered several letters written to the testator in the years prior to his death. None of the letters expressly commented on the testator’s mental capacity, but the content suggested that the letter writers believed the testator was competent. This inference was offered as evidence that the testator was in fact competent. The case went all the way to the House of Lords, and the letters

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7. See infra note 37 (citing articles critical of the hearsay definition in Rule 801, as interpreted by the Advisory Committee).
9. Id. at 489. The case labored through trials and appeals for eight years before its final resolution in the House of Lords. Id. at 469, 524 (noting that the case began in 1830 at the Lancaster Spring Assizes and was resolved in 1838 in the House of Lords).
10. Id. at 488.
11. Id. at 490-94. A letter from the testator’s cousin in Virginia discussing family matters and a letter from a local vicar asking the testator to arrange for his attorney to resolve a dispute between the decedent and the township were among those forming the heart of the dispute. Id. at 490-91, 496.
12. Id. at 493-94.
ultimately were declared inadmissible hearsay because their relevance depended on the credibility of the nontestifying letter writers. That is, the letters were hearsay because the factfinder was being asked to trust the memory, perception, narrative capacity, and sincerity of the letter writers without the benefit of cross-examination.

*Wright* may be known best for a hypothetical suggested in dicta by Baron Parke, the author of the most influential opinion. Parke posited a hypothetical in which the seaworthiness of a vessel is at issue, and as evidence of seaworthiness, a party calls a witness to testify that the captain of the ship inspected it at the dock and then boarded with his family. Parke concluded that the witness’s testimony in that situation would be hearsay, because the captain is in effect “testifying” to the seaworthiness of the vessel, and the factfinder is being asked to rely on the captain’s perception, memory, and sincerity without the benefit of cross-examination.

For both the letters actually offered in *Wright* and the ship captain hypothetical given in dicta, the factfinder was asked to make what Christopher Mueller has described as a “two-step inference.” From the declarant’s conduct—writing a letter proposing a business transaction or boarding a ship—the factfinder is asked to infer the declarant’s belief about some real-world condition, in this case the competence of the recipient or the seaworthiness of the vessel. Based on that belief, the factfinder is asked to infer that the real-world condition existed. This type of evidence—now packaged under the heading “implied assertions”—is problematic because its validity turns on the un-cross-examined belief of the declarant. Its treatment has informed the debate about the definition of hearsay for over 150 years.
B. Hearsay Definitions Past and Present

Wright apparently represented the common law view of hearsay at least until the beginning of the twentieth century. Courts and commentators of that era typically eschewed formalistic definitions in favor of a loose, conceptual approach to hearsay, focusing on the importance of the cross-examination of any witness.

Supreme Court Decide the Kearley Case?, 16 Miss. C. L. Rev. 1 (1995) [hereinafter Hearsay Symposium] (electronic symposium addressing the problem of implied assertions and featuring Professors Allen, Berger, Callen, Friedman, Kirkpatrick, Kuhns, Mosteller, Mueller, Park, Scallen, Seideman, Swift, and others). The symposium organizer, Craig Callen, described four models for dealing with the implied assertion problem: (1) the explicitness-based model; (2) the dangers-based model; (3) the communicative intention-based model; and (4) the system-based model. Craig R. Callen, Forward to the First Virtual Forum: Wallace Stevens, Blackbirds and the Hearsay Rule, 16 Miss. C. L. Rev. 1, 2-10 (1995).

19. It is not clear how seriously courts took the rule against hearsay prior to Wright. In his thorough study of the history of evidence law, Thomas Gallanis concluded that, as of the mid-1700s, the hearsay bar was seldom enforced. T.P. Gallanis, The Rise of Modern Evidence Law, 84 Iow A. L. Rev. 499, 512 (1999) ("Hearsay ... occupies much of the modern law of evidence but in 1755 was accepted almost without comment.") (citation omitted). Even in the years immediately preceding Wright, decisions applying the hearsay rule typically engaged in little or no analysis of the hearsay definition. See, e.g., Foote v. Hayne, 171 Eng. Rep. 1310, 1310-11 (K.B. 1824) (admitting one item of apparent hearsay and excluding another, without explanation).

20. Early American courts applying the hearsay concept generally avoided offering any definition at all, working instead from an assumption that the hearsay character of the evidence was inescapable. See, e.g., Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397 (1869) (discussing admissibility of statements of physical condition and state of mind without offering a definition of hearsay); Nicholls v. Webb, 21 U.S. (8 Wheat.) 326, 333 (1823) (analyzing several hearsay issues, including declarations against interest and business records, while stating only that "[t]he general objection to evidence, of the character of that now before the Court, is, that it is in the nature of hearsay, and that the party is deprived of the benefit of cross-examination"). Those courts that offered more were extremely conclusory. See, e.g., Melius v. Houston, 41 Miss. 59, 59 (1866) ("A witness will not be permitted to testify to facts of which he has no knowledge, and of which he is informed by the statements of others not parties to the suit."); Salmon v. Orser, 12 N.Y. Super. Ct. (5 Duer) 511, 516 (1856)("[T]he declaration of a third party, out of court, not examined as a witness, is not evidence of the fact stated in such declaration. It is mere hearsay ...."). The first great American evidence treatise writer, Simon Greenleaf, described hearsay as "that kind of evidence, which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person." 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 89, at 175-76 (3d ed. 1846). The United States Supreme Court adopted Greenleaf's terminology almost verbatim in Hopt v. Utah, 110 U.S. 574, 581 (1884).
whose credibility was at issue.\textsuperscript{21} This approach allowed for essentially ad hoc judgments based on a range of credibility concerns, freeing courts either to take the hearsay rule to its Wright-inspired limits or to apply it more narrowly.\textsuperscript{22}

In the twentieth century, the credibility-based approach embodied by Wright began to fall out of favor. The reformist trend, with its emphasis on black letter rules, emerged in the law of evidence as in other common law disciplines.\textsuperscript{23} Relying on Wigmore, courts found a concise hearsay formulation in the language that now seems so familiar, defining hearsay as "extrajudicial utterances" offered to prove the "truth of the matter asserted."\textsuperscript{24}

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\textbf{21.} 1 Greenleaf, supra note 20, § 98, at 175.
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(I) It is found indispensable, as a test of truth, ... that every living witness should, if possible, be subjected to the ordeal of a cross examination, that it may appear, what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth.
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\textit{Id.}

The original motivation for the hearsay rule apparently was that the statements of the out-of-court declarant were made in the absence of an oath. See Gallanis, supra note 19, at 533 (explaining hearsay rationales in the eighteenth and nineteenth centuries). By the beginning of the nineteenth century, that rationale had been subordinated to one focusing on the absence of cross-examination. \textit{Id.}

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\textbf{22.} Although frequently cited by nineteenth-century treatise writers, Wright escaped significant critical analysis for decades. See Charles T. McCormick, The Borderland of Hearsay, 39 Yale L.J. 489, 498 (1930) (noting the absence of judicial analysis of Wright). Most authorities simply ignored Wright's suggestion that nonassertive conduct could be hearsay and elided the implied assertion problem presented by the letters. See, e.g., 1 Greenleaf, supra note 20, § 124, at 213 (stating only that the hearsay rule "rejects all hearsay reports of transactions, whether verbal or written, given by persons not produced as witnesses"); March Phillipps & Thomas James Arnold, A Treatise on the Law of Evidence 171-72 (4th American ed. 1859) (approvingly citing Wright's holding with respect to letters, but implying that courts in England did not extend the holding to nonassertive conduct). In practice, an enormous amount of "implied assertion" evidence almost certainly came in without judges or lawyers recognizing the potential hearsay issue. See Richard O. Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence 367 (2d ed. 1982) ("American courts have generally dealt with the problem of whether non-assertive conduct is hearsay by failing to recognize that such conduct might present a hearsay problem.").
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\textbf{24.} Fitzgerald v. State, 72 S.E. 541, 543 (Ga. 1911) (quoting 3 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 1768, at 2274 (1st ed. 1904)). Ironically, Wigmore refused to offer a formulaic hearsay definition. He would state only that "the Hearsay rule, as accepted in our law, signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination." 3 John Henry Wigmore, A Treatise on the Anglo-American System of
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Over the next half century, the “truth of the matter asserted” definition became internalized in the common law of evidence. With the passage of the Federal Rules of Evidence, it was formally codified. Under Federal Rule of Evidence 801(c), hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

The substitution of a single, concise rule for a vague, conceptual principle necessitated some line drawing on the difficult issues presented by Wright. Although influential commentators praised Wright for its intellectual integrity, few wanted a hearsay rule as broadly exclusionary as Wright seemed to require. In addition, courts defining hearsay in “truth of the matter asserted” terms increasingly held that Wright-type evidence was not hearsay.

EVIDENCE IN TRIALS AT COMMON LAW § 1362, at 3 (2d ed. 1923). Later in the work, however, in discussing statements that are not hearsay, such as verbal acts, Wigmore stated that “[i]f, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the Hearsay rule does not apply.” Id. § 1766, at 770-71. This is the language courts adopted. A handful of reported decisions had used the phrase “truth of the matter asserted” to refer to hearsay prior to the publication of Wigmore’s treatise. E.g., Vietor v. Spalding, 84 N.E. 1016, 1017 (Mass. 1908); Murray v. Boston & M.R.R., 54 A. 289, 290 (N.H. 1903).

A definition centered on the “truth of the matter asserted” formula appeared in the ill-fated Model Code of Evidence and in the slightly more successful Uniform Rules of Evidence. UNIF. R. EVID. 63 (“Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence ....”); AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, Rule 501(2), at 224 (1942) (adopted in no jurisdictions) (“A hearsay statement is a statement of which evidence is offered as tending to prove the truth of the matter intended to be asserted ....”). The formula got its real boost, however, from McCormick, who used it in his treatise. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 225, at 460 (1954) (“Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.”). A series of Westlaw searches showed that in the decade from 1945 through 1954, the year McCormick’s treatise appeared, eighteen reported decisions of state and federal courts used some variation of “truth of the matter asserted” to define or refer to hearsay. In the decade following the publication of the treatise, the number of reported decisions using that formulation more than tripled, to sixty-five. In the following decade, coincidentally leading up to the promulgation of the Federal Rules, the number more than tripled again, to 231 reported decisions.

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

27. See Edmund M. Morgan, Hearsay and Non-Hearsay, 48 HARV. L. REV. 1138, 1139-40 (1935) (proposing a definition of hearsay that would include evidence offered for a two-step inference within the scope of the hearsay rule but admit it under an exception in most cases).

28. The best known “implied assertion” cases have been those involving telephone orders.
These trends forced the codifiers of the Federal Rules of Evidence to decide how evidence offered for the two-step inference should be treated under their definition.

The drafters easily dispensed with the issue of nonassertive conduct (Baron Parke’s ship captain hypothetical). They accomplished this by incorporating into Rule 801 the following definition of “statement”: “(1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.” By providing that conduct can qualify for hearsay treatment only if it is intended as an assertion, the definition unambiguously removes nonassertive conduct offered for the two-step inference from the scope of the hearsay rule.

The Rule is not as clear with respect to verbal assertions offered for the two-step inference, as in the letters in Wright. In the notes following Rule 801, however, the Advisory Committee expressed its intention to treat verbal assertions as not hearsay when offered for the two-step inference. It did so by explaining why nonassertive conduct is not hearsay. Although modern cognitive research teaches that problems of misperception and poor memory are probably placed to a gambling or drug-dealing operation and offered in evidence to prove the nature of the business. Although statements of this type are directly analogous to the letters offered in Wright, most American courts have held that they are not hearsay because they are not offered for the truth of the matter asserted, but rather for the fact that they were made. E.g., People v. Reifenstuhl, 99 P.2d 564, 565 (Cal. Dist. Ct. App. 1940); State v. Tolisano, 70 A.2d 118 (Conn. 1949); Friedman v. State, 13 S.E.2d 467 (Ga. 1941); Annotation, Admissibility of Evidence of Fact of Making or Receiving Telephone Calls, 13 A.L.R. 2d 1409 (1950) (citing cases).

29. FED. R. EVID. 801(a).
30. The uncertainty stems from the placement of the phrase “if it is intended as an assertion” in the definition of “statement.” It has been argued that because this phrase comes immediately after the portion of the definition referring to nonverbal conduct, it modifies only that portion of the definition. See David E. Seidelson, Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts, 24 DUQ. L. REV. 741, 757-58 (1986). As discussed in the following text, the Advisory Committee interpreted the final phrase to modify the entire definition, thus bringing oral and written assertions within the definition only to the extent that they are intended as assertions. See Paul R. Rice, Should Unintended Implications of Speech Be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence, 65 TEMP. L. REV. 529, 531 (1992) (“According to the Advisory Committee’s interpretation of Rule 801(a), the last clause modifies both subsections (1) and (2), thereby excluding from the definition of hearsay both conduct and verbal utterances that are offered to prove something other than what the speaker or actor intended to communicate by his conduct or words.”).
much more significant, legal commentators have tended to see the risk of insincerity as the most problematic of the four testimonial infirmities. Following that line of reasoning, the Advisory Committee enunciated a rationale for the exclusion of nonassertive conduct grounded in the reduced risk of insincerity associated with that kind of evidence:

Admittedly [nonverbal conduct] 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.\(^2\)

Having spelled out that rationale, the Committee added one more sentence: “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).”\(^3\) The Committee concluded that “[t]he 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.”\(^4\) The Committee thus enunciated what might be termed an “intent-based” approach to the hearsay rule.\(^5\) The intent-based approach focuses on what the out-

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32. Fed. R. Evid. 801(a) advisory committee's note.
33. Id.
34. Id. (emphasis added).
35. Roger Park has described the approach in Rule 801 as “assertion-centered,” in contrast to the “declarant-centered” approach of the common law. Roger C. Park, “I Didn’t Tell Them Anything About You”: Implied Assertions as Hearsay Under the Federal Rules of Evidence, 74 Minn. L. Rev. 783, 783 (1990) (“Under an assertion definition, an out-of-court statement is hearsay when offered in evidence to prove the truth of the matter asserted. Under a declarant definition, an out-of-court statement is hearsay when it depends for value on the credibility of the declarant.”) (citations omitted). Because an approach focusing on assertions need not rely on intended meaning, I do not use his terminology.
of-court declarant intended to assert, and then asks whether that intended assertion has been offered for its truth at trial. If the statement is offered for something other than its intended assertion, it is not hearsay.

Legitimate questions have been raised both about the degree of authority that should be afforded the Advisory Committee’s Notes in general and about the validity of the intent-based approach. For example, a leading critic, David Seidelson, has argued that to draw a distinction between express and implied assertions is “to elevate form over substance and amorphous rules of grammar over the realities of the litigation process.” Another critic, Paul Rice, has argued that the Advisory Committee’s interpretation fails the test of its own logic because it potentially allows evidence bearing the risk of insincerity—an allowance that the approach is designed to prevent.


37. See, e.g., Ronald J. Bacigal, Implied Hearsay: Defusing the Battle Line Between Pragmatism and Theory, 11 S. Ill. U. L.J. 1127, 1144-45 (1987) (“A return to the foundation of the hearsay rule and a proper emphasis on protecting the right of cross-examination is not only the proper academic approach, it is also the common sense approach and the easiest approach to apply in practice.”); Michael H. Graham, “Stickperson Hearsay”: A Simplified Approach to Understanding the Rule Against Hearsay, 1982 U. Ill. L. Rev. 887, 920 (1982) (arguing that the hearsay rule should be revised to include any “statement whose relevance depends upon the matter asserted being true, without reference to whether a further inference is then going to be drawn”); Seidelson, supra note 30, at 758 (“[T]here is nothing in the legislative history of the Rule to indicate that Congress affirmatively acquiesced in the Advisory Committee’s conclusion that [assertive verbal conduct offered as a basis for inferring something other than the matter asserted] should be treated as nonhearsay.”); Olin Guy Wellborn III, The Definition of Hearsay in the Federal Rules of Evidence, 61 Tex. L. Rev. 49, 92-93 (1982) (proposing a revised hearsay rule including all verbal inferred assertions in definition of hearsay).


39. Rice, supra note 30, at 534. As Rice explained:

- It is illogical to conclude that the question of sincerity is eliminated and that the problem of unreliability is reduced for unintended implications of speech if that speech might have been insincere in the first instance, relative to the direct message intentionally communicated. If potential insincerity is injected into the utterance of words that form the basis for the implied communication, the implication from the speech is as untrustworthy as the utterance upon which it is based.

Id.
Nevertheless, most leading treatises and recent judicial opinions seem to accept the Advisory Committee's understanding. As a result, under the prevailing view, Rule 801 draws a line between the risk of sincerity and the other testimonial risks. Evidence that implicates the sincerity of an out-of-court declarant is potentially hearsay; evidence that does not implicate the sincerity of an out-of-court declarant is not hearsay. Because evidence offered to prove something other than what the declarant intended to assert—whether the evidence describes verbal assertions or assertive conduct—does not implicate the sincerity of the declarant, it is not hearsay.

40. See, e.g., Kenneth S. Broun & Walker J. Blakely, Evidence 136 (3d ed. 2001) ("Under Federal Rule 801 evidence of an out-of-court statement offered to prove an apparent but unstated belief of the speaker (an 'implied assertion') for the purpose of proving that the belief is true ... is excluded from the definition of hearsay."); Charles T. McCormick, MCCORMICK EVIDENCE § 250, at 382 (John W. Strong ed., 5th ed. 1999) ("An out-of-court assertion is not hearsay if offered as proof of something other than the matter asserted. The theory is that questions of sincerity are generally reduced when assertive conduct is offered as a basis for inferring something other than the matter asserted."); Mueller & Kirkpatrick, supra note 17, § 8.12, at 819 ("For purposes of the hearsay doctrine, finding the 'matter asserted' leads the court to a subjective inquiry because the term refers to the points declarant intended to express or communicate."); Paul F. Rothstein et al., Evidence in a Nutshell: State and Federal Rules 390 (3d ed. 1997) ("A 'statement' is a verbal or written assertion, and may not be implied except from something intended at the time as a substitute for the statement."); Jack E. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 801.10[2][c] (Joseph M. McLaughlin ed., 2d ed. 2001) (citing Advisory Committee Note and noting that "[m]any courts have found that words or conduct offered to show the actor's implicit beliefs do not constitute statements under the hearsay rule"); Glenn Weisbenner, FEDERAL RULES OF EVIDENCE § 801.6, at 411 (1999) ("[C]onduct and oral communications intended to be assertive, but offered to prove something distinct from the fact intended to be communicated, are not hearsay."). But see Michael H. Graham, Federal Practice & Procedure: Evidence § 7001 (Interim ed. 2001) (arguing that foundation facts that must be assumed to be true for a statement to make sense should be considered part of the "matter asserted").

41. See, e.g., Quartararo v. Hanslmaier, 186 F.3d 91, 98 (2d Cir. 1999) (finding that an out-of-court statement is not hearsay when it is not offered for an intended assertion); United States v. Jackson, 88 F.3d 845, 848 (10th Cir. 1996) (same); United States v. Ybarra, 70 F.3d 362, 366 n.1 (5th Cir. 1995) (same); United States v. Oguns, 921 F.2d 442, 448-49 (2d Cir. 1990) (same); United States v. Day, 591 F.2d 861, 886 (D.C. Cir. 1978) (same); United States v. Zenni, 492 F. Supp. 464, 467-69 (E.D. Ky. 1980) (same); see also Park, supra note 35, at 810-13 (citing cases excluding implied assertions from the operation of the hearsay rule). But see United States v. Reynolds, 715 F.2d 99, 100 (3d Cir. 1983) (finding that an out-of-court statement assumed to be offered for an implied assertion is hearsay).

42. See Arthur Best, Evidence: Examples & Explanations 74 (4th ed. 2001). The Federal Rules reject [the Wright approach] on the theory that the risk of lying about a particular subject is greatest when an out-of-court statement is
Unfortunately, the matter does not end there. Simply saying that only statements offered for their intended assertions can be hearsay does not erase the interpretive issues. Courts must now identify the assertions in a statement. Experience has shown this to be an exceedingly difficult task. To take just one example, assume the police obtain a confession from an injured suspect after getting permission from his doctor to interrogate him. At trial, the prosecution offers the doctor's permission as evidence that the suspect was competent to confess. Is this hearsay? It depends on whether the permission was an assertion about the suspect's capacity. Without a way to recognize assertions that can count as hearsay, there is simply no means of consistently distinguishing hearsay from nonhearsay.

The process of recognizing the assertions in a statement boils down to the determination of meaning. To know what assertions are intended in an utterance, we must know the meaning of the utterance. While most courts and many commentators have been willing to accept that the Federal Rules cover only intended assertions, they have often struggled in the search for the meaning of the statement. Reaching an understanding of the concept of meaning as it is incorporated into Rule 801 is the first step in devising a consistent hearsay methodology.

explicitly about that subject. If a conclusion about one subject can be drawn from a speaker's statements on another subject, the chances that the speaker made a false statement about the second subject to create a false impression about the first subject are slight.

Id.

43. See Ted Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 STAN. L. REV. 682, 697 (1962) (contending that a hearsay definition nearly identical to that in the Federal Rules of Evidence is unclear because courts still must decide “(a) that the actor did intend to assert the proposition his conduct is offered to prove, and thus that the offered evidence is hearsay, or (b) that the actor had no such intent, and thus that the evidence is nonhearsay”).

44. Id. at 696 (adapting facts from People v. Harrison, 258 P.2d 1016 (Cal. 1953)).

45. See supra notes 40-41 (citing treatises and cases endorsing intent-based approach).
II. THE CONCEPT OF MEANING IN RULE 801

A. Two Approaches to Meaning

In 1976, three men, later identified by police as Lawrence T. ("Beanny") Day, Eric J. Sheffey, and Gregory Williams, robbed a sporting goods store in Washington, D.C., stealing shotguns and personal items from the store's customers.\(^46\) In the days following the robbery, Williams had a falling out with Day and Sheffey, and became convinced that they were out to get him.\(^47\) Williams told a friend, Kerry Mason, about the robbery and about his fear of Day and Sheffey.\(^48\) He gave Mason a slip of paper that read "Beanny, Eric, 635-3135," the number being the telephone number for a house where the guns stolen in the robbery were located.\(^49\) He told Mason that if he, Williams, was not back by 3:00 the next day, Mason should call the police, give them the paper, and tell them what Williams had told him.\(^50\) Williams was subsequently shot and killed by Day.\(^51\) The district court excluded as hearsay both the paper and Williams's accompanying statement in a preliminary hearing before the resulting murder trial.\(^52\)

In an interlocutory appeal, the D.C. Circuit held that the paper should come in and that Mason should be allowed to testify that Williams gave it to him, but that Mason was properly barred from testifying to what Williams told him.\(^53\) The majority held that the paper should be admitted as circumstantial evidence of an association between Williams, Day, and Sheffey.\(^54\) It dismissed arguments that the real evidentiary significance of the paper was in the inference the jury could be expected to draw about Williams's belief that Day and Sheffey planned to kill him, finding that the

\(^{46}\) United States v. Day, 591 F.2d 861, 867 (D.C. Cir. 1978). Day pleaded guilty to the robbery, Sheffey was acquitted. Id. at 868.

\(^{47}\) Id. at 879.

\(^{48}\) Id. at 879-80.

\(^{49}\) Id. at 880.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id. at 861-62.

\(^{53}\) Id. at 883.

\(^{54}\) Id.
information conveyed by the paper was "neutral." Looking only to the surface meaning of the paper, it concluded that the paper was not being offered for anything it asserted, and so was not hearsay:

The words themselves do not assert anything except that Beanny and/or Eric might have a particular telephone number. The statement is not being offered as proof that Beanny and/or Eric had that telephone number, and hence, we conclude that the statement is not within the definition of hearsay evidence.

The dissent took a very different approach to the meaning of Williams's note. Instead of evaluating the note outside the context of its creation and transmission—its "utterance" in linguistic terms—the dissent looked at the intention motivating the words on the paper. The dissent concluded that the note was intended as a message from Williams to the police to the effect that, should he die, Beanny Day and Eric Sheffey were his probable killers. In other words, the note meant "I believe Beanny and Eric plan to kill me and in the event of my demise, evidence against them can be found at the following phone number." The dissent argued that the evidence would be irrelevant if offered for any purpose other than to prove that meaning. Accordingly, in the dissent's view, the note

55. Id. at 883-84. The majority opined that "if the writing on the slip contained a statement to the effect that 'I am afraid I will be killed by [Eric and Beanny],' ... we would not characterize the information as neutral." Id. at 884 n.43 (citation omitted). The risk that the jury would draw an inference about Williams's fear was precisely what motivated the court to exclude Williams's statement to Mason accompanying the paper:

The hearsay danger posed [by Williams's statement to Mason] is that the jury might conclude from the statement that Day bore ill will toward Williams and had reason to cause him harm. The jury might infer from the slip, apart from the statement, that Williams was associated with defendants. That is a permissible inference since there is nothing in the slip of the paper itself that would lead the jury to conclude that defendants had a reason to kill Williams.

Id. at 886. Of course, his belief that Day and Sheffey were out to get him is exactly what Williams intended the note to convey. The court's superficial analysis of the note allowed it to elide the hearsay problem the note presented.

56. Id. at 883.
57. Id.
58. Id. at 894-95.
59. Id. at 894.
could only be offered for the truth of Williams’s assertion and would thus be hearsay.\(^6\)

Although they surely did not realize it, the judges writing in *Day* were engaged in a classic debate about meaning.\(^6\) The two authors adopted the two primary approaches to meaning delineated by linguists and language philosophers.\(^6\) The first of these, and the one favored by the *Day* majority, is linguistic meaning. Linguistic meaning is a semantic concept referring to the meaning a lexical form has outside the context of its utterance.\(^6\) When statutory interpretation theorists refer to “plain meaning” or “textualism,” they are referring to linguistic meaning. Although the allure of

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60. *Id.* at 894-95.

61. Similar disputes about meaning have beset other legal disciplines, most prominently the law of contracts. *In re Soper’s Estate*, 264 N.W. 427 (Minn. 1935), is a representative case. In *In re Soper*, the decedent had faked his suicide several years before his death in order to escape his wife and marry another woman. *Id.* at 428. He then took out a life insurance policy naming his “wife” as beneficiary. *Id.* at 428-29. When he died, both women laid claim to the proceeds. *Id.* at 429. The majority held the proceeds were properly paid to the second woman, to whom the decedent apparently intended them to go. *Id.* at 431-32. The dissenting judge argued that the first woman—the decedent’s legal wife—should receive the proceeds. “A man can have only one wife. ... The contract in this case designates the ‘wife’ as the one to whom the money was to be paid. I am unable to construe this word to mean any one else than the only wife of Soper then living.” *Id.* at 433.

62. For a concise overview of the debate about meaning, see ALEXANDER MILLER, PHILOSOPHY OF LANGUAGE 221-24 (1998).

63. Three approaches to linguistic meaning have dominated the philosophy of language. One account takes the position that meaning lies in the relationship between the lexical form and the real-world item to which the form refers. The most influential proponent of this view of meaning was the German philosopher Gottlob Frege. The core of Frege’s philosophy of meaning was the distinction he drew between “sense” and “reference.” For Frege, “sense” described the objective meaning of a language fragment for those who understand the language. “Reference” described the item in the world to which the language fragment refers. Gottlob Frege, *On Sense and Meaning* (1892), reprinted in THE PHILOSOPHY OF LANGUAGE 200 (A.P. Martinich ed., 1985). One major problem with this account, which is often called “referential” or “denotational,” is that many words, like “and” or “because,” do not refer to any tangible item in the world.

Another account treats meaning as lying in the ideas we conjure in our minds to give content to symbols. *E.g.*, JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 259-60 (A.D. Woozley ed., Meridian Books 1969) (1689). The problem with this account, sometimes called “mentalist,” is that our ideas are subjective abstractions, leaving the theory without any explanation of the apparent commonality of understanding among speakers of a language. This was the basis for Frege’s attack on Locke. See Frege, *supra*, at 202. The third account, which has come to dominate theories of linguistic meaning, defines meaning in pragmatic terms, as a product of the uses of the language within a given community of speakers. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43, at 20 (G.E.M. Anscombe trans., 1967) (“[T]he meaning of a word is its use in the language.”).
linguistic meaning lies in its promise of objective, literal determinations of meaning, virtually all linguists now recognize that meaning does not inhere in language. It is, instead, a product of the conventions of the community using the language. Understanding the meaning of the words of a language means understanding the conventions governing the possible uses of the words. Interpreting the linguistic meaning of a language fragment involves supplying the most salient conventional use of the language.

The second type of meaning, which the dissent in Day relied on, is speaker's meaning. Speaker's meaning refers to the import a sentence has when it is uttered in a given context. It is a function of the speaker's intention. When a speaker uses language in its direct, "literal" sense, speaker's meaning corresponds with linguistic meaning. But often people use language indirectly to communicate meaning that does not correspond to linguistic meaning. An example of how speaker's meaning can diverge from linguistic meaning is the sentence "Can you reach the salt?" The linguistic meaning of this sentence is an inquiry into whether an unspecified hearer has the physical ability to grasp the salt. But when uttered in a particular context, for example at a dinner table, the sentence has a speaker's meaning of a request to a dinner partner to retrieve the salt and give it to the speaker.


65. Linguistic meaning is thus sometimes referred to as "conventional meaning." See Law and Linguistics Conference, supra note 64, at 831 (comments of Michael Geis).

66. See GENNARO CHIERCHIA & SALLY MCCONNELL-GINET, MEANING AND GRAMMAR, AN INTRODUCTION TO SEMANTICS 149-51 (1990) (distinguishing speaker's meaning from linguistic meaning). A variety of terms are used to refer to the phenomena of "speaker's meaning" and "linguistic meaning." Speaker's meaning is sometimes referred to as "utterer's meaning" or "conveyed meaning" and linguistic meaning is referred to as "sentence meaning" or "literal meaning." See LEVINSON, supra note 64, at 17-18.

67. See CHIERCHIA & MCCONNELL-GINET, supra note 66, at 151.


69. Id.

70. Id.
In many cases, the distinction between linguistic meaning and speaker’s meaning has little or no significance, because they are equivalent. When a person uses language “literally,” she intends to communicate what the conventional meaning of her words would indicate. Speaker’s meaning and linguistic meaning differ primarily in the cases of metaphor, sarcasm, exaggeration, understatement, and related discursive techniques. As Day shows, however, the class of utterances in which linguistic meaning and speaker’s meaning diverge is large enough to have significant hearsay ramifications. To resolve hearsay problems in a consistent fashion, an approach to meaning in Rule 801 must be specified.

B. The Approach to Meaning in Rule 801

The modern hearsay rule as encapsulated in Rule 801 is premised on the notion that the risk of insincerity is the predominant testimonial concern. The rule covers only intended assertions because people generally do not lie about things they do not intend to talk about. Given this background, the rule makes sense only if it is interpreted to require a search for the speaker’s intended meaning.

Deception is an intentional act. It is the act of wanting an audience to believe a proposition, \( p \), when the speaker believes a contrary proposition, \( \neg p \). If a person does not intend to produce a belief in another person about a matter, then there is no danger of insincerity with respect to that matter. For hearsay purposes, we can rule out statements not bearing a risk of insincerity if we can identify those matters about which a speaker intends to produce a belief in his audience. As I will show in the next section, the speaker’s intention regarding the beliefs produced in his audience is the dispositive factor in speaker’s meaning. By providing a mechanism for evaluating the speaker’s communicative intent,

71. See Chierchia & McConnell-Ginet, supra note 66, at 148-63 (describing relationship between linguistic meaning and speaker’s meaning).

72. See Philip R. Cohen & Hector J. Levesque, Rational Interaction as the Basis for Communication, in Intentions in Communication 230 (Philip R. Cohen et al. eds., 1990) (“[I]nsincerity involves wanting others to come to believe false things and is a notion independent of language.”).
speaker's meaning offers an avenue for effectuating the purposes behind the modern hearsay rule. 73

Linguistic meaning, in contrast, bypasses the speaker's subjective intention in favor of a search for the most conventional "literal" meaning of the words used. Because it ignores the declarant's intentions in uttering a statement, the use of linguistic meaning disregards the rationale behind the switch from a definition based on credibility concerns to a definition based on sincerity concerns.

Furthermore, linguistic meaning's promise of simplified, objective interpretations is illusory. First, linguistic meaning is always subject to the possibility of ambiguity. Ambiguity can take two forms, lexical or syntactic. 74 Lexical ambiguity refers to words that have multiple meanings, such as "bank" or "duck." 75 Syntactic ambiguity refers to the multiple meanings that can arise as a result of the syntactic structure of a sentence. 76 The sentence "Flying planes can be dangerous" is an example. The sentence could mean either that it can be dangerous to fly a plane or that planes can be dangerous in flight. As a result of the potential for ambiguity, language fragments, whether at the sentential or subsentential level, often have multiple linguistic meanings. Typically the only way to identify the "correct" meaning of a particular utterance is to evaluate the situation-specific context of utterance. That looks very much like a slide into speaker's meaning.

73. A number of influential commentators have argued that Rule 801 requires an inquiry into the declarant's intended meaning rather than a literalist interpretation. MUELLER & KIRKPATRICK, supra note 17, § 8.12, at 820-21 (advocating analysis of declarant's subjective communicative intent); STEPHEN A. SALZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 1472 (7th ed. 1998) ("We believe that a statement should be treated as hearsay whenever it is offered to prove the truth of either an express or implied assertion, so long as the Trial Judge finds that the declarant intended to communicate that assertion when he made the statement."); Callen, supra note 3, at 113 ("When deciding whether a statement is hearsay for a particular purpose, courts should recognize that propositions the speaker generally intends the hearer to understand from the communication should be part of an assertion for purposes of the hearsay rule."); Paul S. Milich, Re-Examining Hearsay Under the Federal Rules: Some Method for the Madness, 39 U. Kan. L. Rev. 893, 907 (1991) ("[I]ntent to communicate is the key to distinguishing between hearsay and nonhearsay under the federal definition.").

74. CHIERCHIA & McCONNELL-GINET, supra note 66, at 32 (describing lexical and syntactic ambiguity).

75. Id.

76. Id.
Second, linguistic meanings are neither perspicuous nor stable. Linguists refer to this problem as "vagueness." Even the most straightforward terms, like "chair," have uncertain applications. At some width a chair becomes a loveseat, and the transition will occur at different points for different people. The problem of vagueness is well-known to legal scholars familiar with post-modernist attacks on the cult of plain meaning. As Stanley Fish has persuasively argued, \textit{all} language is subject to interpretation. There is no such thing as "objective" literal meaning, even for the simplest terms. That does not mean that it is useless to talk about linguistic meaning. It does mean, however, that linguistic meaning is inherently uncertain and malleable.\footnote{One of the most influential language philosophers to recognize the problem of the instability of meaning is Saul Kripke. Kripke denies the possibility of sentences being true or false. He argues that meaning is best understood as reflecting the acceptable uses of language within a linguistic community. Saul Kripke, \textit{On Rules and Private Language}, in \textit{Saul A. Kripke, Wittgenstein on Rules and Private Language} (1982), \textit{reprinted in The Philosophy of Language} 479, 488-89 (A.P. Martinich ed., 1985). Linguists implicitly recognize Kripke's skepticism—as well as his solution to the skeptical dilemma—when they speak of linguistic meaning as conventional meaning. The imprecision of language has not escaped the great legal minds. As Justice Holmes said: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).} At best, we can hope to find paradigm cases, or prototypes; that is, when interpreting the word "chair" we can consciously choose to apply the term to items that we think most members of the relevant linguistic community would consider a chair.\footnote{Larry Solan has pointed out that in the interpretation of statutes, many judges do not even rely on prototype analyses, instead using dictionary definitions that sometimes produce highly questionable results. See Solan, \textit{supra} note 2, at 260-62. Professor Solan argues against textualism in statutory interpretation because textualism excludes important evidence of context that provides clues to the legislature's intended meaning. \textit{Id.}}

Finally, literalism does not avoid the search for a communicative intention motivating the interpreted statement, it just relocates it. To understand a statement, an interpreter must always assume the existence of an intentional actor making the statement.\footnote{See \textit{Chierchia & McConnell-Ginet}, \textit{supra} note 66, at 82. Larry Solan has pointed out that in the interpretation of statutes, many judges do not even rely on prototype analyses, instead using dictionary definitions that sometimes produce highly questionable results. See Solan, \textit{supra} note 2, at 260-62. Professor Solan argues against textualism in statutory interpretation because textualism excludes important evidence of context that provides clues to the legislature's intended meaning. \textit{Id.}} In an

\textit{Id.} at 81-82.
\textit{Id.}

\textit{See generally} \textit{STANLEY FISH, IS THERE A TEXT IN THIS CLASS?} (1980) (arguing that texts are not stable and that interpretation is constrained by interpretive communities).
immediate case, the actor is apparent and the actor’s intentions often can be gleaned from context. But where a statement is removed from the context of its utterance, an interpreter must supply an intention motivating the statement. This is often a subconscious step. As a consequence, even plain-meaning interpretation requires an inquiry after an authorial intention. Rather than seeking the specific intention of the actual speaker, however, plain meaning supplies an intention based on the interpreter’s personal, often subconscious, judgments about the likely intention motivating the utterance. Interpreters who believe they are being objective are merely applying what to them appears to be the most obvious conventional meaning.

Debunking the literalist objectivity myth will accomplish very little if nothing emerges to take the place of “plain meaning.” If we cannot find a way to define and identify the declarant’s intended meaning, we may as well let judges speculate under the guise of plain-meaning interpretation. To date, efforts by those commentators who espouse an intent-based approach to meaning to solve this problem have met with little success. For example, in their

understand an utterance without at the same time hearing or reading it as the utterance of someone with more or less specific concerns, interests, and desires, someone with an intention.

83. See Law and Linguistics Conference, supra note 64, at 859 (comments of Jerrold Sadock) (“[W]hether you pretend to or not, you will always import ideas of intent and purpose in the interpretation of ... words ... to try to find out what the actual sentence meaning is ...”).

84. Chief Justice Traynor of the California Supreme Court indicted judicial reliance on plain-meaning interpretation in the seminal parol evidence case Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968), saying:

When a court interprets a contract [without examining contextual evidence], it determines the meaning of the instrument in accordance with the "... extrinsic evidence of the judge's own linguistic education and experience." The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. This belief is a remnant of a primitive faith in the inherent potency and inherent meaning of words.

Id. at 643-44 (citations omitted).

85. See MUELLER & KIRKPATRICK, supra note 17, § 8.12, at 820-21. Professors Mueller and Kirkpatrick advocate the use of the declarant's subjective intent, and offer a "broad idea of intent" and a "narrow idea of intent." Id. But their discussion of examples is largely conclusory. They do not provide a mechanism for identifying communicative intention, instead declaring that, through examination of contextual information, "[i]t should be possible for courts competently to assess declarant's (subjective) intent." Id. at 821.
exhaustive *Federal Rules of Evidence Manual*, Stephen Saltzburg, Michael Martin, and Dan Capra advocate an intent-based approach to Rule 801, while recognizing the difficulty in determining communicative intention. To solve the dilemma, they propose an "objective, rather than subjective, test of intent." But they then explain their test as asking "whether a reasonable person making a statement such as the declarant made would have intended to communicate the implied assertion that the proponent is offering for its truth." The problem with that test is that it begs the question of communicative intent. Casting the declarant as a "reasonable person" does not solve the basic dilemma: What does it mean to intend to communicate an assertion? Certainly, judges and juries lacking omniscience, any investigation will have to rely on objective evidence of what the declarant, or a reasonable person posing as the declarant, intended to communicate. The problem remains, however, of defining the speaker's meaning so that we know which evidence of communicative intention is relevant.

These questions lie at the heart of the confusion surrounding the Rule 801 definition of hearsay. The rule can seem arbitrary because of the absence of a cogent formula for identifying the assertions that are intended in a statement. As a result, those who are willing to retain the rule as drafted often favor misleading plain-meaning interpretations as an easy way out. Even those who desire an approach more consistent with the purposes motivating the rule often end up back at linguistic meaning because they lack a definition of speaker's meaning. Pragmatics offers a definition of speaker's meaning that points the way out of this thicket.

### III. Defining Speaker's Meaning

Speaker's meaning, unlike linguistic meaning, is concerned with the speaker's goals in issuing a certain utterance. It explicitly addresses the situation-specific context of utterance. By concentrating on the communicative intentions of the speaker, it holds the

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86. *Saltzburg, Martin, & Capra*, supra note 73, at 1472 ("There is some indeterminacy in the application of any intent-based test.").
87. *Id.* at 1473.
88. *Id.*
promise of an escape from problems of ambiguity and vagueness.\textsuperscript{89} The interpreter of speaker’s meaning accepts that words and sentences can have multiple meanings and looks for meaning in what the speaker intended to accomplish in uttering particular words and sentences. Although different theories of linguistic meaning have proliferated, one definition of speaker’s meaning has dominated for four decades. Although not without its detractors, Paul Grice’s theory of speaker’s meaning, or, in his terminology, utterer’s meaning, has been widely accepted as the standard.\textsuperscript{90}

The heart of Grice’s theory appears in his 1957 paper \textit{Meaning}.\textsuperscript{91} He begins his analysis by distinguishing between two types of meaning, “natural” and “nonnatural\textsuperscript{92}.” Natural meaning describes situations in which the existence of some condition entails the existence of another condition.\textsuperscript{93} In contrast, non-natural meaning is the product of human social convention.\textsuperscript{94} Consider the following uses of the concept of meaning:

1) Screeching tires mean a car is stopping suddenly.

2) A red light means cars must stop.

In the first example, what is “meant” necessarily follows from the observed fact. Tires screech when a car stops suddenly as a result of the natural operation of physical laws. The “meaning” of the screeching tires is not conventionally determined as a matter of language. A red light, on the other hand, could mean anything; it has the meaning ascribed only because of a social convention to that effect. Grice’s theory addresses only this latter type of meaning. For clarity, I will italicize the words “mean” and “meaning” when I use them to indicate non-natural meaning.

\textsuperscript{89} In reality, of course, this promise can never be fully realized, because we can never know what another person is thinking. But “given certain contextual conditions or defaults,” a pragmatic approach to meaning can “define a ranking of likely candidates for the intended interpretation of an utterance ...” GREEN, \textit{supra} note 64, at 9. In the hearsay context, the burden-of-proof regime provides the contextual conditions and defaults that make consistent, defensible interpretations possible. \textit{See infra} Part IV.

\textsuperscript{90} ANITA AYRAMIDES, \textit{MEANING AND MIND: AN EXAMINATION OF A GRICEAN ACCOUNT OF LANGUAGE} ix (1989) (“It is no exaggeration to say that [Grice's theory of meaning] is one of the most successfully developed analyses in the philosophical literature.”).


\textsuperscript{92} \textit{Id.} at 21-22.

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{Id.}
A brief description of Grice’s symbolic abbreviations will help in the following discussion. Grice speaks in terms of “utterances” rather than “statements” or “sentences” in order to make clear that any communicative act is a candidate for meaning. An utterance can be any action, not just traditional communicative acts such as speaking or writing. Grice represents the utterer as “U.” The utterance is indicated by “x.” The utterer’s audience is indicated by “A.” A response produced in the audience is indicated by “r.” In Grice’s only resort to the language of formal logic, “iff” is shorthand for “if and only if.”

Grice begins his account of meaning by positing that an utterer U means something in uttering x if U utters x with the intention of producing a certain belief in A, provided that U intended A to recognize U’s intention to produce that belief. Grice is attempting to account for meaning in terms of intentions as a way around the problems associated with linguistic meaning. Communication is an act, and it is an act motivated by an intention to produce certain beliefs in an audience, A. Meaning is thus a function of U’s intention and the belief in A that U seeks to produce.

A’s recognition of U’s intention is critical because without that element, the definition would sweep in any action intended to produce a belief in another person, including action that clearly cannot be associated with the concept of meaning. An example of the overbreadth that would result from leaving out that element is a scenario in which X leaves Y’s clothing at the scene of a crime in order to frame Y. In this situation, X wants the police to believe...

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95. The notations I give are from Grice’s follow-up article, Utterer’s Meaning and Intentions. See H.P. Grice, Utterer’s Meaning and Intentions, in The Philosophy of Language 84 (A.P. Martinich ed., 1985). For simplicity, I discuss the two articles together and use the same notations throughout.
96. Grice, supra note 95, at 86.
97. Id. at 85.
98. Id. at 84.
99. Id. at 86.
100. Id.
101. Id.
103. AVRAMIDES, supra note 90, at 45 (“[T]he difference between a mere sound and an act of communication is that when there is communication, human beings with appropriate audience-directed beliefs and intentions produce the sounds.”).
104. Grice, supra note 91, at 25.
that \( Y \) committed the crime, but by leaving the clothing \( X \) did not mean that \( Y \) committed the crime. ¹⁰⁵ That is, the belief that \( Y \) committed the crime is not produced as a result of social convention. The definition excludes this case by requiring that \( X \) intend the police to recognize \( X \)'s intention to convince the police that \( Y \) committed the crime. ¹⁰⁶ Absent that intention, the act of leaving the clothing has no non-natural meaning.

Grice's initial formulation, while a good first step, still sweeps in too much. Assume a friend asks me to play basketball with him this afternoon. In response, I hold up my wrist, which is in a cast. My action has natural meaning: It means that my hand is immobilized. But I also intend it to have non-natural meaning: I mean that I cannot play basketball. With respect to both the natural and non-natural meanings, I intend my friend to acquire a belief about my circumstances and I intend him to recognize that I intend him to acquire that belief. The difference between the two—and the key ingredient in non-natural meaning—is that in the latter case I intend the recognition of my communicative intention to be the basis for my friend reaching the desired conclusion. Even if my friend misunderstands my intention, he can recognize that my hand is immobilized; the fact of immobilization follows necessarily from the fact that my hand is in a cast. But in order to understand that I mean I cannot play basketball, my friend must recognize my communicative intention; he must understand that I intend my action as a response to his inquiry.

To differentiate between natural meaning and non-natural meaning, then, Grice has to add another condition to his definition. Meaning must include an intention on the part of the speaker that the recognition of the speaker's communicative intention play a role in inducing the belief the speaker wants the audience to acquire. ¹⁰⁷ In other words, as Grice formulates the revised definition, 'means

¹⁰⁵. Note that the fact that \( Y \)'s clothing is at the scene of the crime will have natural meaning for the police. It will mean that at some point some person was at the scene with an item of \( Y \)'s clothing and left the item there. \( X \) is counting on the police drawing further, and inaccurate, inferences from that natural meaning—specifically, that \( Y \) was at the scene and inadvertently left the clothing behind. But \( X \)'s action has no nonnatural meaning because the meaning and the inferences \( X \) hopes will be drawn from it do not depend on communicative conventions.

¹⁰⁶. See Grice, supra note 91, at 25.

¹⁰⁷. Id. at 26.
something by uttering \(x\) if \(U\) intends the utterance of \(x\) to produce some effect in \(A\) by means of the recognition of \(U\)'s intention.\(^{108}\) What \(U\) means is determined by the effect he intended.\(^{109}\)

Grice stopped at that point in his first paper. His theory was widely critiqued,\(^{110}\) and in a 1969 follow-up article, *Utterer's Meaning and Intentions*,\(^{111}\) he responded to some of the criticism. He began by redrafting his definition in a more formal style, as follows:

\[ U \text{ meant something by uttering } x \text{ iff, for some \(A\), } U \text{ uttered } x \text{ intending } A \]

\(1\) to produce a particular response \(r\);

\(2\) to think (recognize) that \(U\) intends \(A\) to produce \(r\); and

\(3\) to fulfill \((1)\) on the basis of the fulfillment of \((2)\).\(^{112}\)

He then acknowledged that he needed to add some additional conditions to the definition. The most significant is the addition of a condition directed at the form of the utterance.\(^{113}\) The problem with the definition as drafted is that it encompasses situations in which an utterer induces a response without employing non-natural meaning.\(^{114}\) For example, assume a prisoner of war is believed by his captors to possess certain information.\(^{115}\) They want him to divulge this information and he knows they want him to divulge it.\(^{116}\) Being a patriot, he refuses.\(^{117}\) His captors apply thumbscrews in an attempt to compel disclosure.\(^{118}\) The act of applying the thumbscrews satisfies Grice's initial definition. The captors want the prisoner to divulge the information; they want him to recognize that intention; and they want him to divulge the information based

\(^{108}\) Id. at 27.

\(^{109}\) Id.

\(^{110}\) See MILLER, supra note 62, at 228-43 (summarizing criticism of Grice's theory of meaning).

\(^{111}\) Grice, supra note 95.

\(^{112}\) Id. at 86, 94.

\(^{113}\) Id. at 87.

\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) Id.

\(^{117}\) Id.

\(^{118}\) Id.
at least in part on his recognition of their intention. But the act of applying the thumbscrews is merely an inducement. It does not have non-natural meaning because its meaning is not tied to social convention: pain is pain in any language.

The reason the definition sweeps in the inducement case is that it does not distinguish among the different ways an actor can reveal an intention. To have non-natural meaning, the audience's recognition of the utterer's intention must be tied to the utterance—that is, to the aspects of conventional usage that give the utterance significance. The audience must recognize the utterer's intention at least in part from the form of the utterance. The revised definition including this condition looks like this:

\[
U \text{ meant something by uttering } x \text{ iff, for some audience } A, \ U \text{ uttered } x \text{ intending } A
\]

(1) to produce a particular response \( r \);
(2) to think (recognize), at least in part from the utterance of \( x \), that \( U \) intends \( A \) to produce \( r \); and
(3) to fulfill (1) on the basis of the fulfillment of (2).

This seems daunting, but it makes sense when applied to an actual utterance. Take the note from United States v. Day as an example. The dissent argued that Williams intended to communicate to the police that, in the event of his demise, Day and Sheffey were his probable killers. We can use Grice's theorem to verify that conclusion. Williams is \( U \). His note "Beanny, Eric, 635-3135" is \( x \). The police are \( A \). And the belief that Beanny Day and Eric Sheffey are responsible for Williams's death is \( r \). Now plug these into the definition:

Williams uttered "Beanny, Eric, 635-3135" intending the police:
(1) to believe that Beanny Day and Eric Sheffey are responsible for Williams's death;

119. Id.
120. Id.
121. AVRAMIDES, supra note 90, at 47 ("By ensuring that the audience's recognition of the speaker's intention is based on the audience's recognition of some feature of the utterance, the analysis is made to square more firmly with our intentions about what is to count as a genuine case of [nonnatural] meaning.").
122. Grice, supra note 95, at 87.
(2) to recognize, based on the note, that Williams intended them to believe that Beanny Day and Eric Sheffey are responsible for Williams's death; and (3) to reach the desired belief on the basis of their recognition of Williams's intention that they reach that belief.

All of these conditions appear to be satisfied. The context indicates that Williams thought Day and Sheffey planned to kill him and wanted the police to have that information. It was critical for the successful communication of that information that the police understand that that was what Williams wanted to communicate by the note. Finally, Williams certainly intended the recognition of his communicative intention to be the basis for the police reaching the desired conclusion—he intended the police to reach the conclusion based on their understanding of his message.

Grice further refined his theory, making it substantially more complex. The refinements account for a number of difficult hypotheticals raised in the many critiques of the first article. For my purposes, the more extensive refinements are unnecessary. A limited version of the refined theory provides a sufficient account of speaker's meaning to allow workable hearsay determinations. In the next section, I offer such an account.

IV. A Speaker's Meaning Approach to the Hearsay Rule

A. The Speaker's Meaning Hearsay Formula

The intent-based hearsay approach espoused by the Advisory Committee, and now widely accepted, focuses on the risk of the declarant's insincerity. That risk exists only with respect to statements that assert some proposition of fact, either directly or indirectly. Although a form of insincerity can infect other types of utterances, such as performatives, those types of utterances do not raise hearsay concerns because they do not have truth values.

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124. See id. at 879-80.
125. See id.
126. See id.
127. Performatives, originally identified by the language philosophers J.L. Austin and John Searle, are utterances that do things rather than assert things. See Levinson, supra
only a proposition of fact can be offered "for its truth." Thus, for hearsay purposes, only utterances in which the speaker meant a proposition of fact demand attention. A speaker means a proposition of fact if the speaker intends to produce a belief in that factual proposition in her audience by means of the recognition of her intention—that is, in Grice's definition, if \( r \) is a belief in a proposition of fact.\(^{128}\)

Rule 801 provides that hearsay is a statement, defined in terms of intended assertions, made out of court and offered in evidence to prove the truth of the matter asserted.\(^{129}\) Combining this definition with the speaker's meaning definition leads to a concise formula for identifying hearsay under an intent-based approach:

An out-of-court statement is offered to prove the truth of the matter asserted when it is offered as evidence of a proposition \( P \), and:

(1) The declarant intended the audience to believe \( P \);

(2) The declarant intended the audience to recognize the intention in (1); and

(3) The declarant intended the audience's belief in \( P \) to result at least in part from the audience's recognition of the intention in (1).

\(^{128}\) In other words, the response \( r \) must be a belief in the proposition of fact. Defining \( r \) in a way that satisfactorily would account for all types of meaning proved to be the most problematic aspect of Grice's theory. In response to criticism directed at this problem, Grice further revised his definition, making it significantly more formal and complex. Grice, supra note 85, at 94-100. For purposes of using the definition in hearsay analysis, however, there is no need to follow Grice all the way down his path. Given the limited types of meaning implicating the hearsay rule, it is sufficient to define \( r \) solely in terms of the audience's belief in a factual proposition.

\(^{129}\) FED. R. EVID. 801(c).
The key to the formula lies in its third element. The declarant means the proposition if and only if he intends that her audience reach a belief in the proposition based on the audience's recognition of his communicative intention. Whenever the declarant's communicative intention is not intended to be the basis for the audience's belief in the proposition, there can be no hearsay issue. This requirement excludes from the hearsay rule a large quantity of information arguably contained in and transmitted by language. Most importantly, it removes from the rule any proposition about which the parties are already in agreement and know they are in agreement prior to the utterance, where there is no communicative reason for drawing one or both parties' attention to the agreed upon proposition. In such a case, the declarant would not intend the audience to reach a belief about the proposition based on the audience's recognition of his communicative intention; he assumes that the audience holds the belief irrespective of his communicative intention.

As a result of this requirement, a proposition implicit in a statement typically will not be covered by the rule because the declarant typically will not have intended to produce a belief about the proposition based on the audience's recognition of the declarant's communicative intention. For example, assume I say to a friend, "Let's go to the movies tonight; I'll pick you up at eight." This statement arguably contains the proposition that I have, or have ready access to, a car. But if I have a car, and my friend knows that I have a car, and I know that my friend knows that I have a car, I do not mean in uttering this statement that I have a car. We share a common understanding about my car ownership before the statement is made, so I have no reason to produce a belief that I have a car through my utterance. If my statement is later offered as evidence that I had a car at the time, the statement should not be hearsay.

On the other hand, information conveyed expressly in a statement will almost always be a part of the speaker's meaning and so potentially hearsay, even when there is a pre-existing mutual understanding, because the decision to make a proposition explicit is invariably motivated by a desire to produce a response linked to that proposition in the audience. For example, assume two old friends get together to reminisce. They talk about the old times,
both assuming that the other already knows about the events. But in talking about the events, they intend to change the nature of their beliefs to make what had been a latent or dormant belief active. That intention to create an active, current belief is sufficient to satisfy the definition. Because it is rare that a person makes explicit reference to a fact without some desire to focus the audience’s attention on the fact, express statements of fact will virtually always satisfy the speaker’s meaning hearsay formula.

Between these extremes, a significant amount of implicit information will fall within the speaker’s meaning hearsay formula. Whenever $U$ intends $A$ to recognize $U$'s belief in some proposition based on $A$'s recognition of $U$'s communicative intention, $U$ means that proposition, regardless of whether the proposition is stated expressly. Returning to the earlier example, assume I have not had a car in the past, but today on impulse I bought one. I want to let my friend know of my purchase, but I want to be coy about it. So I say, “Let's go to the movies tonight, I'll pick you up at eight.” I make this statement intending that my friend will recognize my intention to suggest that I have a car. I mean that I have a car, even though that proposition does not appear expressly in my utterance. If my statement is offered in court as evidence that I had a car at the time of the utterance, it is hearsay.¹³⁰

The range of utterances bearing this sort of indirect intended meaning is limitless.¹³¹ The difficulty for a court lies in segregating

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¹³⁰ Professor Park has suggested a hearsay analysis that has strong similarities to the one that I propose. He suggests the following:

Let $PF$ be the fact the proponent proposes to have the trier of fact infer from the declarant's words. When the proponent asks the trier to believe that the declarant desired to send the message $PF$ with the words, the utterance is hearsay whatever its form. When it appears likely that the declarant was aware that someone would find the declarant's words useful in inferring or remembering $PF$, then the utterance is also hearsay. When the [declarant] was apparently unaware that the utterance might be useful to infer or remember $PF$, then the words are not hearsay because they are not offered for the truth of any assertion they contain.

Roger C. Park, The Definition of Hearsay: To Each Its Own, 16 Miss. C. L. Rev. 125, 131 (1995). Although “awareness that an utterance will be useful” might be broader than “intent to produce a response,” it seems likely that Professor Park's test would produce results similar to those produced by the speaker's meaning test.

¹³¹ Indirect, intended meaning is conveyed through what Grice has identified as "conversational implicature." See H.P. Grice, Logic and Conversation, in THE PHILOSOPHY
the intended meanings from the unintended presuppositions. Clues to the intended meanings must be gleaned from context. In the example just given, a judge, in deciding whether my statement was intended to assert that I had a car, should look for clues about the assumptions existing between my friend and me at the time of the utterance. Evidence that my friend knew that I did not have a car previously and had not spoken to me earlier that day, coupled with evidence that I made the purchase on the spur-of-the-moment, would suggest that I meant that I had a car. Again, the key is the underlying assumptions; if the declarant had no reason to intend to produce a belief about a proposition based on the utterance, the proposition probably was not a part of the speaker's meaning.

Significantly, the results reached by applying the speaker's meaning formula square with the rationale advanced by the Advisory Committee for excluding unintended assertions from the scope of the rule. The rule, at least in the Advisory Committee's view, is designed to cover only statements bearing a sincerity risk. When the parties to a conversation share an understanding about the background assumptions underlying the conversation, there is

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OF LANGUAGE 159, 160-61 (A.P. Martinich ed., 1985). Conversational implicature accounts for an enormous range of information communicated indirectly or nonliterally, including irony, exaggeration, metaphor, even tactful understatement. A conversational implicature is a proposition implied by and intended in a statement but not expressed by the linguistic meaning of the statement. Id. Grice has explained conversational implicature in terms of the "cooperative principle," which holds that participants in a conversation cooperate with each other by following four conversational maxims: 1) the maxim of quantity: a person's contributions should be as informative as is required; 2) the maxim of quality: a person should not make statements that are false or unsupported by evidence; 3) the maxim of relation: every contribution should be relevant; and 4) the maxim of manner: every contribution should be direct and unambiguous. Id. at 162. The cooperative principle is not always explicitly followed. Rather, we enter discourse with the assumption that our conversational partners will follow it. Id. at 164. When they apparently fail to do so, we interpret what they said so as to conform to the maxims. Id. Conversational implicatures are the result. Id. Craig Callen has used the cooperative principle in analyzing hearsay by arguing that a statement is not hearsay when the factfinder has no need to evaluate the declarant's implicit claim of cooperation. See Callen, supra note 3, at 78-82. For example, assume a doctor leaves a sponge in a patient during surgery. Id. at 79 (relating the facts of Smedra v. Stanek, 187 F. 2d 892 (10th Cir. 1951)). A nurse says "the sponge count did not come out right." Id. (quoting Smedra, 187 F. 2d at 893). To use this statement to demonstrate that the doctor was on notice, the factfinder does not need to evaluate the statement in light of the conversational maxims. See id. It is sufficient that the doctor heard a statement that would alert him to the possibility of a missing sponge. Id. Accordingly, the statement is not hearsay. Id.
virtually no risk of one of the parties attempting to mislead the other about those assumptions. The attempt would be futile; it would be met with confusion or simple dismissal. This is true in every case in which a statement is offered for a proposition that all parties to the conversation believed prior to the conversation and that was understood by all to be believed by the others.\textsuperscript{132} In such a case, there is no risk of insincerity and, under the speaker's meaning formula, the hearsay rule does not apply.

**B. Applying the Formula**

The test of any methodology lies in its application. In this section, I apply my formula to show its usefulness in deciding real-world hearsay issues. I begin with some basic scenarios to show the core validity of the formula, and then move to some of the more vexing implied-assertion problems.

1. **The Basics**

Consider the following classic hearsay situation: At the scene of an accident, a bystander, $A$, says to another bystander, $B$, "The blue car ran the red light." At the trial many months later, $A$ has disappeared, so $B$ testifies to $A$'s statement. This is a hornbook example of hearsay, and it also clearly fits under the speaker's meaning formula. The statement is offered as evidence of the proposition that the blue car ran the red light. The context strongly suggests that $A$ intended to produce a belief in that proposition in $B$, intended $B$ to recognize $A$'s communicative intention, and intended $B$'s belief to result at least in part from $B$'s recognition of

\textsuperscript{132} This is a conclusion that Richard Friedman has reached intuitively. He has said that if conduct merely takes the proposition as a premise, reflecting the actor's belief that the proposition is true and her assumption that her listener also accepts the proposition as true ... it seems to me that it should not be deemed hearsay within the Federal Rules' approach. But if part of the aim is to communicate the truth of the proposition to the other party ... then I think it is hearsay under the Rules' approach.

A's communicative intention. Note that A may have any number of motives for making the statement; A may have wanted to produce the belief in B to enlighten B, to persuade B, to get confirmation from B, or for some other reason. As long as the hearsay test is met, though, A's motivation is irrelevant. The risk of insincerity is present and the statement is hearsay, albeit probably admissible as a present-sense impression or excited utterance.

The speaker's meaning hearsay formula also produces outcomes consistent with hearsay doctrine in the most common situations involving out-of-court statements that are not hearsay. For example, traditional hearsay doctrine holds that verbal acts, such as contractual promises, defamation, and fraud, are not hearsay either because they are nonassertive,133 or because they are not offered for the truth of the matter asserted because the statement has independent legal significance.134 Another way to think about verbal acts is to say that they are not being offered as evidence of a factual proposition that was a part of the speaker's meaning. In the contract example, for instance, if I say words in an appropriate context that a reasonable person would construe as an offer, I may be found to have made a binding offer even if I had no intention of making an offer in uttering those words. What matters in this situation is linguistic meaning, not speaker's meaning; the court supplies the most conventional meaning available and asks whether an offer appears. The law is simply not concerned with what propositions of fact the speaker meant.

Another important category of nonhearsay encompasses statements offered for their effect on the listener, such as statements that give notice of a dangerous condition or threatening statements offered to show the reasonableness of the listener's fear.135 These statements are not considered hearsay under traditional doctrine because they are offered not for the truth of the matter asserted, but rather for the fact that the listener heard them. Statements of this type are not hearsay under the speaker's meaning formula because the value of the evidence depends on the propositions that

133. See McCORMICK, supra note 40, § 249, at 377; 6 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM ON EVIDENCE IN TRIALS AT COMMON LAW § 1772, at 191 (3d ed. 1940).
134. MUELLER & KIRKPATRICK, supra note 17, § 8.16, at 827.
135. See McCORMICK, supra note 40, § 249, at 378.
appear as part of the linguistic meaning. If the linguistic meaning of the statement suggests a warning or a threat, the speaker’s meaning is irrelevant.

Establishing that the speaker’s meaning formula accounts for routine cases is important—no hearsay theory could claim legitimacy if it could not clear that hurdle—but the real test of the theory is its ability to guide resolution in the difficult cases. I take up that challenge next.

2. The Hard Cases

With Rule 801’s unambiguous removal of nonassertive conduct from the scope of the hearsay rule, the difficult hearsay cases now involve what the Advisory Committee referred to as “verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted.” While the range of cases potentially raising this issue is limitless, some recurring problem areas exist, and I will concentrate on these areas in the following analysis. Besides showing how the speaker’s meaning concept can be used to apply Rule 801, the analysis reveals a frequent lack of significant contextual evidence of communicative intention in the reported decisions. Whether the evidence was available and simply not utilized by the courts or was not available at all is an open question. Its absence suggests that the more difficult questions may often be resolved simply through the allocation of the burden of proof. According to the Advisory Committee’s note to Rule 801, “[t]he rule is so worded as to place the burden upon the party claiming that the [assertive] intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility.” While the Advisory Committee’s understanding has not gone unchallenged, for purposes of this Article, I will

136. FED. R. EVID. 801 advisory committee's note.
137. Id.
138. See Seidelson, supra note 30, at 764 (“I don't think the 'rule is so worded as to place the burden upon the party claiming that the intention existed' with regard to ... an extrajudicial declaration which consists of an oral assertion.”) (citation omitted). I agree with the Advisory Committee’s interpretation, although I recognize the potential difficulties this position raises in regard to criminal defendants. To the extent my approach results in hearsay determinations that unduly affect the rights of criminal defendants, I believe the proper remedy is a more vigorous Confrontation Clause analysis rather than a more
assume that it is correct. Absent sufficient contextual evidence, then, the evidence should not be deemed hearsay.

a. Orders and Requests

The nature of a request can suggest important facts about the people making and receiving the request and about the subject matter of the request. Requests raise potential hearsay issues most frequently in drug and gambling cases in which the prosecution offers evidence of drug or gambling orders placed to a particular premises in order to show that the premises were used for drug sales or betting. Typically, an investigating officer searching the premises takes a phone call in which the caller requests drugs or places a bet. The officer then testifies to the substance of the call. The evidence is offered for the two-step inference: from the substance of the calls, the factfinder is asked to infer that the callers believed the premises were used for drug dealing or gambling; from that inference, the factfinder is asked to infer that the premises were in fact used for drug dealing or gambling. American courts have generally held that the evidence is not hearsay because the callers made no assertion about the nature of the premises.

A striking feature of these decisions is the absence of any thorough analysis of the actual statements. The courts typically simply declare that the callers requested drugs or placed bets

expansive hearsay definition. See infra notes 202-03 and accompanying text (suggesting confrontation approach).

139. See, e.g., United States v. Oguns, 921 F.2d 442 (2d Cir. 1990); United States v. Lewis, 902 F.2d 1176 (5th Cir. 1990); United States v. Giraldo, 822 F.2d 205 (2d Cir. 1987).


141. See United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990). In Long, the police were searching a co defendant's apartment when the phone rang. Id. at 1579. A police officer answered and an unidentified woman asked whether "Keith" (Long's first name) "still had any stuff." Id. She then arranged to come to the apartment to pick up "a fifty." Id. The trial court admitted evidence of the phone calls and the court of appeals affirmed, finding that "Long has not provided any evidence to suggest that the caller, through her questions, intended to assert that he was involved in drug dealing." Id. at 1579.

Within the last decade, in keeping with the Wright tradition, the English House of Lords held that calls of this type requesting drugs were inadmissible hearsay. See Regina v. Kearley, 95 Crim. App. R. 88 (H.L. 1992).
without recounting the conversation. At most, they recite a single sentence requesting the drugs or placing the bet. To adequately evaluate the declarant's communicative intention, more contextual data is required. United States v. Zenni shows why.

Zenni involved a police raid on a betting parlor. While at the premises, the police took a number of phone calls from people who wanted to place bets on various sporting events. The prosecution offered the calls as evidence that the premises were being used for gambling. The defense raised a hearsay objection, but the court held the evidence admissible. In reaching its decision, the court never recounted the conversations. It offered one representative statement, apparently as a hypothetical: "Put $2 to win on Paul Revere in the third at Pimlico." No context was given. Mixing verbal-act justifications with a literal-meaning interpretation of the statement, the court concluded that the statement was not offered for the truth of any assertion contained in it and so was not hearsay under Rule 801.

The court was probably correct that the utterer of the quoted statement did not intend to assert, and did not mean that the premises were used for gambling. There is not, however, enough contextual evidence to say for certain. To be hearsay, the caller must have intended his audience to produce an active belief that the establishment was used for gambling and to produce the belief based on the recognition of the caller's intention. Normally, a caller does not have that intention. Most people who call a betting parlor and place an order using that kind of truncated language do so under an assumption that all parties to the transaction share a pre-existing understanding of the nature of the transaction and

142. See, e.g., Southard, 700 F.2d at 13 (describing evidence as "a tape of three telephone conversations" which "[i]f believed, ... showed rather conclusively that Brian and Kachougian operated a gambling business"); United States v. Pasha, 332 F.2d 193, 196 (7th Cir. 1964) ("[I]n response to the caller's question, 'Who is this?', [the agent] gave the name of one or the other of the defendants as the person speaking, and the caller then placed a bet or asked for racing information.").
144. Id. at 465.
145. Id.
146. Id.
147. Id. at 465, 469.
148. Id. at 466 n.7.
149. Id. at 469.
character of the establishment. The caller who is comfortable enough to make such a call probably has a relationship with the bookmakers such that he assumes that they assume he is calling with reference to their gambling operations. He has no reason to try to communicate anything about the nature of the establishment.\textsuperscript{150}

There may be situations, however, in which a caller attempting to place a telephone bet does intend to communicate something about the nature of the establishment. If the bookmakers are operating on the sly, and the caller does not have a pre-existing relationship with them, he may need to convey to them that his call relates to their betting operations. He will want his audience to assume the role of bookmaker, which involves the audience recognizing, in something more than a subconscious way, the nature of the business. The most effective way of doing that without raising suspicion might be to call and announce a bet using the appropriate jargon. In that situation, the caller does intend the proposition that the establishment is used for betting to be a part of his speaker's meaning. If his statement is later offered in evidence for that proposition, it is hearsay.

This possibility could be explored with minimal additional evidence about the context of the call. The judge could rule out this scenario simply through evidence that the caller did not identify himself or identified himself using a nickname or other shortened name. That would indicate a pre-existing relationship, which would negate the need for the caller to produce a response linked to the nature of the operation. If no additional evidence were available, the judge would have to let the evidence in based on the defendant's failure to meet his burden of proof on the admissibility issue. That result seems justified, because, in most cases, the caller would not intend to assert the offered proposition.

\textsuperscript{150} Professor Park reached a similar conclusion through application of his "awareness" test:

The intercepted utterance "Put $5 on Nick's Arrival in the 5th" would not be hearsay when offered to show that the intended addressee was a bookmaker. Unless one assumes unusual facts, the declarant would not have thought that the utterance provided information that anyone would find useful in drawing an inference about the addressee's status as a bookmaker.

Park, supra note 130, at 131.
b. Lies

In *Anderson v. United States*, a number of government officials were prosecuted for conspiring to rig an election. Two of the defendants had given perjured testimony in the form of false statements about the number of people who had voted in the election, and this testimony was used by the prosecution against the other defendants. The defendants argued that this evidence was hearsay and, furthermore, was not admissible as statements of co-conspirators because the conspiracy had ended. The Supreme Court held that the statements were not hearsay. In the Court's view, since the statements were false and were offered as evidence of the defendants' guilty minds, they were not offered to prove the truth of the matter asserted. On the same rationale, other courts have consistently held that false statements are not hearsay when offered to show guilty knowledge. Scholars taking a credibility-based approach, however, have argued that false statements are hearsay because they depend on the credibility of the declarant for value.

Under a speaker's meaning approach, false statements are not hearsay when offered to show guilty knowledge because they are not offered as evidence of any proposition contained in the speaker's meaning. For example, assume that a defendant is charged with car

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152. Id. at 213.
153. Id. at 216-17.
154. Id. at 216-18.
155. Id. at 219.
156. Id. at 219-20.
157. See, e.g., United States v. Kirk, 844 F.2d 660, 663 (9th Cir. 1988) (stating that misrepresentations of the defendant offered in a fraud case were not hearsay because they were not offered for truth of matter asserted); United States v. Perholtz, 842 F.2d 343, 357 (D.C. Cir. 1988) (discussing a racketeering case in which evidence of a “script” prepared by one defendant for another person was not hearsay because it was offered to prove falsity); United States v. Hathaway, 798 F.2d 902, 905 (6th Cir. 1986) (same).
158. See Roger C. Park, McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers, 65 MINN. L. REV. 423, 426 (1981). In describing his category of “declarant-oriented” hearsay definitions, Professor Park posits a case in which a wife lies to police about the whereabouts of her husband on the day of a crime. Id. Professor Park states that “[u]nder a declarant-oriented definition, ... the statement would be hearsay because the trier's use of it requires reliance on the wife's powers of memory, perception, and narration.” Id.
theft, and the prosecution offers evidence that when the defendant was stopped, his companion falsely told police that the car belonged to her brother.159 The companion wanted the police to believe that the car was her brother's, she wanted them to recognize her intention to create that belief, and she wanted them to produce that belief based on their recognition of her intention. She clearly meant that the car belonged to her brother. She in no way wanted them to recognize her intention to mislead them or her belief in the guilt of her companion. Therefore, when the statement is offered to show her belief in her companion's guilt, it is not offered to prove the truth of any matter she intended to assert.

c. Silence

Courts have long struggled with the hearsay implications of silence. The situation comes up most often in civil cases where a defendant wants to prove the absence of complaints to refute an allegation of a dangerous condition.160 Courts in these cases have typically held that the absence of complaints is not hearsay because the people who did not complain did not intend to assert anything by their failure to complain.161 In some cases, however, silence can pose difficult hearsay problems, which can be resolved using the speaker's meaning formula.


160. See Judson F. Falknor, Silence as Hearsay, 89 U. Pa. L. Rev. 182, 209 (1940). Silence is also an aspect of the doctrine of adoptive admissions, by which a party to an action may be held to adopt statements made in her presence by third parties where the statements would normally provoke a denial. For a discussion of this hearsay doctrine and of the legal effect of silence generally, see Peter Tiersma, The Language of Silence, 48 Rutgers L. Rev. 1, 74-80 (1995).

161. See, e.g., Cain v. George, 411 F.2d 572, 573 (5th Cir. 1969) (holding that evidence that guests in a hotel room prior to plaintiffs had not complained about carbon monoxide leaking from a gas heater was not hearsay); Silver v. New York Central R.R., 105 N.E.2d 923, 925-27 (Mass. 1952) (allowing evidence that passengers in car on which plaintiff was traveling had not complained of cold). But see Menard v. Cashman, 55 A.2d 156, 160-61 (N.H. 1947) (holding that evidence that no other tenants had complained about lighting on a stairway where plaintiff fell was hearsay). In some cases, silence is clearly assertive, for example, when a doctor examining a patient tells the patient to speak out when the patient feels pain. In that case, as long as the patient does not speak out, he is "asserting" that he does not feel pain.
In *United States v. Pacelli*, Pacelli was arrested for murdering a government witness. Lipsky, who had been with Pacelli when the murder was committed, testified that after Pacelli's arrest, Lipsky met with members of Pacelli's family and discussed the arrest. Although Pacelli's uncle expressed frustration that the body of the victim had not been disposed of more thoroughly, none of Pacelli's family members protested that Pacelli was innocent. The prosecution offered this testimony as evidence that Pacelli's family knew he was guilty: if they had believed that he was not guilty, the prosecution argued, they would have expressed dismay at the arrest of their innocent family member. The prosecution argued that the jury could conclude from this evidence that Pacelli must have told his family that he committed the murder. The court disallowed the evidence, holding that "[s]ince the extra-judicial statements clearly implied knowledge and belief on the part of third person declarants not available for cross-examination as to the source of their knowledge regarding the ultimate fact in issue, i.e., whether Pacelli killed Parks, Lipsky's testimony as to them was excludable hearsay evidence." For the evidence in *Pacelli* to be hearsay using the speaker's meaning formula, Pacelli's family had to intend to assert through their silence that he was guilty. In other words, the family members had to mean that they believed he was guilty when they failed to protest his arrest. It seems likely that they did not. For a member of Pacelli's family, his wife for instance, to mean that Pacelli was guilty, she had to intend the other family members to conclude, based on her silence in response to the discussion of his arrest, that Pacelli was guilty. But she had no reason to harbor that intention, because the context suggests that everyone involved in the exchange shared a common understanding prior to the conversation. She was almost certainly operating within an assumption that everyone present already held a belief as to Pacelli's guilt and

162. 491 F.2d 1108 (2d Cir. 1974).
163. Id.
164. Id. at 1111.
165. Id. at 1115-16.
166. Id. at 1115.
167. Id. at 1116.
168. Id. (citation omitted).
already knew her belief about his guilt. Because she had no incentive to produce a belief regarding his guilt based on her silence, she probably did not mean that he was guilty. Her silence is not hearsay when offered for the proposition that he was guilty.

\[d. \text{ Statements suggesting knowledge of facts or events} \]

Sometimes a statement is offered as evidence of the speaker's knowledge on the theory that the speaker could not talk about the matter unless she had knowledge about it. In one manifestation, this theory would allow evidence that a speaker uttered a grammatical sentence in Spanish as evidence that the speaker has some understanding of the Spanish language. Probably the most famous case applying this theory is Bridges v. State,\(^\text{169}\) in which a child molestation victim was permitted to describe the defendant's room as evidence that she had been there.\(^\text{170}\) The Wisconsin Supreme Court held that the child's testimony was admissible for that purpose, although it would not have been admissible to prove what the defendant's room looked like.\(^\text{171}\) The court found that, when offered in conjunction with other evidence about what the defendant's room looked like, the child's description was circumstantial evidence of her knowledge, and not hearsay.\(^\text{172}\)

The court's terse analysis suggests that it had difficulty enunciating a rationale for finding the girl's testimony nonhearsay. Viewed in speaker's meaning terms, though, the case is relatively simple. The easiest way to understand it is to go back to the distinction between natural meaning and nonnatural meaning. The girl's statement certainly had nonnatural meaning: she meant that the defendant's room looked the way she described it. But the statement was not offered for that proposition. Instead, it was offered for its natural meaning. The fact that she was able to describe the room meant, in a natural sense, that she had perceived the room before. Her communicative intention played no role in the understanding of that meaning. Because a statement can be

\[169. \text{19 N.W.2d 529 (Wis. 1945).} \]
\[170. \text{Id. at 535.} \]
\[171. \text{Id.} \]
\[172. \text{Id.} \]
hearsay only when offered for a proposition contained in its nonnatural meaning, the girl’s testimony was not hearsay.

e. Indirectly inculpatory statements

Among the most interesting implied assertion cases, because they raise significant Confrontation Clause issues in addition to pure hearsay issues, are the cases in which a suspect says something that indirectly implicates an accomplice. This scenario formed the basis for two Supreme Court decisions addressing implied assertions.

In *Krulewitch v. United States*,\(^{173}\) the defendant and a co-conspirator, Betty Sookerman, were charged with transporting a woman named Joyce Sorrentino across state lines for purposes of prostitution.\(^{174}\) At the defendant’s trial, Sorrentino testified that Sookerman met with her after Sorrentino’s arrest, and the following conversation took place:

She asked me, she says, “You didn’t talk yet?” And I says, “No.” And she says, “Well, don’t,” she says, “until we get you a lawyer.” And then she says, “Be very careful what you say.” And I can’t put it in exact words. But she said, “It would be better for us two girls to take the blame than Kay (the defendant) because he couldn’t stand it, he couldn’t stand to take it.”\(^{175}\)

The lower courts had assumed that this testimony was hearsay, but admitted it as a co-conspirator’s statement.\(^{176}\) The Supreme Court agreed that the statement was hearsay, but held that the co-conspirator exception did not apply because the conspiracy had ended before the statement was made.\(^{177}\) The Court’s analysis of the hearsay character of the statement is sparse, but it suggests an expansive approach to meaning. The Court found that:

\(^{173}\) 336 U.S. 440 (1949).
\(^{174}\) Id. at 441.
\(^{175}\) Id.
\(^{177}\) Krulewitch, 336 U.S. at 442-43.
The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner's absence and the Government made no effort whatever to show that it was made with his authority. The testimony thus stands as an unsworn, out-of-court declaration of petitioner's guilt.\footnote{178}{Id. at 442.}

\textit{Krulewitch} was decided twenty-five years before the promulgation of the Federal Rules, at a time when the hearsay definition, although crystallizing, was still open to differing interpretations. The Court could have adopted a credibility-based analysis, and that may be what it intended. Under a credibility analysis, the Court's decision is entirely defensible. If the case were to come up today under the Federal Rules, however, it would likely come out differently. Sookerman may have conveyed the impression that the defendant was guilty, but she did not mean that he was guilty. The contextual evidence suggests that she entered into the conversation believing that Sorrentino already believed both that the defendant was guilty and that Sookerman believed that he was guilty. Sorrentino testified at trial that she and Sookerman had been living together and working as prostitutes in New York and that, at the defendant's urging, they went to Miami with the defendant and worked as prostitutes there.\footnote{179}{United States v. Krulewitch, 145 F.2d 76, 77 (2d Cir. 1944), aff'd, 167 F.2d 943 (2d Cir. 1948), rev'd, 336 U.S. 440 (1949).} Because they apparently shared a common understanding about the defendant's role, Sookerman had no reason to intend to produce a belief in Sorrentino that the defendant was guilty. Sookerman's statement would not be hearsay under Rule 801 if offered to prove her belief that he was guilty.

Twenty years later, still prior to the Federal Rules, the Court took up another case in which an accomplice made an inculpatory jailhouse remark. In \textit{Dutton v. Evans},\footnote{180}{400 U.S. 74 (1970).} Alex Evans and Venson Williams were charged with murdering three police officers.\footnote{181}{Id. at 76.} At Evans's trial, the prosecution called a man named Shaw. The Supreme Court described Shaw's testimony as follows:

He testified that he and Williams had been fellow prisoners in the federal penitentiary in Atlanta, Georgia, at the time
Williams was brought to Gwinnett County to be arraigned on the charges of murdering the police officers. Shaw said that when Williams was returned to the penitentiary from the arraignment, he had asked Williams: "How did you make out in court?" and that Williams had responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."\textsuperscript{182}

The testimony was admitted by the trial court, which apparently assumed that it was hearsay but found that it fell within Georgia's exception for co-conspirator's statements.\textsuperscript{183} The case reached the Supreme Court on Evans's petition for a writ of habeas corpus arguing that the statement was improperly admitted.\textsuperscript{184} The Supreme Court also assumed, without any analysis at all, that the testimony was hearsay.\textsuperscript{185} Finding that the testimony fit within the Georgia exception and that the exception was constitutional, however, the Court denied the petition.\textsuperscript{186}

Although the Court did not provide enough contextual evidence for a conclusive explication, it appears that this situation is different from the one in \textit{Krulewitch}. The circumstances of Shaw's conversation with Williams are not clear, but it appears that Shaw was not affiliated with the conspiracy. He knew Williams and spoke with Williams in the prison hospital after Williams was indicted.\textsuperscript{187} Assuming that Shaw had not had earlier conversations with Williams about the crime—an assumption that could easily have been checked—he probably was not privy to the details of the crime at the time of the prison conversation. In that case, for Williams's expression of disgust with Evans to make sense to Shaw, Shaw had

\textsuperscript{182} \textit{Id.} at 77. An earlier opinion by the Georgia Supreme Court on the appeal of the original decision described a slightly different statement by Shaw:

Lynn W. Shaw testified that he is a prisoner in the United States Penitentiary at Atlanta. He stated that he knew the defendant and had had a conversation with him in the hospital at the prison after the defendant had been indicted for the killing of the three officers. Shaw asked the defendant how he came out at the hearing, and the defendant replied: "If that dirty s.o.b. Alex Evans hadn't shot Everett we wouldn't be in this mess."


\textsuperscript{183} \textit{Dutton}, 400 U.S. at 78.

\textsuperscript{184} \textit{Id.} at 76.

\textsuperscript{185} \textit{Id.} at 80.

\textsuperscript{186} \textit{Id.} at 82-83.

\textsuperscript{187} \textit{See Williams}, 149 S.E.2d at 457.
to be made aware of Evans’s role in the crime. Williams’s statement must have been intended to convey that message as well as the more overt message about Williams’s disgust. In speaker’s meaning terms, Williams apparently intended Shaw to believe, based on Shaw’s recognition of Williams’s communicative intention, that Evans participated in the crime. Thus, when offered as evidence of Williams’s belief that Evans participated in the crime, Williams’s statement is hearsay.

Later courts interpreting *Krulewitch* and *Dutton* have not seen any difference in the cases. The cases relying on them typically cite them as generalized support for a credibility-based approach to the hearsay rule, even though most cases in this camp post date the Federal Rules. The most celebrated case of this type is *United States v. Reynolds*.188 In *Reynolds*, the defendant, Parran, and a co-conspirator, Reynolds, were charged with possessing and attempting to cash a stolen unemployment check.189 They were seen together purchasing a false identification and then conversing as they walked to a bank.190 Parran kept walking while Reynolds went in and tried, unsuccessfully, to cash the check.191 As he left the bank, Reynolds was arrested by postal inspectors.192 Parran then returned to the scene of Reynolds’s arrest, where, according to a postal inspector making the arrest, Reynolds said to him, “I didn’t tell them anything about you.”193 At trial, the postal inspector testified to Reynolds’s statement.194 Parran was convicted.195 He appealed, arguing that the postal inspector’s testimony was inadmissible hearsay.196

The Third Circuit agreed. Relying on both *Krulewitch* and *Dutton*, the court adopted a credibility-based approach to the

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188. 715 F.2d 99 (3d Cir. 1983). *Reynolds* was a focal point of Professor Park’s widely-cited article “I Didn’t Tell Them Anything About You”: Implied Assertions as Hearsay Under the Federal Rules of Evidence, supra note 35.
189. *Reynolds*, 715 F.2d at 100.
190. *Id.* at 101.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 100.
195. *Id.*
196. *Id.*
hearsay issue, focusing on the risk of ambiguity inherent in Reynolds's statement:

Reynolds's statement is ... ambiguous and susceptible to different interpretations. As the government uses it, the statement's probative value depends on the truth of an assumed fact it implies. Unless the trier assumes that the statement implies that Reynolds did not tell the postal inspectors that Parran was involved in the conspiracy to defraud, even though Parran was in fact involved, the statement carries no probative weight for the government's case.\textsuperscript{197}

Concluding that it could not find "any distinction of substance" between Reynolds's statement and the statements at issue in \textit{Krulewitch} and \textit{Dutton}, the court held that the statement was hearsay.\textsuperscript{198}

Of course, an important difference between \textit{Reynolds} on the one hand and \textit{Krulewitch} and \textit{Dutton} on the other is that the former was decided under the Federal Rules of Evidence while the latter were not. The Third Circuit avoided any discussion of Rule 801 and whether it required a different result than might have been permissible in its absence. Leaving that point aside, I have suggested that there was also a substantive distinction between \textit{Krulewitch} and \textit{Dutton}. The question for purposes of analyzing \textit{Reynolds} according to the speaker's meaning formula is whether \textit{Krulewitch} or \textit{Dutton} more closely resembles \textit{Reynolds}. Once again, unfortunately, there is not enough contextual evidence to say for certain.

The analysis depends on several factors. One important issue involves Reynolds's intended audience. Assume first that Reynolds thought he was out of earshot of anyone but Parran. In that situation, the statement potentially resembles the statement in \textit{Krulewitch}. If Parran and Reynolds were complicitous in the scheme, then they both would have believed that Parran was involved and that the other believed that he was involved. Reynolds

\textsuperscript{197} Id. at 103.
\textsuperscript{198} Id. at 104.
would not have made the statement intending Parran, *on the basis of the statement*, to produce a belief that he was involved.199

On the other hand, it is possible that Reynolds knew that he would be overheard by the arresting postal inspectors. He could have intended to impart blame to Parran as a strategy for mitigating his own dire circumstances. In other words, he could have intended the postal inspectors to believe that Parran was involved in the scheme and to reach that belief based on their recognition of his intention. If that were the case, his statement clearly would be hearsay. But in the absence of sufficient contextual evidence on these points, and it is hard to imagine such evidence existing, the issue has to be resolved in favor of nonhearsay treatment. In other words, we have to assume that Reynolds did not intend to communicate anything about Parran’s guilt to the arresting officers.

To the extent that a finding that the statement is not hearsay results in its admission, that conclusion raises troubling confrontation concerns. As the Supreme Court has explained, “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”200 Reynolds’s statement strongly suggests Parran’s guilt and was used to show Parran’s guilt without any rigorous testing for reliability.201 But concerns raised by the

199. Even if Reynolds intended his statement to be heard by Parran only, he could have intended to communicate the proposition that Parran was, or could be considered, partly culpable. Assume that Parran had no active role in the crime. Reynolds might have wanted to suggest to Parran the possibility that Parran could be implicated as a way to keep Parran from talking. If that were the case, he might have meant the proposition “you were involved” when he said, “I didn’t tell them anything about you.” The statement would be hearsay if offered as evidence that Parran was involved. Again, though, given the burden-of-proof regime in Rule 801, that possibility must be discounted absent more substantial evidence.

200. Maryland v. Craig, 497 U.S. 836, 845 (1990); see also Lilly v. Virginia, 527 U.S. 116, 141 (1999) (Breyer, J., concurring) (“As traditionally understood, the right was designed to prevent, for example, the kind of abuse that permitted the Crown to convict Sir Walter Raleigh of treason on the basis of the out-of-court confession of Lord Cobham, a co-conspirator.”).

201. This is an issue that David Seidelson has recognized. Professor Seidelson cites the potential contraction of Confrontation Clause protections as a reason for rejecting the approach to Rule 801 that I advocate. See Seidelson, supra note 30, at 769 (“The nonhearsay characterization [of verbal assertions offered for the two-step inference] was a judgment call or arbitrary determination made by the Committee. Such a determination cannot negate the
admission of this evidence do not necessarily undermine the intent-based approach to the hearsay rule as effected by the speaker’s meaning formula. Rather, the problem lies in the uncompromising integration of the hearsay rule and the Confrontation Clause. There is nothing in the text of the Confrontation Clause that requires a mechanical decision in which any out-of-court statement found to be nonhearsay must also be found to pass constitutional muster. Divorcing hearsay analysis from confrontation analysis would free courts to make consistent hearsay determinations while still guaranteeing the reliability of evidence against criminal defendants under the Confrontation Clause. Statements like that in Reynolds, although clearing the hearsay hurdle, might still be excluded on constitutional grounds.

V. CONCLUSION

The application of the hearsay definition in Rule 801 turns on the identification of intended assertions. The speaker’s meaning approach offers a guiding principle for making those determinations. To identify the speaker’s meaning, we need to know constitutional guarantee of the confrontation clause when the evils to be met by the clause in fact exist.

202. Over the last three decades, the Confrontation Clause has become inextricably intertwined with the operation of the hearsay rule. See, e.g., Idaho v. Wright, 497 U.S. 805, 815, 826-27 (1990) (finding a violation of the Confrontation Clause where an unavailable child’s out-of-court declaration was admitted under a state residual exception); United States v. Inadi, 475 U.S. 387, 399-400 (1986) (holding that the government has no obligation to produce an available co-conspirator hearsay declarant); Ohio v. Roberts, 448 U.S. 56, 65-66, 73 (1980) (upholding the admissibility of agency admissions and introducing a two-prong Confrontation Clause test); Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (holding that admission of hearsay statements under a state co-conspirator exception did not violate the Confrontation Clause because of sufficient “indicia of reliability”); California v. Green, 399 U.S. 149, 164 (1970) (holding that delayed cross-examination of a hearsay declarant satisfies the Confrontation Clause); see also Glen Weissenberger, Reconstructing the Definition of Hearsay, 57 OHIO ST. L.J. 1525, 1527 (1996) (“[T]he development of the Confrontation Clause of the Sixth Amendment has created a body of law that barely diverges from the hearsay system as it is codified in the Federal Rules of Evidence.”).

203. Richard Friedman has advocated a Confrontation Clause approach that would offer the protection that I suggest. He believes that the Confrontation Clause should assure cross-examination of any witness against a defendant, and defines a witness against a defendant as “anybody who makes a statement knowing that it would likely be used in the investigation or prosecution of a crime.” See Friedman, et al., supra note 132, at 88-89 (comments of Richard D. Friedman).
what she believed that the other participants in the conversation already assumed. If the declarant and the audience shared a set of common premises, the declarant probably would not have intended to assert anything about those premises, absent some reason for bringing them to the forefront of the others’ minds—as in the cases of reminding or reviewing facts. A statement offered as evidence of a proposition relating to those premises should not be considered hearsay. This makes good sense as an organizing principle for the hearsay rule. The rule does not cover unintended assertions because of the minimal insincerity risk associated with that kind of communication. A person is not likely to try to mislead another person about something that both of them presuppose.

In many cases, sufficient contextual evidence will exist to make an informed judgment about the speaker’s presuppositions. In some cases like Reynolds, however, that will not be possible. In those cases, because the party opposing the admission of the evidence has the burden of proving that an out-of-court statement is offered for the truth of an intended assertion, the evidence should be admitted. The risk of unreliable evidence coming in through this method can be addressed through a more aggressive Confrontation Clause approach.