

1-1994

Hearsay and Informal Reasoning

Craig R. Callen

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Criminal Law Commons](#)

Recommended Citation

Craig R. Callen, Hearsay and Informal Reasoning, 47 *Vanderbilt Law Review* 43 (1994)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol47/iss1/2>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Hearsay and Informal Reasoning

Craig R. Callen*

I.	INTRODUCTION.....	44
II.	THE LITERALIST HEURISTIC AND IRONY IN HEARSAY DOCTRINE.....	49
III.	HUMAN DECISIONMAKING AND EVIDENCE	55
	A. <i>Limitations on Human Capacity and Strategies to Overcome Them</i>	55
	B. <i>Common Sources of Organizing Strategies</i>	58
	C. <i>Problem-Solving and Human Communication: Evidence Rules and Inference</i>	60
	1. Exclusionary Rules and Communication...	60
	2. Recognition of the Maxim's of Co- operation Implicit in Evidence Doctrine	63
	3. The Distrust Rationale and Its Critics	66
	4. Alternatives to Exclusionary Rules.....	69
IV.	HEARSAY: INFERENCE IN EVALUATING COMMUNICATION AND LANGUAGE.....	73
	A. <i>Grice and the Hearsay Problem</i>	73
	B. <i>Functional Distinctions Between Hearsay and Nonhearsay</i>	78
	C. <i>Interpreting Federal Rule 801 with the Co-operative Theory</i>	82
	D. <i>A Co-operative Restatement of the Definition of Hearsay</i>	86
	E. <i>Narrowing the Dangers Approach: Non-Communicative Conduct</i>	90
	F. <i>Cross-Examination and the Conventional Rationale for Exceptions</i>	93
	G. <i>The Exceptions</i>	96
	1. A System of Rules that Requires Data to Facilitate the Evaluation of Communications.....	96
	2. The Complexity of the System of Exceptions.....	97
V.	THE CO-OPERATIVE THEORY IN PRACTICE.....	101
	A. <i>Less Than Words Can Say: Implication in Communicative Conduct</i>	101

1.	The Prototypical Case	101
B.	<i>Related Techniques for Truncating Hearsay Rules</i>	103
1.	Inferring Events from Knowledge.....	103
2.	Requests as Hearsay	107
C.	<i>Practical Consequences</i>	110
VI.	CONCLUSION	112

I. INTRODUCTION

The Federal Rules of Evidence define hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”¹ A statement, in turn, is “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”² Hearsay is inadmissible unless it falls within an exception to the rule³ or an exclusion from the definition.⁴ Courts and commentators often write as if the distinctions they make between hearsay and nonhearsay are consistent with informal reasoning,⁵ the

* Professor, Mississippi College School of Law. B.A., University of Iowa; J.D., Harvard Law School. The Author would like to thank Ronald J. Allen, Richard B. Kuhns, William H. Page, Roger C. Park, Michael L. Siegel, and Peter Tillers for comments on various drafts over a number of years; Pamela S. Gerity, Anthony C. Hayes, M. Michelle Van Hook, and Petra Van Kampen for adroit research; the International Seminar on Evidence in Litigation and the Society for the Reform of Criminal Law for the opportunity to discuss these ideas at workshops; the Faculty of Law at the University of Leiden, The Netherlands, for providing timely seclusion; and Mississippi College School of Law for grants that helped to support this research.

1. F.R.E. 801(c).

2. F.R.E. 801(a).

3. F.R.E. 802.

4. F.R.E. 801(d). For a discussion of the function of the exclusions as opposed to the exceptions, see note 170.

5. See, for example, *United States v. Reynolds*, 715 F.2d 99, 102 (3d Cir. 1983); *Lyle v. Koehler*, 720 F.2d 426, 433-34 (6th Cir. 1983); *United States v. Pacelli*, 491 F.2d 1108, 1116-17 (2d Cir. 1974); *The Queen v. Kearley*, 2 App. Cas. 228, 261-62, 2 W.L.R. 656, 681-82, 2 All E.R. 345, 368-69 (H.L. 1992); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 178-79 (1948); Christopher B. Mueller, *Post Modern Hearsay Reform: The Importance of Complexity*, 76 Minn. L. Rev. 367, 417 & n.149 (1992); 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, 800-01 (1990); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 Cal. L. Rev. 1339, 1362 (1987). Compare arguments for abolishing hearsay doctrine that rely on notions of informal reasoning: Keuneth Culp Davis, *Hearsay in Nonjury Cases*, 83 Harv. L. Rev. 1362, 1363 (1970) (stating that in a bench trial, a court should be able to rely on hearsay inadmissible in a jury trial “if it is ‘the kind of evidence on which responsible persons are accustomed to rely in serious affairs’” (quoting *NLRB v. Remington Rand*, 94 F.2d 862, 873 (2d Cir. 1938)); Jack B. Weinstoin, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 353 (1961); Paul J. Brysh, Comment, *Abolish the Rule Against Hearsay*, 35 U. Pitt. L. Rev. 609, 622, 625 (1974). Of course, Professor Morgan’s analysis of the hearsay dangers represents the conventional legal wisdom about the informal reasoning humans use to evaluate hearsay, although some authorities disagree with Morgan’s labels for the inferential dangers hearsay poses, or with his view of the

inferential methods based on common experience that human beings employ in litigation as well as everyday life.⁶ There is certainly good reason to take account of informal reasoning in conceptualizing hearsay. Interpretation of terms such as "assertion" and "assert" to reflect the process people use to make everyday judgments takes maximum advantage of human experience, and is therefore easy for courts and lawyers to learn and apply. But courts, rulemakers, and scholars have failed to develop a workable and accurate model of informal reasoning on which a clear understanding of hearsay could rest. One result of that failure is the debate over the proper ambit of the hearsay rule that has recurred since the Exchequer Chamber decided *Wright v. Doe d. Tatham*⁷ over a century and a half ago.

Conventional attempts to distinguish hearsay from nonhearsay produce baffling results. Consider one understanding of the hearsay definition, which might be called the "literalist heuristic." Literalist analysis⁸ holds that, for hearsay purposes, a communication ordinarily

precise risk each poses. F.R.E., Article viii, Advisory Committee's Note, itself relies on Morgan, although describing the sincerity danger "as an aspect" of his other three dangers. For a fuller discussion of Morgan's model, see notes 145-54 and accompanying text.

The term "informal reasoning" does not imply any of the following: (i) that informal reasoning would inevitably lead to the same result regardless of the person employing it, (ii) that informal reasoning excludes reliance on the results of formal study when the reasoner would choose to rely, or (iii) that the results of informal reasoning are necessarily inferior to the results of formal methods. This Article uses the term "informal reasoning" to describe non-technical reasoning, to avoid using terms such as "practical reasoning," which may carry considerable theoretical baggage in cognitive science or philosophy irrelevant here. See Gilbert Harman, *Change in View: Principles of Reasoning* 1 (M.I.T., 1986).

6. See, for example, *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 526 (1956); *Toth v. Quarles*, 350 U.S. 11, 18 (1955). F.R.E. 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified . . . may testify thereto. . . [.]" thus recognizing both judges' and jurors' informal reasoning. Compare *Jurek v. Estelle*, 623 F.2d. 929, 980 (5th Cir. 1980) (relying on "common sense" in reviewing lower court conclusions on the voluntariness of confession).

7. 112 Eng. Rep. 488 (Ex. Ch. 1837), aff'd, 7 Eng. Rep. 559 (H.L. 1838).

8. Those who follow the debate on implied assertions may consider this another term for what Professor Park first called the "assertion-oriented" approach. 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, 427 (1981). Professor Park's terminology has since gained some currency. See, for example, 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 Temple L. Rev. 529, 531 & n.6 (1992); Glen Weissenberger, *Unintended Implications of Speech and the Definition of Hearsay*, 65 Temple L. Rev. 857, 857 (1992). An adherent of the assertion-oriented approach may accept it only for pragmatic reasons, however, rather than because of a belief in quasi-literalist semantics in communication. This pragmatic position largely reflects Professor Park's rationale. Park, 74 Minn. L. Rev. at 829-38 (cited in note 5). In contrast, *McCormick on Evidence* has been fairly dogged in its literalism. See Charles T. McCormick, *Handbook of the Law of Evidence* § 228 at 446 (West, 1954) (labelling "Harold is the finest of my sons" nonhearsay to prove the declarant was fond of Harold). Park, 65 Minn. L. Rev. at 427, is a trenchant criticism of such literalism. The treatise may have retreated from that extreme position. See John W. Strong, et al., eds., 2 *McCormick on Evidence* § 246 (West, 4th ed. Practitioner's ed. 1992) ("*McCormick 4th*") (omitting discussion of that point). Professor Park might even classify this Article's co-operative approach to hearsay "assertion-

asserts only those propositions that it literally, expressly, or directly⁹ articulates.¹⁰ The sheer unreality of the notion of literal interpretation¹¹ frequently results in anomalies, for example, in prosecutions alleging sexual abuse of children or illegal distribution of drugs. The prosecution might offer a seven-year-old's statement, "Sex is disgusting," in a molestation case, arguing it is nonhearsay to show the child was molested because it does not declare that the child has been involved in a sex act, but rather demonstrates an attitude toward sex that is circumstantial evidence of abuse.¹² Alternatively, the prosecution in a drug case might offer a single call, answered by an officer during a raid: "Is Joe there? I'm trying to buy some drugs." The

oriented" because it considers nonhearsay false statements offered to show the speaker's awareness of a third person's guilt. See Park, 65 Minn. L. Rev. at 426; note 193.

9. Of course, these terms seem to set up a straw man, in view of the difficulty of attaching any one objectively certain meaning to an utterance. Paul Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 Ky. L. J. 841, 850 (1987). One cannot, however, describe this view of "assertion" without occasionally using terms such as "literal," "direct," or "primary." See, for example, Weissenberger, 65 Temple L. Rev. at 861 (cited in note 8).

10. See, for example, *United States v. Limehouse*, 950 F.2d 501, 503 (7th Cir. 1991); *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990); *United States v. Giraldo*, 822 F.2d 205, 208, 212-13 (2d Cir. 1989); *United States v. Hensel*, 699 F.2d 18, 31 (1st Cir. 1983); *United States v. Groce*, 682 F.2d 1359, 1364 (11th Cir. 1982); *United States v. Day*, 591 F.2d 861, 883 (D.C. Cir. 1978); *United States v. Zenni*, 492 F. Supp. 464, 469 (E.D. Ky. 1980). See also Park, 74 Minn. L. Rev. at 817-19 n.183 (cited in note 5). See also note 18, which includes cases in which the courts relied on their view of the literal meaning of communications to hold those communications nonhearsay. Commentators who use the same analysis include Richard D. Friedman, *The Elements of Evidence* 143 (West, 1991) (declaring that the statement, "Look at my daughter move," spoken to another bystander at a soccer game, does not assert that the person moving is the speaker's daughter within the meaning of the Federal Rules); Graham C. Lilly, *An Introduction to the Law of Evidence* (West, 2d ed. 1987) (criticizing *Wright v. Doe d. Tatham*, 7 Eng. Rep. 559 (H.L. 1838), arguing that "the letters were not offered to prove anything expressly said therein"); Jack B. Weinstein and Margaret A. Berger, *Weinstein's Evidence Manual* ¶ 14.02[02] at 14-13, 14-14 (Matthew Bender, Student ed. 1987); Rice, 65 Temple L. Rev. at 532 (cited in note 8).

11. See, for example, Bergman, 75 Ky. L. J. at 850, 855-63 (cited in note 9) (discussing the weaknesses in the notion that it is possible to arrive at an objective, literal interpretation of an utterance). An adherent of the literalist heuristic who notes this weakness contends it is relatively inconsequential: "The question is not whether any possible situation exists in which the definition would allow dubious evidence to be received, but whether in everyday operation it does a capable job of sorting." Park, 74 Minn. L. Rev. at 793 (cited in note 5). See also McCormick, *Handbook of the Law of Evidence* § 225 at 460 (cited in note 8) (attempting to justify the literalist heuristic's anomalies by stating, "Simplification has a measure of falsification.").

In addition, adherents of the literalist heuristic in hearsay doctrine would be unlikely to urge its use in other contexts. F.R.C.P. 49(a) provides the best example of the legal system's abandonment of literalism in a related context. That rule provides that if a court does not submit an interrogatory on an issue to the jury, and fails to make a specific finding on that issue, the court is "deemed to have made a finding in accord with the judgment on the special verdict." See also James Boyd White, *Justice as Translation* xi (U. of Chicago, 1990) (stating that "little of what happens in any real utterance is reducible to the words uttered"); Gregory Currie, *Interpretation and Objectivity*, 102 Mind 413 (1993).

12. See notes 293-98 and accompanying text.

prosecution could argue that the call was nonhearsay on the theory that it did not declare that Joe was selling or had ever sold drugs.¹³

Judicial and scholarly use of the literalist heuristic and related strategies for curtailing the reach of the hearsay rule, such as the concept of verbal parts of acts, or of circumstantial use of statements that supposedly does not depend on the speaker's accuracy,¹⁴ has created much of the oft-bemoaned complexity in hearsay doctrine. Terms such as "assertion" and "nonassertive verbal conduct," interpreted in accord with the literalist heuristic, become arcane,¹⁵ forcing judges, teachers, and students to apply distinctions with no substantial basis, in the manner of creaky but marginally useful automatons. Common perceptions that a conceptual muddle inevitably results from any distinction between hearsay and other evidence¹⁶ compound the problem. Ironically, the original literalists may have formulated strategies for curtailing the reach of the hearsay rule to effect radical change reflecting their ideas of reliable inference in informal reasoning.¹⁷ Federal courts frequently rely on the literalist heuristic, but the multiplicity of attendant problems has led some courts to ignore it, or to refuse explicitly to apply it.¹⁸

13. See notes 301-18 and accompanying text.

14. See notes 278-318 and accompanying text.

15. See note 191 for a dogmatic interpretation of the term "assertion." On nonassertive verbal conduct, see, for example, Ronald J. Allen and Richard B. Kuhns, *An Analytical Approach to Evidence* 321-22 (Little, Brown, 1989):

We use the term *nonassertive* to describe the verbal conduct in *Wright* both because it is a convenient shorthand and because the term is frequently used to describe the evidence in *Wright* and similar cases. . . . [I]t is important to note that the term is technically inaccurate and potentially misleading. Almost every verbalization is a manifestation of an intent to assert something: thus, the likely presence or absence of a sincerity problem does not usually depend upon whether the declarant is intending to make an assertion.

16. See Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 Minn. L. Rev. 797, 799-800, 802 (1992).

17. See Park, 65 Minn. L. Rev. at 457-58 (cited in note 8); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 Tex. L. Rev. 49, 59, 91-92 (1982).

18. The first person to notice this possibility may have been Wellborn, 61 Tex. L. Rev. at 78 (warning that "confining the hearsay definition to assertions offered for their *literal* meaning will not be tolerated by anyone") (emphasis in original). Park, 74 Minn. L. Rev. at 827-28 (cited in note 5), notes that applications of the literalist heuristic that result in classifying implied assertions as hearsay "generally have arisen in situations in which the [hearsay] dangers are minimal," indicating that courts may use the heuristic to rationalize decisions made on other bases. A number of circuit courts conflict regarding the treatment of various implied assertions. See, for example, *United States v. Figueroa*, 750 F.2d 232, 238-41 (2d Cir. 1984) (hearsay); *United States v. Giraldo*, 822 F.2d 205, 213 (2d Cir. 1987) (nonhearsay); *United States v. Mahar*, 801 F.2d 1477, 1491-92 (6th Cir. 1986) (hearsay); *United States v. Short*, 790 F.2d 464, 466-67 (6th Cir. 1986) (nonhearsay); *United States v. Parker*, 991 F.2d 1493, 1500 (9th Cir. 1993) (hearsay); *United States v. Cowley*, 720 F.2d 1037, 1044-45 (9th Cir. 1983) (same); *United States v. Jaramillo-Suarez*, 950 F.2d 1378, 1382-84 (9th Cir. 1991) (nonhearsay); *United States v. Patrick*, 959 F.2d 991, 999-1002 (D.C. Cir. 1992) (hearsay); *United States v. Long*, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990) (nonhearsay). In addition, although the bases for the court's rulings are not entirely clear, *United States v. Rodriguez*, 993 F.2d 1170, 1174 (5th Cir. 1993), and *United States*

Other prominent views of hearsay rely on accounts of human reasoning that fare no better. Literalism's leading competitor, Professor Morgan's dangers approach, rests on a flawed model of human communication.¹⁹ That model leads the dangers theory to misclassify non-communicative conduct as nonhearsay²⁰ and to overestimate the value of cross-examination.²¹

Because traditional legal analyses have failed to draw a workable and theoretically sound distinction between hearsay and nonhearsay, it is necessary to turn to disciplines that study human decisionmaking systematically. This Article offers an alternative to the traditional analyses of the distinction between hearsay and nonhearsay: co-operative analysis. Co-operative analysis, derived from cognitive science and other empirical research²² about human decision-making, makes the theory of hearsay more comprehensible and both streamlines and clarifies the system of hearsay rules. The linchpin of

v. Wiley, 979 F.2d 365, 369 (5th Cir. 1992), seem to treat the implied assertions in those cases as hearsay, consistent with *Park v. Huff*, 493 F.2d 923 (5th Cir. 1974), and *United States v. Brown*, 548 F.2d 1194 (5th Cir. 1977), but contrary to *United States v. Mazyak*, 650 F.2d 788 (5th Cir. 1981). The Third Circuit refuses to follow the literalist analysis. See, for example, *United States v. Reynolds*, 715 F.2d 99 (3d Cir. 1983). Although the Supreme Court has never squarely confronted the issue, it has treated communications offered to show propositions not expressly articulated as hearsay without addressing literalist arguments. See, for example, *Dutton v. Evans*, 400 U.S. 74, 77, 88 (1970); *Krulewitch v. United States*, 336 U.S. 440, 441-42 (1949). See also Park, 74 Minn. L. Rev. at 809-10 (cited in note 5); note 100.

19. See notes 142-54 and accompanying text.

20. See notes 205-18 and accompanying text.

21. See notes 219-28 and accompanying text.

22. Three scholars recently have analyzed the informal reasoning used to evaluate hearsay in interdisciplinary terms. See Richard D. Friedman, *Toward a Partial Economic Game-Theoretic Analysis of Hearsay*, 76 Minn. L. Rev. 723 (1992); Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*, 13 Cardozo L. Rev. 883 (1991); Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 Yale L. J. 667 (1987); David Schum, *Hearsay from a Layperson*, 14 Cardozo L. Rev. 1 (1992); Peter Tillers and David Schum, *Hearsay Logic*, 76 Minn. L. Rev. 813 (1992). Professors Schum and Tillers reserve judgment about the wisdom of the existing hearsay rules for a number of reasons. Tillers and Schum, 76 Minn. L. Rev. at 857-58 & n.55. Professor Friedman briefly exposes the inconsistency between wholesale treatment of implied assertions as nonhearsay and hearsay theory, Friedman, 96 Yale L. J. at 723-29, but apparently approves of treating at least some implied assertions as nonhearsay in accord with prevailing practice. *Id.* at 681-83. The definition of hearsay under F.R.E. 801(a) or (c) is essentially peripheral to Professor Friedman's empirical study, which focuses on the conditions for admission of evidence once it has been classified as hearsay. But see note 10 for a discussion of Friedman's use of the literalist heuristic to exemplify positive law.

Another set of studies presented at the University of Minnesota's Hearsay Reform Conference questioned the juror distrust rationale for the hearsay rule, which presumes that jurors will overvalue hearsay. See Margaret Bull Kovera, Reger C. Park, and Steven C. Penrod, *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 Minn. L. Rev. 703 (1992); Peter Miene, Roger C. Park, and Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 Minn. L. Rev. 683 (1992); Richard F. Rakos and Stephen Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 Minn. L. Rev. 655 (1992). None of the studies specified the jurors' inferential processes in evaluating hearsay, as opposed to the jurors' results, nor did any study directly address the distinction between hearsay and nonhearsay.

co-operative theory is research showing that the process of communication necessarily conveys a substantial amount of information that the communicator never verbalizes.²³ Cognitive science demonstrates that human beings, including factfinders, must employ decision-making shortcuts for complex tasks to avoid cognitive gridlock.²⁴ Whenever a court classifies as nonhearsay a communication offered to establish a proposition that it implies, but does not articulate, the court permits the receipt of that communication without proof of the facts that satisfy an exception to the hearsay rule. Evidence that satisfies the exceptions' conditions helps factfinders who are evaluating a communication offered for a hearsay purpose to use their personal experience, specifically, strategies for evaluating communications, to maximum benefit.²⁵ By stressing the importance of implication in communication, co-operative theory reveals how the prevailing assumptions about factfinders' evaluations of out-of-court communications are flawed, and the consequences of those flaws.

To explain the flaws in conventional hearsay analysis that cognitive research exposes, this Article first illustrates the literalist heuristic's application in a problematic context: irony. It then offers a sounder alternative to the conventional rationale for exclusionary rules based on brief accounts of both the nature of lay reasoning about facts and human inferences from communication. After applying that scholarship to the standard justifications for, and criticisms of, hearsay and other exclusionary rules, the Article concludes with an exploration of hearsay doctrine's treatment of implied assertions, possibly evidence law's most dramatic deviation from informal reasoning.

II. THE LITERALIST HEURISTIC AND IRONY IN HEARSAY DOCTRINE

Applying the Federal Rules' definition of hearsay to ironic utterances to prove propositions that the speaker might have intended, but did not articulate, poses problems for literalists. Analysis of the problem demonstrates the conflict between the results of the literalist heuristic²⁶ and the needs of factfinders relying on their own informal reasoning. Suppose a murder defendant were to claim that

23. See notes 74-86, 134-57, 184-85, and accompanying text.

24. See notes 54-65 and accompanying text.

25. See notes 232-41 and accompanying text.

26. Of course, differences exist among the approach's adherents. Professor Park is perhaps the most cautious adherent of the literalist heuristic. See, for example, Park, 74 Minn. L. Rev. at 799 (cited in note 5).

the police mishandled evidence at the scene of the crime and falsely accused him. Defendant offers the statement of Reporter, a since-deceased veteran of the police beat, to show that the forensics officer at the scene, Daryl, damaged the evidence, a shell casing, in a way that prejudiced the defendant. A witness heard Reporter say to the officer "Yup. Way to go, Daryl, way to handle the shell casing flawlessly." The witness says that Reporter "seemed to be sort of a wise-acre about it." The central question for this Article is whether Reporter's statement would be hearsay to show that Officer Daryl mishandled the evidence.

A zealous literalist²⁷ must either classify the statement as nonhearsay or do a very fast shuffle to explain why the statement is hearsay.²⁸ Courts and scholars often use the term "implied assertion" to refer to a proposition for which a communication that did not directly articulate the proposition is offered in evidence.²⁹ Perhaps the most distinctive consequence of the literalist position is the recurrent argument that implied assertions are not part of "the matter asserted" for hearsay purposes.³⁰

The most prominent current proponent of the literalist heuristic, *McCormick on Evidence*, defines the term "assert" as "to say that something is so."³¹ Reporter did not articulate any proposition other

27. 2 *McCormick 4th* §§ 246-250 at 97-117 (cited in note 8) is one of the most persistent sources of the literalist heuristic.

28. The prosecution's best hearsay argument would be that Reporter obviously meant to assert that Officer Daryl damaged the evidence. Adherents of the literalist approach, however, have seldom permitted the declarant's intention to determine the content of an assertion for hearsay purposes. See notes 278-83, 311-17, and accompanying text.

Insofar as other objections to admission are concerned, Reporter would be more likely to make the statement if Daryl erred than if she had not, so it would be relevant in that sense. The prosecution's best argument under literalist theory for excluding the evidence would be to argue, based on F.R.E. 403, that the prejudicial impact of Reporter's comment would outweigh its probative value. Reliance on Federal Rule 403 leaves unanswered an interesting question. Members of the literal statement school's heavy reliance on Rule 403 indicates that their own definition is underinclusive. See Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 *Stan. L. Rev.* 682, 694, 698, 702 (1962). See notes 51 and 244.

29. Park, 74 *Minn. L. Rev.* at 788 (cited in note 5). The term may also refer to proffers of non-communicative conduct to prove a proposition that the actor might have believed. For a discussion of the hearsay status of such conduct, see notes 205-18 and accompanying text.

30. See, for example, Mueller, 76 *Minn. L. Rev.* at 418 (cited in note 5).

31. 2 *McCormick 4th* § 246 at 97 (cited in note 8). The literalist heuristic can be traced back to Professor Wigmore, who treated "I did X" as nonhearsay to show that the speaker believed she did X, while "I think I did X" would be hearsay for that same purpose. John H. Wigmore, 3 *A Treatise on the System of Evidence in Trials at Common Law* §§ 1715, 1788, 1790 (Little, Brown, 1904). See also *Lyle v. Koehler*, 720 F.2d 426, 433 (6th Cir. 1983); Enstace Seligman, *An Exception to the Hearsay Rules*, 26 *Harv. L. Rev.* 146, 150-51 (1912). McCormick has disclaimed at least one of the mere extreme results of the literalist heuristic. 2 *McCormick 4th* § 250 at 112 n.21. See also note 35 and accompanying text. The treatise undoubtedly approves of cases that adhere to literalist analysis, however. *Id.* at 111-12 n.19. Specific examples are discussed in notes 278-318 and accompanying text.

than that Daryl handled the shell casing flawlessly, and possibly that Daryl's work was praiseworthy. The statement, then, according to McCormick's literalism, would not *assert* that Daryl erred. Accordingly, it would be nonhearsay to prove that Daryl erred, even though many hearers would understand Reporter's comment to mean that Daryl made some sort of mistake.

Adherence to the idea that a statement only asserts what it articulates would seem to compel the conclusion that Reporter's statement should be admissible. While hearsay scholarship to date has included relatively little³² systematic discussion of irony, critics of the literalist approach frequently have mentioned that consistent literal interpretation of an utterance would forbid the court to classify communications offered to show propositions communicated by metaphor as hearsay.³³ Literalism likewise invites courts to regard questions or nondeclarative utterances as completely outside the hearsay rule because such utterances do not "say something is so." The courts often have accepted the invitation.³⁴ Under these circumstances, there is no reason that the courts should step at exempting figures of speech from hearsay. The new full edition of *McCormick on Evidence*, departing from what had been a zealous defense of literalism, admits that communications may assert (for hearsay purposes) propositions conveyed by metaphor, noting the certainty of the declarant's intention, the "inevitability of the implication," and the "greater likelihood of deception" as compared to other implied assertions.³⁵ Even if such a rationale conforms to the remainder of McCormick's analysis,³⁶ squaring the treatment of ironic statements as hearsay with hearsay literalism remains tricky.

32. The prime example is Rice, 65 Temple L. Rev. at 534-35 (cited in note 8). See also Morgan, 62 Harv. L. Rev. at 189 (cited in note 5); Park, 74 Minn. L. Rev. at 799 (cited in note 5); Wellborn, 61 Tex. L. Rev. at 73-74 (cited in note 17).

33. Park, 74 Minn. L. Rev. at 799 (cited in note 5); Wellborn, 61 Tex. L. Rev. at 78-79 (cited in note 17); Weissenberger, 65 Temple L. Rev. at 860 n.17 (cited in note 8); Madeleine Sloane and D. Barratt Irwin, Comment, *Hearsay: The Threshold Question*, 9 U.C. Davis L. Rev. 1, 14 n.48 (1976).

34. See, for example, *United States v. Oguns*, 921 F.2d 442, 448-49 (2d Cir. 1990); *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990). For general discussion of some courts' use of nondeclarative sentences as nonhearsay, see, for example, Park, 74 Minn. L. Rev. at 795 & n.58 (cited in note 5).

35. 2 *McCormick 4th* § 250 at 112 n.21 (cited in note 8).

36. Certainly, a need for a difficult judgment about the degree of explicitness defeats the treatise's claim that its test is clear. *Id.* § 246 at 98 n.5. See David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts*, 24 Duquesne L. Rev. 741, 759 (1986).

The sort of irony in which the defendant would argue Reporter engaged does not fit McCormick's reasoning about metaphor.³⁷ First, Reporter's intention is foggy. She may have intended to point out an error in Officer Daryl's handling of the shell casing, which might or might not be the error the defendant would allege. Reporter alternatively might have meant to tell Daryl that handling the shell casing flawlessly was not a significant accomplishment.³⁸ Second, irony assumes some sort of insincerity. The claim that Reporter was being ironic is thus a claim that she did not mean to convey the proposition that she expressly articulated, but rather to convey that she did not believe the proposition herself.³⁹ Of course, she simply could have been trying to embarrass Daryl by praising her performance. Considering the degree of indirection inherent in irony, it is significant that literalist theorists tend to believe that indirectness ensures sincerity, and that the possibility of insincerity is the principal risk that hearsay creates in factfinding.⁴⁰ It is doubtful that ironic utterances fall within the classic literalist understanding of hearsay, unless they are nudged while falling.⁴¹

To label the ironic statement hearsay and avoid the anomaly, hard-core literalists could argue, based on notions of intention or of intention to assert a proposition, that the relevance of Reporter's statement would stem from Reporter's intent to convey a flaw in the

37. Indeed, Professors Sperber and Wilson argue that irony and metaphor differ, relying on the idea that irony "plays on the relationship between the speaker's thought and a thought of someone other than the speaker." Dan Sperber and Deidre Wilson, *Relevance: Communication and Cognition* 243 (Harvard U., 1986). If so, Reporter clearly did not articulate "the thought of someone other than the speaker," which would therefore make Reporter's utterance nonhearsay to show Daryl erred under the literalist heuristic.

38. While the uncertainty of Reporter's intention creates an obvious problem, one should keep in mind that the literalist heuristic often analogizes the use of verbal conduct to prove propositions that it does not articulate with the nonhearsay use of noncommunicative verbal conduct to prove propositions that the actor may have believed. 2 *McCormick 4th* § 250 at 108-13 (cited in note 8). Professors Lempert and Saltzburg argue in favor of treating nonassertive conduct as nonhearsay because the ambiguity of such conduct is so obvious that jurors will be wary of it. Richard O. Lempert and Stephen A. Saltzburg, *A Modern Approach to Evidence: Text Problems, Transcripts and Cases* 368 (West, 2d. ed. 1983). See note 211 and accompanying text. Accordingly, it is not at all clear that the ambiguity risk would require classifying the irony as hearsay.

39. See, for example, Sperber and Wilson, *Relevance: Communication and Cognition* at 239 (cited in note 37).

40. See, for example, Edward J. Imwinkelried, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten*, 41 Fla. L. Rev. 215, 219-22 (1989); Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 Temple L. Rev. 145, 149 (1991). In fact, the hearsay dangers are mutually dependent. See notes 147-54 and accompanying text.

41. See Rice, 65 Temple L. Rev. at 534-35 (cited in note 8).

gathering of evidence.⁴² Because the literalist heuristic by definition requires exclusion of some implied assertions from hearsay, such uses of intent are ad hoc in the extreme—a wild card⁴³ used whenever the literalist theory's results seem too anomalous. Difficult questions about whether a particular statement conveys a proposition with sufficient directness are, of course, antithetical to a heuristic based on the notion of literal statement.⁴⁴ The communicator's intention in

42. See note 35 and accompanying text. Compare Park, 74 Minn. L. Rev. at 800 (cited in note 5) (exemplifying the use of a theory of intention by a critic of the literalist heuristic's extremes).

Professor Michael Seigel suggests another possible argument for labelling Reporter's irony nonhearsay: Reporter may have assumed that Daryl erred, taken for granted that she would agree, and accordingly, intended only to tease her. Distinguishing between hearsay and nonhearsay in terms of whether the speaker specifically meant to assert, or merely to assume, the proposition at issue has several weaknesses, two of which are relevant here.

First, distinguishing between such assertions and assumptions would impose a dubious a priori, or quasi-literalist, interpretation of Reporter's utterance. It is at best questionable that a speaker who made a statement such as Reporter's would be more likely to intend simple disapproval, rather than to convey both the idea that Daryl had erred and Reporter's criticism. Accordingly, imputing to Reporter an assumption that an error was obvious, based on her utterance, rests on sand at least as prone to shift as the typical foundation for a literal construction of the utterance.

Second, assume the language in Reporter's statement was more likely to be uttered if Reporter assumed, but did not consciously intend to communicate, that Daryl erred. One might further contend that if Reporter did not think she was conveying novel information about Daryl's evidence handling, the statement presented no sincerity risk if offered on that issue—the absence of a specific intent to communicate entailed an absence of intent to deceive. That result, however, rests on the premise that Reporter could not intend to deceive when she did not utter words indicating a specific intent to communicate Daryl's error. That premise, in turn, rests on the assumption that persons who intend the hearer to reach a false conclusion would articulate that conclusion expressly, rather than simply misleading the hearer. Deceivers are probably more successful if they make statements that, although innocuous in most contexts, would lead hearers to draw false conclusions in the context in which the statements are uttered. See Mueller, 76 Minn. L. Rev. at 414 n.140 (cited in note 5) (pointing out that "deceivers convey very little false information," and accordingly, that a distinction similar to a specific intent test "seems likely to treat as nonhearsay much that is embraced by the doctrine").

For further discussion of specific intent, or assertion-assumption, arguments, see notes 139 and 190.

43. For instance, the purchaser in *The Queen v. Kearley*, 2 App.Cas. 228, 2 W.L.R. 656, 2 All E.R. 345 (H.L. 1992), undoubtedly meant to convey a belief that Kearley might make drugs available. There is no difference in degree or intensity of intention between the use of the statement in *Kearley* to show that Kearley intended to sell drugs and that in the hypothetical to show that Daryl erred. For a more complete discussion of *Kearley*, see notes 301-18 and accompanying text.

44. Seidelson, 24 Duquesne L. Rev. at 759 (cited in note 36), points out that distinguishing between hearsay and nonhearsay in terms of the explicitness of assertions, when one is willing to treat some implied assertions as hearsay, "would impose on the courts an ongoing difficult task: determining if the disparity between the fact to be inferred and the fact explicitly or impliedly asserted was sufficiently great to justify characterizing the declaration as nonhearsay."

Professor Park, a flexible literalist, has suggested to the Author that use of a notion of intention to classify irony as hearsay is relatively straightforward and does not make literalism too indeterminate for a heuristic. Although literalist use of intent to deal with irony seems natural, it creates uncertainty when one tries to square it with literalist treatment of other communications as nonhearsay, such as the letters in *Wright*. See Park, 74 Minn. L. Rev. at 801 (cited in note 5) (describing the *Wright* letters as nonhearsay). See also notes 42, 139, and 190

communicating⁴⁵ is critical in distinguishing hearsay from nonhearsay. Co-operative analysis offers a theory of intention in communication that is consistent with the Federal Rules' hearsay definition without constructing secret passages or trap doors for abandoning that standard whenever its results are intuitively unacceptable.

Although implication such as that present in understanding ironic statements is a common component of communication, controversy over the hearsay status of implied assertions (that is, controversy over the extent to which an out-of-court communication must have literally conveyed the fact for which it is offered to be hearsay) has continued for many years.⁴⁶ The disagreements may seem especially odd, since a ruling that a statement is hearsay for a particular purpose does not entail a further ruling that the statement is inadmissible for that purpose.⁴⁷ Nevertheless, the Federal Rules⁴⁸ are so murky on the issue that they contain some support for almost any argument in the debate over implied assertions.⁴⁹ If law is, as Holmes said, a prediction of judicial action,⁵⁰ the Federal Rules' distinction between hearsay and nonhearsay is poor law.

Hearsay doctrine, including the Rules, bears the scars of battles based on black letter legal rules and convenient behavioral assumptions, in the absence of empirical information about the ways in which human minds actually decide questions of fact.⁵¹ The

(discussing problems of the use of specific intent to limit the scope of assertions); notes 258-74 and accompanying text (discussing *Wright* and Professor Park's use of a specific intent theory to analyze the case, as opposed to the general intent theory necessary to classify irony as nonhearsay). While it is important for the reader to understand the differences between theories, it is also important to realize that the results of co-operative analysis in many cases parallel those of Professor Park's carefully nuanced literalism.

45. See notes 73-86, 134-57, and accompanying text.

46. At least since *Wright v. Doe d. Tatham*, 7 Eng. Rep. 559 (H.L. 1838).

47. Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 Harv. L. Rev. 1138, 1147 (1935). See Allen, 76 Minn. L. Rev. at 799-800 (cited in note 16).

48. Including the Advisory Committee's comments. See notes 176-88 and accompanying text.

49. See, for example, note 18 (citing conflicting cases on the treatment of various implied assertions).

50. Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457-58 (1897).

51. While this Article relies on some fairly recent empirical scholarship, the reader should realize that the theories underlying this scholarship have been well known in various disciplines for decades. For example, Paul Grice first introduced his maxims of communication in 1967. H. Paul Grice, *Studies in the Way of Words* v (Harvard U., 1989).

The stress on cognitive research to model the hearsay rule may seem "reductionist" in that it relies very heavily on one theory to model the distinction between hearsay and nonhearsay. Professor Park has identified a number of explanations for rules excluding hearsay, the classic reason being that the hearsay's reliability has not been tested. Reger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 Mich. L. Rev. 51, 55 (1987). The in-court witness may report the out-of-court statement inaccurately. *Id.* at 56-58. The jury may grossly misvalue the testimony, particularly given the lack of similarity between trials and more familiar decision-making contexts. *Id.* at 59. The rule prohibiting hearsay that does not fall within an exception helps to

hearsay rules necessarily become more obscure whenever courts and commentators applying the rules rely on unrealistic views of human communication. Evidence law, however, is not doomed to follow such views. Regardless of how one views the status of evidence teachers' favorite chestnuts, hearsay at its core concerns the ways in which human factfinders evaluate data that others communicate to them, often relying on the statements of third persons.⁵² Research in cognitive science indicates that humans use a process of reasoning about communications⁵³ that resembles some accounts of inference from hearsay commonly found in cases and commentary. Nevertheless, conventional evidence doctrine has failed to get the process right. Recognition of conventional doctrine's flawed empirical assumptions is a cornerstone for a modification of conventional theory that is more easily understood and more congruent with the importance of the factfinder's role in litigation.

III. HUMAN DECISIONMAKING AND EVIDENCE

A. Limitations on Human Capacity and Strategies to Overcome Them

Using empirical research about human mental processes to formulate and interpret evidence rules has at least two benefits. Obviously, those who are knowledgeable about the behavior that the rules purport to govern can appraise the likely results of their actions

avoid unfair surprise to adversaries, who may be unprepared to oppose the evidence effectively. *Id.* at 62. Free admission of hearsay raises the possibility of misuse of judicial discretion under a provision allowing for a discretionary test specific to hearsay. *Id.* at 63. Misuse of discretion also might pose a problem if abolition of the hearsay rule remitted the court to more general admissibility standards such as F.R.E. 403. See note 244. Free admissibility of hearsay also might encourage jury lawlessness and reward parties who fabricate evidence. Park, 86 Mich. L. Rev. at 63-64. Prohibiting hearsay avoids time-consuming efforts to impeach hearsay declarants, *id.* at 64, and helps those who face adversaries who in turn have the power or resources to distort or generate information. *Id.* at 65-66. Although this Article disagrees with the reasons that imply or assume distrust of jurors' reasoning capacities, see notes 98-106 and accompanying text, the cooperative theory's emphasis on obtaining information about communications to help the factfinder evaluate the speaker's compliance with the maxims of co-operation seems consistent with any of the other reasons Professor Park mentions. Information about the circumstances in which the communication allegedly took place would, for instance, tend to reduce the likelihood that a fabrication would be successful.

52. James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 501, 518-19 (Little, Brown, 1898). Mirjan Damaska, *Of Hearsay and Its Analogues*, 76 Minn. L. Rev. 425, 425 (1992), says much the same for non-adversary systems.

53. See notes 73-86, 134-57, and accompanying text for a fuller discussion of the processes of communication.

or arguments more accurately than those without that knowledge.⁵⁴ More subtly, as the accuracy and clarity with which the rules reflect the empirical world increase, the effort and costs of interpretation and application, including the effort needed to train new lawyers and judges, decrease.⁵⁵ Cognitive science, which deals with human reasoning under uncertainty, is a natural source of empirical models for evidence, particularly because it emphasizes the efficient use of cognitive resources in problem-solving.

Cognitive psychology reveals significant limits on the human mental workspace,⁵⁶ specifically on the ability to organize masses of

54. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L. J. 557, 563-64, 621 (1992) (stressing the importance of lowering the cost of learning law).

55. If, as seems to be the case, the literalist heuristic's distinction between hearsay and nonhearsay is essentially artificial, it is doubtful that its application produces any social benefit. At most, one could argue that the existence of the heuristic does not cause the courts to make decisions about the admission of evidence they would not otherwise make. The cases cited in note 18 indicate that a number of circuits, as well as the Supreme Court, are not thoroughgoing literalists. Even assuming *arguendo* that a court's decisions to use the literalist heuristic were completely pragmatic, the heuristic is still theoretically weak. The sheer unreality of its distinction between hearsay and nonhearsay requires a good deal of extra effort for (i) courts, who have to reconcile their decisions with it; (ii) parties, who must plan their arguments about the admissibility of evidence by anticipating whether the court will adhere to one understanding of hearsay as opposed to another; and (iii) students, who must learn a number of approaches to the Federal Rules' treatment of hearsay. See, for example, Park, 65 Minn. L. Rev. at 449-56 (cited in note 8) (advising instruction based on both assertion-oriented and declarant-oriented approaches). The cynicism that lawyers, judges, and law students tend to develop as a result of exposure to irrational doctrines multiplies the costs of such doctrines by producing more unprincipled arguments and ad hoc decisions that create greater future costs. See Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. Rev. 893, 949 (1992).

While it is true that those who have been trained in the literalist model can now apply it (albeit with some difficulty, see, for example, notes 258-318 and accompanying text), the costs of training are already spent and, for most decision-making purposes, initiates will have some success in applying almost any theory that has gained a level of acceptance, whether ultimately tenable or not. No one would ever accept a theory, even provisionally, unless it yielded some worthwhile results. See, for example, Nicholas Rescher, *Cognitive Economy: The Economic Dimension of the Theory of Knowledge* 128-29 (U. of Pittsburgh, 1989); Paul Thagard, *Explanatory Coherence*, 12 Behav. & Brain Sci. 435, 437 (1989). In reality, then, a fair share of the resources expended to further apply the literalist model may be a dead-weight loss.

56. This observation is more than a truism that follows from the fact that the mind-brain is a finite system. Although the exact number of pieces of information that one's consciousness can contain and manage at any one time varies with the nature of the task and the individuals involved, one standard measure is seven "chunks," give or take three. See, for example, Howard Gardner, *The Mind's New Science* 122 (Basic Books, 1985). Herbert Simon's research, for example, revealed that this working capacity is limited to seven random one-syllable words, *et. par.* Herbert A. Simon, *How Big Is a Chunk?*, in Herbert A. Simon, *Models of Thought* 50, 52 (Yale U., 1979). Simon's point is not that chunks are of an invariant size, either among individuals or for any given individual; rather, Simon's research shows the extremely limited nature of a human's mental workspace. Experience in a particular domain, or the individual's ability to perceive meaningful relationships among the data in that domain, appear to expand the size of chunks, or the capacity of one's memory for a particular task. Herbert A. Simon and William G. Chase, *The Mind's Eye in Chess*, in Simon, *Models of Thought* at 404, 413.

data in the mind and to employ those data to solve problems.⁵⁷ These limits on humans' practical capacity to understand, evaluate, and draw inferences from information require the adoption of decision-making strategies that use limited resources efficiently. A brute effort to review all possibly pertinent information before making a decision is futile. The debate over the use of Bayesian logic as a model for decisionmaking under conditions of uncertainty, including factfinding in litigation, illustrates the importance of effectively employing one's cognitive resources.⁵⁸ A growing number of critics of Bayesian methods hold that Bayesian logic, or any other effort to require inference from all data available or from prior experience, would demand fantastic computational feats from the human mind, or, in its stead, a computer.⁵⁹

The increased efficacy of problem-solving known as human expertise largely results from the experts' use of strategies for selecting critical data. Experts select data to delineate more precisely a problem in their domain and, eventually, to apply a familiar procedure to solve the problem. Chess masters⁶⁰ and physics teachers⁶¹ differ from novices in their ability to perceive familiar patterns and to use critical data to solve problems in those fields. This ability is crucial when dealing with large amounts of data. For example, the average possible lines of play on a chessboard, considering the next two possible moves for each player, would amount to one million; for three moves, one billion.⁶² Assessing the alternatives, considering only each player's possible first two moves, would take about three months and twenty-five days.⁶³ Chess masters and others relying on experience to

57. This research typically specifies the hypothesized theory as a computer program, and then tests it by repeated iterations of the program. For example, if the program's output does not conform to human performance, then the hypothesis is an inadequate specification of the human decision-making procedure. See, for example, Herbert A. Simon, *The Information Storage System Called "Human Memory"* in Simon, *Models of Thought* at 62, 68 (cited in note 56).

58. See generally Christopher Cherniak, *Minimal Rationality* 8-12 (M.I.T., 1986) (arguing that the problem of limited cognitive capacity must necessarily affect judgments about the rationality of forms of human reasoning); Harman, *Change in View* at 5-6, 10, 26 (cited in note 5) (arguing same).

59. Cherniak, *Minimal Rationality* at 92-95 & n.13; Harman, *Change in View* at 25-27 (cited in note 5); Pat Langley, et al., *Scientific Discovery: Computational Explorations of the Creative Processes* 39-40 (M.I.T., 1987).

60. Simon and Chase, *The Mind's Eye in Chess*, in Simon, *Models of Thought* at 404, 420 (cited in note 56).

61. Micheline T. H. Chi and Robert Glaser, *Problem-solving Ability*, in Robert J. Sternberg ed., *Human Abilities, An Information-Processing Approach* 227, 243-46 (W.H. Freeman, 1985).

62. Herbert A. Simon and Peter A. Simon, *Trial and Error Search in Solving Difficult Problems*, in Simon, *Models of Thought* at 175 (cited in note 56).

63. Actually, it would take 115.74 days, under the reasonable assumption that evaluating each possibility would take ten seconds. *Id.* at 178 & n.3.

solve problems thus rationally⁶⁴ must use strategies⁶⁵ to keep the demands on their resources within workable bounds. Tailoring trial procedure to capitalize on these strategies, therefore, can help factfinders apply the informal reasoning that is their *raison d'être*.

B. Common Sources of Organizing Strategies

A critic might argue that, although such strategies seem intuitively likely and desirable, no one a priori correct⁶⁶ strategy exists for gathering and organizing data to solve problems such as making inferences about past events from present data.⁶⁷ It could follow that the assumption that humans can or do learn to use common strategies to organize and sort data for problem-solving has no a priori basis. Accordingly, without an a priori correct strategy, any attempt to reflect ordinary reasoning in rules of evidence would be futile. While it may be impossible to establish that any given procedure is a priori optimal for a specific problem,⁶⁸ considerable empirical evidence reveals that humans derive common problem-solving strategies from at least two related sources. The more basic source is shared mental and physical capacities. Although limited, human capacities provide means of grappling with problems—interpersonal measuring sticks by which humans can assess problems or data. Humans can depend on the relative constance of their mental and physical capacities and frame problems with these first-order tools, which can address problems directly in the short run. Repeated applications of these capacities can produce tools or constructs for solving problems in the long run. Under these assumptions, the body itself necessarily provides some ways of structuring experience by organizing and managing data in the memory.⁶⁹

64. This is only to say that the use of strategies is an aspect of rational behavior, not that it is an exclusive prescription for such behavior.

65. These strategies are sometimes called "schemata." See generally Craig R. Callen, *Second-Order Considerations, Weight, Sufficiency and Schema Theory: A Comment on Professor Brilmayer's Theory*, 66 B.U. L. Rev. 715, 718-22 (1986).

66. A critic might also argue that the derivation of problem-solving strategies is wholly subjective. The text following this note recapitulates some of the evidence showing the origin of common problem-solving strategies in a culture.

67. See John H. Wigmore, 1A *Evidence in Trials at Common Law* § 37.7 (Little, Brown, Peter Tillers rev. ed. 1983) (arguing that no a priori distinctions exist among atoms of evidence).

68. Although the problem is beyond the scope of this Article, scholars continue to engage in ongoing philosophical efforts to describe such systems. See, for example, Cherniak, *Minimal Rationality* (cited in note 58); Harman, *Change in View* (cited in note 5); Paul Thagard, *Conceptual Revolutions* (Princeton U., 1992).

69. See, for example, Mark Johnson, *The Body in the Mind: The Bodily Basis of Memory, Imagination and Reason* (U. of Chicago, 1987).

The second source, culture, which emerges from numerous and disparate applications of these mental and physical capacities, is itself a way of seizing on critical data and employing procedures to resolve problems.⁷⁰ Together, these two sources create distinctions among data that are, for all human intents and purposes, real. For instance, no machine can test whether the color of a shirt is red unless that machine has been calibrated to classify the light waves reflected from the shirt against externally established wavelengths.⁷¹ Humans acquire the ability to distinguish red in a different manner. While it is true that some languages lack a term for the color, red (or its cognate) is invariably the third color term to develop in the evolution of languages.⁷² Thus, although no a priori argument appears for a distinction between red and white, and certainly some people cannot make such a distinction, it invariably appears in the development of cultures.

Of course, other means may exist by which humans can identify successful strategies, even though they might not be optimal for philosopher-kings. At a minimum, however, there are mechanisms that are practical and necessary sources of strategies for organizing information and making decisions based on it. The lack of clear a priori justification for such strategies should not preclude rulemakers or courts from using rules of evidence that reflect ordinary reasoning.

Factfinders essentially evaluate evidence offered at trial by making inferences from communications. Those inferences rest on data that attorneys and witnesses (and the court in a jury trial) convey to guide factfinders' reasoning or to persuade them to draw particular conclusions. As with any other inferential problem, humans use an inferential strategy to derive information from communications. Knowledge of the operation of that strategy underscores the importance of rules limiting admissibility of evidence, particularly of rules limiting the admissibility of out-of-court communications. This Article first discusses the rationale for admissibility rules and addresses judges' and commentators' objections to their use. The Article then develops a rationale for the exclusion of hearsay that does not rely on distrust or disparagement of the jury, but recognizes and respects jurors' reliance on informal reasoning.

70. See Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience*, 21-39 (Harvard U., 1974).

71. The source of the example is James Gleick, *Chaos: Making a New Science* 164-66 (Viking, 1987). On the neurophysiology of colors, see George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind*, 26-30 (U. of Chicago, 1987).

72. Lakoff, *Women, Fire, and Dangerous Things* at 24-26.

C. Problem-Solving and Human Communication: Evidence Rules and Inference

1. Exclusionary Rules and Communication

An efficient inferential process requires strategies for limiting the amount of data employed to resolve a problem. The strictures of rationality in human decisionmaking strongly imply rules limiting the admissibility of evidence. Rules that allow the court to exclude irrelevant, prejudicial, or otherwise inappropriate evidence need not be based on distrust of jurors. Instead, such rules result from a recognition that factfinders necessarily devote considerable effort to the trial, employing learned strategies to assess the evidence and to understand the communications they receive from the parties,⁷³ thus respecting ordinary reasoning.

Humans have developed strategies that allow them to convey, or infer, a great deal of information based on verbal communications that often are incredibly brief. Grice's maxims of co-operation,⁷⁴ a theory of the nature of communication, especially conversation,⁷⁵ generally recognized by philosophers, cognitive scientists, linguists, and psychologists, among others,⁷⁶ describe the set of assumptions at the core of the strategy. To illustrate how those implicit conventions work in communication, compare two utterances at the dining table: "Can you pass the pepper?"⁷⁷ and "I wish to season my food with pep-

73. See Sperber and Wilson, *Relevance: Communication and Cognition* at 156-57 (cited in note 37). This rationale is consistent with the courts' application of evidence rules in bench trials, a phenomenon that does not square with the juror distrust theory. Dale A. Nance, *The Best Evidence Principle*, 73 Iowa L. Rev. 227, 229-30 (1988). Of course, the jury, as factfinder, also receives information from the court.

74. See, for example, Grice, *Studies in the Way of Words* at 26-27 (cited in note 51).

75. Although Grice chiefly discusses conversation, his theory extends much more broadly. See, for example, *id.* at 295-96.

76. See, for example, Umberto Eco, *The Limits of Interpretation* 257 (Indiana U., 1990) (semioticist); Michael Garman, *Psycholinguistics* 305, 387 (Cambridge U., 1990) (psycholinguist); P. N. Johnson-Laird, *Mental Models* 38 (Cambridge U., 1983) (psychologist-cognitive scientist); Roger C. Schank, *The Connoisseur's Guide to the Mind* 88 (Summit, 1991) (computer scientist-artificial intelligence theorist); John R. Searle, *Expression and Meaning* 32 (Cambridge U., 1979) (philosopher); Sperber and Wilson, *Relevance: Communication and Cognition* at 246 (cited in note 37) (linguists-cognitive scientists—Sperber and Wilson try to simplify Grice's maxims into one or two maxims, but the differences are irrelevant here); Daniel Kahnemann and Amos Tversky, *On the Study of Statistical Intuitions*, in Daniel Kahnemann, Paul Slovic, and Amos Tversky, eds., *Judgment Under Uncertainty: Heuristics and Biases* 493, 501-04 (Cambridge U., 1982) (psychologists). For empirical support, see, for example, Richard J. Gerrig, *Process Models and Pragmatics*, in N. Sharkey ed., 1 *Advances in Cognitive Science* 23, 38 (1986); Raymond Gibbs, *Literal Meaning and Psychological Theory*, 8 *Cognitive Sci.* 275 (1984).

77. The source of the example is Raymond W. Gibbs, Jr., *Contextual Effects in Understanding Indirect Requests*, 2 *Discourse Processes* 1, 10 (1979). For a discussion of the role that

per, and you may have access to some, which I request." With two people at the table, psychological and linguistic research indicates that humans ordinarily would consider "Can you pass the pepper?" to convey the speaker's desire to season her food with pepper, the speaker's belief that the hearer has access to some pepper, and the speaker's request for pepper. For example, passing the butter normally would be an inappropriate response to "Can you pass the pepper," as would simply answering "Yes."⁷⁸ In typical two-person dining, therefore, the first request conveys all the second might—the second would seem either eccentric or designed to convey some proposition or propositions markedly different from those articulated.

In light of Grice's maxims,⁷⁹ the speaker would not specifically articulate her desire for pepper, or her perception of the food, in order to communicate them. First, Grice says, the speaker should be neither more nor less informative than required for the purpose of the exchange: dining. Second, the speaker's utterances should relate to the purposes of the exchange. Third, the speaker should be perspicuous: orderly, brief, and clear. In conversation at the table, the speaker would not need to articulate the reason for her question. Fourth, the speaker should try to make her contribution true; she should not say what she believes false or unsupported by adequate evidence. If the speaker realized that her dining companion were manacled to the chair, unable to reach anything on the table, the utterance would convey a joke or ironic comment rather than any conclusion about the hearer's access to pepper.⁸⁰

Humans' recognition, implicit or explicit, that time and cognitive resources are limited provides the underpinnings of this co-operative social strategy. A speaker who wishes to communicate effectively with others, particularly in conversation, must realize that her intended audience will devote their resources to processing her communication only when the communication seems sufficiently likely to benefit them. On the other hand, her prospective audience will realize

intonation could play in helping the hearer understand the utterance as a request, see Dwight Bolinger, *Intonation and Its Parts: Melody in Spoken English* 304 (Stanford, 1986).

78. Of course, the addressee of the initial statement might answer "Yes" to express disapproval of the initial speaker's table manners.

79. When circumstances show that the speaker has violated one or more conventions, the communication still conveys implicit information. Grice, *Studies in the Way of Words* at 32-37 (cited in note 51). For simplicity, this Part excludes those situations.

80. Deciding whether the speaker has violated the third and fourth maxims entails inferences about the traditional hearsay dangers. In other words, whenever conventional hearsay doctrine interprets the words of an utterance narrowly, positing that the utterance only "asserts" that interpretation, it risks ignoring all of the hearsay dangers—not merely the danger of ambiguity or misstatement—and missing the true significance of the communication.

that ordinarily⁸¹ she has no reason to communicate anything to them that would not warrant their attention and reliance.⁸² The members of the audience will then assume that the communication is useful for the members' own purposes.⁸³ Communication that is "useful" in that sense conforms to Grice's maxims by, for example, referring to matters that the audience would consider relevant to their interests, and omitting matters that lack evidentiary support adequate to warrant the audience's effort to understand and evaluate the communication.⁸⁴

For example, if a person were to say, "Now that's a hair brush," when she and a friend were both examining a hair brush, the friend would normally be entitled to infer that she meant to communicate something other than the identity of a household object. Otherwise, the communication would be inefficient for both speaker and hearer.⁸⁵ If the speaker made a sufficient number of useless communications, her friend would tend to ignore her, reducing the likelihood that she could benefit from future communications. Accordingly, she would not merely intend to inform her friend that the object is a hair brush, but instead could seek to convey a number of other things, depending on the context in which she made the statement. For example, she might want her friend to infer that the brush is of exceptional quality, that she had finally found a brush, or that the object she found was not the object she expected to find.⁸⁶

81. Of course, the speaker may intend to mislead her hearers, but that effort likely would succeed only if her hearers adopted a default strategy in reliance on cultural conventions, such as trusting the speaker. See notes 134-43 and accompanying text.

82. Sperber and Wilson, *Relevance: Communication and Cognition* at 156-57, 160-61 (cited in note 37).

83. *Id.*

84. The communication's usefulness also depends on whether it would increase the factfinder's difficulty in framing the issue correctly, that is, in using the correct substantive standard, thus outweighing any benefit from its admission. See notes 88-90 and accompanying text. Compare Nance, 73 Iowa L. Rev. at 287-88, 292 n.308 (cited in note 73) (advocating the exclusion of evidence when adequate appraisal would require excessive time spent explaining flaws in evidence to the jury). In this Article, the term "effort" includes both the unconscious expenditure of resources and conscious endeavors to solve problems or understand phenomena. See *id.* at 241 n.67. Nance uses a similar element in his test for admissibility of evidence, but does not rely on cognitive theory. *Id.* at 271.

It follows from the discussion in the text that if the court fails to recognize the jury's need to limit its intake of information, the jury likely will disregard the evidence and decide according to their pre-trial assumptions. Compare Park, 86 Mich. L. Rev. at 63-64 (cited in note 51) (explaining that free admission of evidence that the jury considers unreliable "gives the jury a peg on which to hang a verdict").

85. This assumes the speaker had sufficient reason to believe her friend could identify hair brushes.

86. See, for example, Kahnemann and Tversky, *On the Study of Statistical Intuitions in Kahnemann, Slovic, and Tversky, eds., Judgment Under Uncertainty* at 493, 501-04 (cited in note 76). Of course, she could be employing irony, which is also consistent with this theory. See note 37.

2. Recognition of the Maxims of Co-operation Implicit in Evidence Doctrine

Although evidentiary doctrine does not reflect the full range of knowledge about inference from communications, courts and commentators often have noticed the effect of the implicit conventions that undergird communications. Professors Allen and Morgan have pointed out that the use of the term "presumption" in jury instructions tends to confuse the jury. When a judge uses that term to characterize a particular inference, jurors might well assume they should accord that inference more weight than they otherwise would. By dignifying the inference with a legal label, the judge implies that the jury should accord special deference to that inference.⁸⁷ The core of the difficulty is the jurors' natural assumption that the court would not refer to the inference as a "presumption" unless the court intended to commend that inference to them. In addition, the judge's position as an expert on the law and as a representative authority figure reinforces the implicit endorsement of the presumptive inference.

If the court and the jury recognize that the court knows more about faults occurring in data presented in litigation, and about the requirements of substantive rules at issue, the jury would naturally infer that the court, by admitting evidence, believes it useful to the jury, and the court would expect the jury to make that inference.⁸⁸ This view of laypersons' natural process of inference at trial implies

87. Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 Iowa L. Rev. 843, 856-57 (1981); Edmund M. Morgan, *Instructing the Jury upon Presumptions and Burdens of Proof*, 47 Harv. L. Rev. 59, 73-77 (1933).

88. Discussions of the proper use of expert witnesses continually address the possibility that decision-making novices in a particular domain might defer excessively to other, ostensibly more expert decisionmakers. See, for example, *United States v. Alvarez*, 837 F.2d 1024, 1030 (11th Cir. 1988); Michael Graham, *Handbook of Federal Evidence*, § 703.2 at 632 (West, 2d ed. 1986); 1 *McCormick 4th* § 17 at 73 (cited in note 8). See also James M. Doyle, *Applying Lawyers' Expertise to Scientific Experts: Some Thoughts About Trial Court Analysis of the Prejudicial Effects of Admitting and Excluding Expert Scientific Testimony*, 25 *Win. & Mary L. Rev.* 619, 636-44 (1984). For a discussion of the utility of deference to experts in an efficient disciplinary community, see Philip Kitcher, *The Advancement of Science: Science Without Legend, Objectivity Without Illusions* 88-89 (Oxford U., 1993). *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2798 (1993), relies heavily on cross-examination, opposing evidence, judicial instruction, summary judgment, and directed verdicts to compensate for this deference, but also permits the use of F.R.E. 403 to exclude evidence that can be "quite misleading because of the difficulty in evaluating it." *Id.* (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)). For a discussion of the jury's role in legal interpretation, see, for example, Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. Rev. 487, 492-94 (1986).

the relevance requirement and other exclusionary rules as well.⁸⁹ Recognition of the role of these inferential strategies does not imply that jurors are inferior or untrustworthy, but rather merely requires the court to respect the jury's role as a lay decision body entitled to expect judicial co-operation (in the Gricean as well as other senses) in performing its tasks. Accordingly, in recognition of the Gricean principle of co-operation, courts and rulemakers must limit admissible data to those with marginal utility for inference about matters at issue,⁹⁰ keeping in mind the risk of miscommunication about the nature of the jury's task.

These rules also reflect two prime differences between factfinding in litigation and inference about everyday events. First, because litigation generally occurs considerably after the events at issue, the data presented at trial represent only a sample of the information available when the litigated events occurred. Rules that exclude evidence whose apparent usefulness does not warrant the effort necessary to evaluate it may ameliorate that artificiality—without the rules, the parties might not offer supporting data sufficient to allow factfinders to evaluate the evidence fully.⁹¹ Second, the role of factfinders, even judges, is more passive than the role of decisionmakers in ordinary contexts; factfinders cannot gather further information or insist that others do so, nor can they postpone decisionmaking until they receive further evidence.⁹² Judicial factfinders also make one-time judgments about strangers, who have extraordinary incentives to distort information, and decide in the

89. See, for example, Richard O. Lempert, *Modeling Relevance*, 75 Mich. L. Rev. 1021, 1032-37 (1977) (using a regret, or utility, matrix to model the extent to which evidence may encourage jurors to employ normative values in the factfinding process).

90. It is not clear whether Professor Nance agrees that exclusions serve this purpose, although he would exclude evidence that "invites decision upon an improper basis" because an adversary's use of such evidence would be unethical. Nance, 73 Iowa L. Rev. at 292 (cited in note 73) (original emphasis omitted).

The argument in the text also implies rules of preference under Professors Nance and Seigel's "best evidence principle." *Id.* at 233-34; Seigel, 72 B.U. L. Rev. at 897-98 (cited in note 55). The need to use the factfinders' capacities efficiently should restrict the admissibility of evidence whenever the proffering party can obtain a substitute for the evidence that would allow the factfinders to make the same inference with less cognitive effort. For example, an original document is better evidence of its own contents than a handwritten copy would be, because the jury need not resolve issues about the copy's accuracy. See F.R.E. 1002. Not all evidence rules under the co-operative theory are rules of preference, however.

91. See, for example, Mueller, 76 Minn. L. Rev. at 387 (cited in note 5); Nance, 73 Iowa L. Rev. at 264 (cited in note 73); Seigel, 72 B.U. L. Rev. at 917 (cited in note 55); Eleanor Swift, *A Response to the "Probative Value" Theory of Hearsay Suggested by Hearsay from a Layperson*, 14 Cardozo L. Rev. 103, 107 (1992).

92. Swift, 14 Cardozo L. Rev. at 103 (cited in note 91). Bergman, 75 Ky. L. J. at 862 (cited in note 9), notes that inferential risks from the uncertainty inherent in linguistic communication are particularly acute for passive decisionmakers.

context of unfamiliar institutions.⁹³ The judicial system thus must give parties adequate incentives to provide factfinders with data compatible with the factfinders' learned strategies for evaluation of evidence.⁹⁴

In addition, rules that exclude evidence based on its lack of marginal utility minimize misunderstandings that may result from receipt of data that lack any significant bearing on the issues under the applicable substantive rule, but clearly bear on other strategies for resolving the dispute. For example, considering the prevalence of auto liability insurance, the insured status of a defendant driver in an auto negligence case has, at most, only trifling probative value on whether the driver was negligent. If the court received that evidence, the jurors likely would recognize that it had little bearing on negligence. The evidence would, however, clearly suggest possible loss-spreading strategies.⁹⁵ Because the evidence obviously lacks value on the negligence question, jurors might assume that the judge admitted the evidence for its relevance to a preferred, or at least tolerable, strategy for resolving the dispute: requiring the defendant's insurance carrier to bear the loss. Whenever imprecise instructions or vague rules of law might leave jurors uncertain about the specific issues they are to resolve,⁹⁶ jurors could reasonably conclude that the questions on which the proffered evidence bore were those critical to resolving the dispute, and that any contrary understanding was mistaken.⁹⁷

While evidentiary doctrine often reflects an intuitive recognition that communication to factfinders depends on implicit inferences, no systematic analysis of evidence law has resulted. That inattentiveness to the communicative process may underlie many criticisms of exclusionary rules, as well as many of the black letter arguments for such rules.

93. Mueller, 76 Minn. L. Rev. at 383 (cited in note 5); Park, 86 Mich. L. Rev. at 60-62 (cited in note 51).

94. Nance, 73 Iowa L. Rev. at 234-36, 291 (cited in note 73); Swift, 75 Cal. L. Rev. at 1355-58 & n.45 (cited in note 5).

95. See Lempert, 75 Mich. L. Rev. at 1038 (cited in note 89). This Article does not endorse such strategies, but rather points out that receipt of the evidence would imply to the jury some degree of judicial endorsement or tolerance of such strategies.

96. Jurors probably realize that their understanding of some issues is imperfect at best. Compare Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L. J. 456, 467-68 (1962) (discussing jurors' difficulty in understanding proximate cause instructions).

97. See, for example, Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 Cal. L. Rev. 1011, 1014 n.7 (1978). Compare *United States v. Muscato*, 534 F. Supp. 969, 976-77 (E.D.N.Y. 1982) (Weinstein, J.) (evidencing the judge's concern with admitting evidence that might impress a factfinder, yet would be of low probative value).

3. The Distrust Rationale and Its Critics

The conventional wisdom suggests that rules excluding evidence, including hearsay rules, exist because the judiciary and legislature distrust the jury.⁹⁸ The distrust rationale falls short for several reasons. First, excluding evidence because the jury cannot adequately appraise it conflicts with the jury's function as the ultimate factfinder, which requires the jurors' independent evaluation of the evidence.⁹⁹ Second, hearsay and other evidentiary rules apply, within the limits of standards of review for findings of fact, to bench trials.¹⁰⁰ Judges in bench trials need not exclude the evidence to which such rules refer, but strict limits constrain reliance on it. If the distrust rationale undergirds the exclusionary rules that restrict judges, the question is whether its adherents trust anyone to evaluate evidence correctly.

Third, reliance on the distrust rationale requires the questionable assumption that one can appraise the necessary true value of the evidence, or of categories of evidence, without regard to other evidence in the case.¹⁰¹ To draft rules that exclude entire categories of evidence, rulemakers who agree with the distrust theory must also assume that the rulemakers themselves can definitively appraise the value of evidence in the categories without regard to other evidence available in a particular case. For example, consider the hearsay exception for present sense impressions. Professor Waltz argues that X's statement, "I see Y out mowing his yard," offered as X's present sense impression to show Y was capable of physical labor, should be inadmissible under the exception without corroboration of Y's actions from a witness who observed Y directly.¹⁰² It is difficult to see how one

98. Gordon Tullock, *The Logic of the Law* 93-94 (Basic, 1971); Jack B. Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 377 (1967); Brysh, Comment, 35 U. Pitt. L. Rev. at 623 (cited in note 5); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 Harv. L. Rev. 1786, 1788 (1980). Nance, 73 Iowa L. Rev. at 278 (cited in note 73), traces this rationale to battles over the division of power between judge and jury.

99. See, for example, Nance, 73 Iowa L. Rev. at 271 (cited in note 73); Swift, 75 Cal. L. Rev. at 1368 (cited in note 5); Note, 93 Harv. L. Rev. at 1805 (cited in note 98).

100. In *Moore v. United States*, 429 U.S. 20 (1976), the Court summarily reversed a conviction in a bench trial because the judge relied on a hearsay statement. The statement, that defendant "and others were in possession of heroin at [defendant's] apartment," offered to show that Moore was a tenant, or resided at the apartment, would be nonhearsay under the literalist heuristic. See, for example, Friedman, *The Elements of Evidence* at 143 (cited in note 10). The Court did not, however, discuss the classification of implied assertions.

101. For discussion of the proposition that the reliability of evidence depends on the other evidence available, see, for example, Seigel, 72 B.U. L. Rev. at 912 (cited in note 55); Weinstein, 46 Iowa L. Rev. at 333 (cited in note 5); Brysh, Comment, 35 U. Pitt. L. Rev. at 624 (cited in note 5).

102. John Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 Iowa L. Rev. 869, 883-97 (1981). For cases in accord, see Terec E. Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 Loyola U. Chi. L. J. 299, 309 & n.29 (1979).

could appraise the value of such evidence categorically, in intellectual isolation.¹⁰³

A flexible, judge-centered, case-by-case standard¹⁰⁴ would not avoid the problem. Permitting judges to exclude evidence when the facts in the case indicate it is unreliable¹⁰⁵ presumes that the judges' own idiosyncratic or mistaken beliefs would not affect their evaluations. In other words, the case-by-case standard rests on the assumption that only the judge can recognize the true value of the evidence—an assumption both epistemologically unlikely and theoretically inconsistent with the right to a jury trial.¹⁰⁶

While critics have scored any number of direct hits on the distrust rationale, their arguments do not entail the abandonment of hearsay doctrine or other exclusionary rules. Critics who seek to abolish or curtail exclusionary rules typically base their arguments on two superficially plausible premises that prove inaccurate on closer examination: (i) exclusionary rules diminish the likelihood of accurate results because access to further evidence improves factfinders' conclusions¹⁰⁷ and (ii) factfinders can capably evaluate evidence at trial because they evaluate all sorts of data in their everyday lives.

Successful decisionmakers limit the data they consider, focusing on key facts to reach a solution.¹⁰⁸ This limitation implies that

103. See, for example, Swift, 75 Cal. L. Rev. at 1342, 1350 (cited in note 5). By examining litigated cases, a rulemaker might try to compare the accuracy of corroborated and uncorroborated present sense impressions. This experiment would pose several problems. For example, corroboration of Y's conduct based on independent observation tends to show that Y was mowing the lawn, without regard to X's statement. Accordingly, if the study found corroborated statements more reliable, it would simply be cloaking the obvious in new clothes: a proposition for which there is one piece of evidence (the present sense impression) is less likely to be true than a proposition for which there is a precisely analogous piece of evidence (the corroborated present sense impression) and additional evidence (the corroboration).

104. Weinstein, 44 F.R.D. at 380 (cited in note 98).

105. For a discussion of reliability as a justification for hearsay exceptions, see notes 229-31 and accompanying text.

106. See Seigel, 72 B.U. L. Rev. at 914 (cited in note 55) (explaining that a truly discretionary power to exclude evidence "is too great to invest in individual trial judges") (footnote omitted); Weinstein, 44 F.R.D. at 377 (cited in note 98) (stating that educated juries are capable of evaluating hearsay).

107. Seigel, 72 B.U. L. Rev. at 900-03; Weinstein, 44 F.R.D. at 381 (cited in note 98) (civil cases); Brysh, Comment, 35 U. Pitt. L. Rev. at 622 (cited in note 5). Compare Nance, 73 Iowa L. Rev. at 233 (cited in note 73) (indicating that completeness of evidence facilitates induction).

108. See notes 54-65 and accompanying text. Seigel, 72 B.U. L. Rev. at 900-02 n.31 (cited in note 55), recognizes the need to control the flow of information to decisionmakers, but says that "factfinding is an extremely information-sensitive endeavor." *Id.* He uses the idea of information-sensitivity to support an argument that optimal inference under uncertainty should consider all, or almost all, "logically relevant evidence." *Id.* at 903. If logical relevance refers to evidence the impact of which warrants the effort to evaluate it, there is no difference between Siegel's view and that of this Article. On the other hand, if Siegel means to include any piece of data that arguably bears on the decision, the demands of evaluating this data exceed human limits. Consider the example of a chess game, discussed in notes 62-65 and accompanying text. Each

efforts to consider all physically available data would adversely affect the accuracy of decisions. Moreover, simple considerations of resource allocation make forcing decisionmakers to consider all available data inefficient. The first prong of the critics' attack on admissibility rules thus sweeps too broadly, at best.

Arguments for reforming exclusionary rules that rely on factfinders' ability to evaluate data in everyday life assume that litigative factfinding replicates the conditions of out-of-court inference. If courts admit significant amounts of evidence that do not warrant the jury's evaluation, courts implicitly endorse a good deal of information with no apparent bearing on the problem—setting a profoundly counter-intuitive task for the factfinder. In contrast, even flawed current theories of the distinction between hearsay and nonhearsay help the court replicate conditions under which jurors (and judges) make inferences from the communications classified as hearsay in their lives outside of court.¹⁰⁹ If the statement is hearsay, its proponent must show that it satisfies an exception by providing data that indicate that the statement's possible probative value warrants the effort necessary to process it; moreover, in so doing, the proponent must provide information about the context in which the declarant made the statement, or about the declarant herself, that helps to minimize the effort required to process the information.¹¹⁰

possible position that can arise from a move bears on the move's desirability, but tracing all such positions surpasses humans' cognitive capacity, at least if the time devoted to the task has realistic limits. Professor Seigel notes that excessive admission of evidence may be counterproductive, Seigel, 72 B.U. L. Rev. at 904, but does not seem to believe that this possibility, taken in tandem with the limits on human cognitive capacity, is significant for factfinding. *Id.* at 915 n.69.

Professor Nance, who laid the cornerstone of current use of the best evidence principle, acknowledges that the receipt of irrelevant information has costs even if the court has received all relevant information. Nance, 73 Iowa L. Rev. at 273 (cited in note 73). He also recognizes the waste of cognitive resources resulting from the receipt of less than optimal evidence, *id.* at 241 n.67, and treats hearsay as a doctrine that seeks to avoid these costs. *Id.* at 281-84. On the other hand, it is not clear whether Professor Nance would consider excluding evidence to avoid misinterpretation of a substantive rule consistent with his approach. Compare *id.* at 227 (criticizing exclusions of evidence for "probative dangers" of "prejudic[ing] or misleading" the trier as manifesting a "cynical" attitude) with *id.* at 292 (discussing confusion of issues).

109. See, for example, 2 *McCormick 4th*, § 248 at 100 (cited in note 8).

110. See Swift, 75 Cal. L. Rev. at 1355-61 (cited in note 5), for a discussion of the importance of data about the declarant and the context in which she made the statement.

The hearsay exclusions operate somewhat differently, see note 170, but still maximize the likelihood that the factfinder will receive information needed to evaluate out-of-court communications.

4. Alternatives to Exclusionary Rules

Scholars skeptical about the value of rules excluding evidence that lacks marginal factfinding utility suggest three basic alternatives. First, judges who would otherwise exclude evidence could inform the jury that the court did not warrant or represent that any evidence admitted had any value, and that the parties were expected to expose any defects in others' evidence.¹¹¹ Critics of rules restricting the admission of evidence advance another alternative, arguing that the adversariness inherent in the American system, in tandem with the parties' desires to present the most persuasive and invulnerable cases possible, should discourage proffers of weak evidence.¹¹² The third argument attacks the rationale for distinctions between evidence that lacks marginal utility and more useful information. Proponents of this argument contend that because jurors know best what evidence they consider probative, judicial exclusion of evidence for lack of marginal utility relies on illegitimate a priori assumptions, even though the theory underlying such exclusions purports to deny that particular pieces of evidence have an ascertainable objective degree of reliability. These three responses are less telling than they appear at first glance.

Advising the jury that the court did not intend to endorse any evidence by allowing its admission would only create more marked divergenco between the factfinding process and ordinary reasoning. At its extreme, reliance on this tactic amounts to abuse of the jury.¹¹³ Substituting this warning for the use of exclusionary rules would, at least formally, allow the parties to dump everything, including the kitchen sink, on the jurors, making their task impossible.¹¹⁴ If this tactic were available, non-burden-bearing parties would have every incentive to create a situation in which the jurors could not decide in

111. Weinstein, 46 Iowa L. Rev. at 336 (cited in note 5) (describing this approach as a palliative for problems accompanying free admission of hearsay).

112. Renald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. Rev. 401, 429 (1986); Weinstein, 44 F.R.D. at 377 (cited in note 98).

113. This tactic also would confuse the jury, conflicting with their implicit assumptions about the process of communication. Some scholars argue that the need for the hearsay rule would be alleviated if the judge were to comment on the possible value of the evidence. Weinstein, 46 Iowa L. Rev. at 336 (cited in note 5); Brysh, Comment, 35 U. Pitt. L. Rev. at 625 (cited in note 5). These arguments are flawed in essentially the same way as arguments for general warnings about evidence in lieu of exclusionary rules. Because warnings about hearsay would address more specific evidence, however, they would be even more anomalous than warnings about the evidence in general.

114. See, for example, Seigel, 72 B.U. L. Rev. at 919 (cited in note 55); Eleanor Swift, *Abolishing the Hearsay Rule*, 75 Cal. L. Rev. 495, 514 (1987) (each discussing the parties' incentive to offer hearsay in a system without a hearsay rule).

the burden-bearing party's favor; they could force a tie by massive overproduction or overproffer. Many critics consider the existing rules of evidence too restrictive, yet judges point out that the amount of evidence submitted in major litigation is frequently excessive.¹¹⁵ In addition, substituting a judicial warning in lieu of any exclusionary rules implies that the judicial system has no particular interest in the way issues of fact are adjudicated. This is surely wrong: in criminal cases, the Bill of Rights, *inter alia*, demonstrates the importance of this interest; society has numerous interests in the way civil trials determine issues of fact.¹¹⁶

The judicial system has limited resources: time, personnel, money, and the human capacities of judges and jurors. Conflicting demands on the resources, as well as their absolute limits, constrain courts from expending them on information-gathering efforts with no apparent point.¹¹⁷ The courts have good reason to insist on better evidence than the parties would offer in the absence of exclusionary rules.¹¹⁸ Otherwise, courts would waste economic or human resources that could produce societal benefits if allocated to other tasks.¹¹⁹ Promotion of accuracy and predictability fosters optimal allocation of resources in society at large.¹²⁰ Finally, correct application of a rule, or set of rules, benefits society.¹²¹ Increasing the quality of decisionmak-

115. See *MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d. 1081, 1170-73 & nn.130, 132 (7th Cir. 1983); *United States v. Reaves*, 636 F. Supp. 1575, 1576-79 (E.D. Ky. 1986); *SCM Corp. v. Xerox Corp.* 77 F.R.D. 10, 15 (D. Conn. 1977); Roger W. Kirst, *Finding a Role for the Civil Jury in Modern Litigation*, 69 *Judicature* 333, 337 (1986); *Jury Comprehension in Complex Cases 27-28* (Report of Special Committee of the ABA Section of Litigation, Dec. 1989). Professors Saks's and Kidd's research indicates that parties may have an incentive to introduce cumulative evidence that commentators often miss: "Redundant information makes certain facts seem intuitively more probable, but in actuality it does not increase their likelihood." Michael J. Saks and Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 *Law & Soc'y Rev.* 123, 136-37 (1980) (emphasis in original).

116. First, the fact that judicial action amounts to state coercion dictates some caution. Nance, 73 *Iowa L. Rev.* at 231 (cited in note 73). Second, correct application of legal principles has a social value. Ronald J. Allen, et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 *J. Legal Stud.* 359, 385, 388 (1990). The formulation of rules that courts apply to determination of the facts on which they premise the application of legal rules thus affects society.

117. Professor Lempert argues that unnecessary litigation costs are dead-weight losses. Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 *B.U. L. Rev.* 439, 470 (1986). Nance, 73 *Iowa L. Rev.* at 273 (cited in note 73), notes that admission of irrelevant evidence creates unwarranted litigation costs. For discussions of the utility of the hearsay rule in avoiding waste of resources in litigation, see Roger C. Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 *Minn. L. Rev.* 1057, 1059 (1986); Weinstein, 46 *Iowa L. Rev.* at 336 (cited in note 5).

118. See Craig R. Callen, *Adjudication and the Appearance of Statistical Evidence*, 65 *Tulane L. Rev.* 457, 475-482, 486 (1991).

119. *Id.* at 436; Nance, 73 *Iowa L. Rev.* at 233, 241 (cited in note 73).

120. Callen, 65 *Tulane L. Rev.* at 432-84, 486 (cited in note 118).

121. Allen, et al., 19 *J. Legal Stud.* at 388 (cited in note 116).

ing on facts underlying the application of those rules therefore has social value, even in simple civil disputes that may seem merely to be disputes between parties.

Relying on parties and counsel to expose defects in their opponents' evidence seems excessively optimistic. Parties seeking to persuade jurors have an incentive both to restrict their presentation to facilitate jurors' comprehension¹²² and to expose flaws in their opponents' evidence. Accordingly, critics would say, exclusionary rules are not necessary to prevent parties from inundating the jury or presenting flawed evidence.¹²³ Yet counsel often have, or believe they have, offsetting incentives to confuse the jury or to over-prove their clients' cases. Furthermore, the parties' interest in factfinding methods or exposure of evidentiary flaws often differs markedly from the state's.

The parties' lack of incentive may manifest itself in several ways. If a small amount is at stake, individual parties may present a much less effective case than if their interests were aggregated.¹²⁴ The aggregate, rather than the individual, utility often reflects the state's interest. Parties may also withhold information relevant to the jury's evaluation of their evidence if it contains uncertain implications for their side.¹²⁵ Finally, parties often have no significant interest in reducing demands on the courts' decision-making resources, except to the extent demands of repeated litigation might raise their own transaction costs over the expected gains from litigation. Moreover, parties have no interest in helping other parties use resources efficiently.

122. See Weinstein, 44 F.R.D. at 378 (cited in note 98). Judge Weinstein has claimed that non-adversary procedures show that the hearsay rule is unnecessary. Weinstein, 46 Iowa L. Rev. at 347-49 (cited in note 5). Non-adversary European systems, however, restrict factfinders' reliance on hearsay. See, for example, Damaska, 76 Minn. L. Rev. at 444-49 (cited in note 52). *Ludi v. Switzerland*, 238 Eur. Ct. H.R. (ser. A) at 20-21 (1992), a recent decision of the European Court of Human Rights, seems to adopt a hearsay-confrontation rule for criminal bench trials.

123. Allen, 66 B.U. L. Rev. at 428 (cited in note 112); Weinstein, 44 F.R.D. at 378 (cited in note 98).

124. Otherwise, incentive for parties to join in actions under F.R.C.P. 20 or to remain in F.R.C.P. 23(b)(3) class actions would decrease. Of course, even if the amount were adequate, the party simply could be negligent or lazy. Nance, 73 Iowa L. Rev. at 258 (cited in note 73).

125. For example, in *Johnson v. United States*, 333 U.S. 46 (1948), a Jones Act plaintiff, relying on *res ipsa loquitur*, failed to call the co-worker whose actions allegedly caused the plaintiff's injury. Nance, 73 Iowa L. Rev. at 264-65 (cited in note 73), and Seigel, 72 B.U. L. Rev. at 917-18 (cited in note 55), discuss parties' reasons for preferring to offer hearsay rather than live testimony. The possibility that allegations of spoliation would deter parties from making such strategic choices is implausible at best. Siegel, 72 B.U. L. Rev. at 918-19. One might argue that a party's opponent could gain a competitive advantage if that party offers evidence that does not warrant the jury's effort to evaluate it or withholds useful evidence, by offsetting the adverse effect of these actions on factfinding by offering other, more useful, evidence. The opponent's incentive or ability to do so, however, is limited in much the same way as the party's incentive to offer the most useful evidence possible. See Nance, 73 Iowa L. Rev. at 265-69.

Asymmetries in access to information may also prevent parties from effectively exposing flaws in their opponents' evidence, particularly when one party has fewer economic resources than its opponent or the opponent relies on the witness's purported expertise.¹²⁶

Although one cannot know either the value of evidence or the appropriate inferential path to take in resolving an issue a priori,¹²⁷ jurors should not be free to shape the factfinding process as they choose.¹²⁸ Respect for jurors' subjective weighing of evidence is consistent with rules of exclusion. Assuming the jury is aware that the judge knows more about the precise issues and their interrelations than do the jurors, exclusions of evidence may be necessary to avoid likely misunderstandings.¹²⁹ Exclusions of evidence do not necessarily preclude subsequent juror requests for more, or other, evidence. Court martial procedure, for example, allows the factfinders to ask questions, subject to submission of the questions to the military judge for a ruling on their propriety or revision of the question.¹³⁰ Recognizing that there is no a priori correct problem-solving strategy for a particular problem does not entail a concession that one cannot distinguish among the likely efficacy of approaches. In fact, given humans' limited mental capacity, continued survival of the species implies some ability to assess the likely efficacy of inferential strategies.¹³¹ Judicial exclusions of evidence need not rest on the conclusion that the proffered evidence is forever useless. Judges instead should only exclude evidence when the proffering party cannot make an adequate argument for its receipt at the particular time it is offered.¹³² Its exclusion therefore neither labels the evidence forever irrelevant nor precludes the party from establishing an adequate predicate for later admission of the information after other evidence or argument.¹³³ The judge thus

126. Nance, 73 Iowa L. Rev. at 234 (cited in note 73); Seigel, 72 B.U. L. Rev. at 923-24 (cited in note 55). Admitting hearsay can weaken the opponent's ability to oppose the proffering party's evidence if the speaker is not available for cross-examination, or if information about the speaker's compliance with the conventions of communication is absent. See, for example, Swift, 75 Cal. L. Rev. at 1370-71 (cited in note 5).

127. Wigmore, 1A *Evidence* § 37.7 (cited in note 67).

128. See, for example, Allen, 66 B.U. L. Rev. at 428-31 (cited in note 112).

129. See notes 87-97 and accompanying text. While the text primarily addresses jury trials, mistaken reliance on evidence could lead to a reversal in a bench trial as well.

130. M.R.E. 614(b), Executive Order 12,473, 49 Fed. Reg. 17,152 (1984).

131. See notes 54-65 and accompanying text.

132. See, for example, F.R.E. 104(b) (allowing admission subject to fulfillment of conditions of fact, or further proof supporting the inference for which the evidence is proffered). See also Glenn Shafer, *The Construction of Probability Arguments*, 66 B.U. L. Rev. 799, 802 (1986) (arguing that probability analysis of evidence "must be treated as just another argument").

133. Of course, the parties have incentives to avoid these problems themselves. However, the court has at least two independent interests in avoiding these problems. First, substantive rules coupled with evidentiary rules set some minimal criteria for state intervention. See Callen,

cannot exclude evidence merely because she disagrees with the conclusion it supports, or because as a factfinder, she might not credit the evidence.

IV. HEARSAY: INFERENCE IN EVALUATING COMMUNICATION AND LANGUAGE

A. Grice and the Hearsay Problem

Analyzing rules of evidence according to Grice's maxims not only shows why courts should exclude irrelevant evidence, but also provides an idea critical to any understanding of hearsay: our understanding of language and communication is an inferential process based on implicit conventions. Return to the example introduced in Part II about Reporter, who made a possibly ironic statement about a forensics officer's handling of a shell casing. Reporter, the speaker,¹³⁴ said to the forensics officer, "Yup. Way to go, Daryl, way to handle the shell casing flawlessly."¹³⁵ To understand what Reporter meant to convey, Daryl (or a juror) must make inferences about the behavior to which "Way to go" referred¹³⁶ and what Reporter meant by the term "flawlessly." Then the juror must infer Reporter's goals:¹³⁷ the

65 Tulane L. Rev. at 482-84 (cited in note 118); Nance, 73 Iowa L. Rev. at 231, 296 (cited in note 73). Second, to the extent factfinding follows predictable standards, persons likely will alter their conduct to conform to legal rules because that alteration will produce a predictably better result. See Jason S. Johnsten, *Bayesian Fact-finding and Efficiency: Toward an Economic Theory of Liability Under Uncertainty*, 61 S. Cal. L. Rev. 137, 145-47, 157 (1987).

134. For brevity and simplicity, the Article generally refers to the actor whose communicative conduct is under consideration as the speaker, and the observer of the conduct as the hearer.

135. Admittedly, this is a fairly ambiguous statement. For a discussion of the importance of contextual inference in discerning meaning and value in any case, see, for example, James L. McClelland and Alan H. Kawamoto, *Mechanisms of Sentence Processing: Assigning Rules to Constituents of Sentences*, in James L. McClelland, et al., eds., 2 *Parallel Distributed Processing: Explorations in the Microstructure of Cognition* 272, 272-77, 302-10, 315-16 (M.I.T., 1986); Johnson-Laird, *Mental Models* at 232-41 (cited in note 76). Compare Wigmore, 1A *Evidence* § 37.7 at 1079-80 (cited in note 67) (noting the importance of context in deciding the content of a statement with a missing term).

136. Consider the statement, "This sentence is false." It is nonsense if taken by itself. See, for example, Lea Brilmayer, *Second-Order Evidence and Bayesian Logic*, 66 B.U. L. Rev. 673, 689 (1986) (discussing the logical order of propositions). If that statement were made while the declarant pointed at a sign reading, "Richard Nixon was the first president of the United States," however, the statement would become comprehensible. In more typical cases, one would infer that only the default assumption about the meaning of the statement applied. See, for example, Johnson-Laird, *Mental Models* at 127-30 (cited in note 76).

137. See Sperber and Wilson, *Relevance: Communication and Cognition* at 58-61 (cited in note 37). For clarity, this Article substitutes "goal" for Sperber and Wilson's "intention."

assumption¹³⁸ or assumptions that Reporter meant Daryl to make¹³⁹ as a result¹⁴⁰ of the statement. Reporter may have intended Daryl to share her view of events, whether favorable or unfavorable. The jurors could only infer Reporter's opinion from the circumstances in which she made the statement and the words she used, such as "flawlessly." Jurors, and Daryl, could not understand Reporter accurately without implicit reliance on the maxims of communication.¹⁴¹

To evaluate the statement fully, jurors must make inferences about Reporter's goals. Those goals result, in turn, from Reporter's beliefs about events, her motivation with regard to those events, and her beliefs about Daryl's interests.¹⁴² Jurors must infer Reporter's goals to select phenomena to which Reporter's statement could refer, and to discern whether Reporter's opinion was favorable or unfavorable. In communicating, Reporter necessarily would intend to warrant the communication's usefulness. Unless Daryl perceived Reporter's implicit claim of compliance with the maxims of co-operation¹⁴³—that the statement's usefulness to Daryl warranted the effort

138. The Article uses "assumption" to refer to the hearer's state of mind concerning a fact at issue, or data that tend to prove or disprove that fact. It includes, among others, beliefs, intentions, guesses, and surmises.

139. Or perhaps assumptions Reporter meant Daryl to hold more strongly. Thus, Reporter might have believed that Daryl agreed the evidence gathering was not flawless, but intended the communication to reinforce that assumption as a form of teasing. This possibility might show that Reporter sought to convey another assumption, such as that Daryl was insufficiently humble.

One might contend that the utterance only assumed the evidence handling was flawed, and did not intend to convey it. See note 42. Even if one agrees that Reporter simply assumed Daryl knew that she erred, if Reporter specifically referred to flaws of which Daryl was fully aware, the reference would violate Grice's maxims by wasting effort on an obvious proposition. See notes 79-80 and accompanying text. Reporter, if complying with Grice's maxims, therefore would intend to communicate to Daryl that she erred, that Daryl did not take her own error sufficiently seriously, or perhaps, with humor, that the error was minor. The first is certainly hearsay. If one argues that Reporter's statement could be construed only as an intent to inform Daryl that Daryl was too casual about an error that they agreed occurred, one must first avoid the pitfalls an a priori construction creates, including the possibility that Reporter might be trying to show Daryl that the error was trivial. For alternative constructions of Reporter's utterance, see notes 37-38 and accompanying text. These traps weaken an argument that insists specific intent, rather than general intent, should determine what a communication asserts. For a discussion of that argument, see note 190.

140. These propositions are known as "implicatures" in linguistics and cognitive science. See, for example, Sperber and Wilson, *Relevance: Communication and Cognition* at 35 (cited in note 37).

141. See notes 79-80 and accompanying text.

142. Sperber and Wilson, *Relevance: Communication and Cognition* at 160-61 (cited in note 37). Schum, 14 *Cardozo L. Rev.* at 62 (cited in note 22), concludes that the probative force of hearsay depends on the completeness of the evidence regarding the inferential risks that a piece of hearsay presents.

143. Sperber and Wilson refer to this implicit claim as the "presumption" or "guarantee" of "relevance." Sperber and Wilson, *Relevance: Communication and Cognition* at 156-63 (cited in

needed to comprehend it—Daryl would ignore the communication. Daryl could then devote her cognitive resources to goals other than Reporter's goals. Similarly, if Reporter thought Daryl would be unwilling to rely on Reporter's implicit claim of co-operation, she would have had no reason to communicate.

Of course, for the jurors to decide whether to alter their view of the facts in accord with Reporter's communication, they must determine whether Reporter's goals conflicted with Daryl's interest and whether Reporter's implicit claim of co-operation is accurate.¹⁴⁴ Once the jurors realize that Reporter intended to communicate, the inferences necessary to evaluate the communication give rise to Professor Morgan's four inferential dangers of hearsay: honesty or sincerity, verbal ability, perceptive ability, and, when necessary, memory.¹⁴⁵ The difference between the process in Grice's view and the process as Morgan understood it is two-fold: First, inferences about Reporter's implicit claim of co-operation and Reporter's goals are the aspects of comprehension and evaluation of the communication that create the true risks with respect to Morgan's four dangers.¹⁴⁶ Second, the communication necessarily incorporates the implicit claim of co-operation—the words and actions in a communication do not stand alone. Without inferences or assumptions based on the speaker's implicit claim of co-operation, evaluation of the probative value of the declarant's words or actions is futile.

The implicit claim of co-operation alters Morgan's depiction of inference from out-of-court behavior. In deciding whether to make or strengthen an assumption as a result of Reporter's communication, jurors must evaluate the speaker's honesty or sincerity,¹⁴⁷ verbal

note 37). This Article has changed the phrase because use of "presumptions" and "relevance" in this sense seems confusing in a discussion of evidence law.

144. Grice, *Studies in the Way of Words* at 30 (cited in note 51), claims that a speaker who violates one or more of the maxims is "liable to mislead."

145. Morgan, 62 Harv. L. Rev. at 178-79 (cited in note 5).

146. A similar idea may underlie the Advisory Committee's comment that the hearsay dangers of nonverbal conduct not intended as an assertion "are minimal in the absence of an intent to assert." F.R.E. 801(a) Advisory Committee's Note. While there may be no risk of insincerity in the absence of an intent to assert, there is no reason to conclude that the lack of an intention makes the conduct less ambiguous or lessens the likelihood that the actor mistakenly remembered or perceived information, Seidelson, 24 Duquesne L. Rev. at 745 (cited in note 36), unless those risks are essentially risks of inference from the implicit claim of co-operation. Non-communicative conduct does not make the implicit claim and, thus, could not create risks of inference from it.

147. This factor is significant at least where honesty can be differentiated from the speaker's motivation, which might already have been considered in evaluating the speaker's intention in making the statement.

ability,¹⁴⁸ perceptive ability, and memory.¹⁴⁹ Morgan correctly identified these as four major risks in making any inference from communications. His account does not, however, treat them more precisely as risks of inference from and about the speaker's goals and her implicit claim of co-operation. Unless jurors have the information necessary to make judgments about the speaker's possible goals and to assess the basis for her implicit assurance that the communication would be useful for the hearer, they might be unable to reduce the alternative possible contents of the communication to a manageable number.¹⁵⁰ A hearer confronted with a communication containing a multitude of possible meanings essentially cannot evaluate the speaker's honesty or sincerity¹⁵¹ in communicating or her ability to remember or perceive the contents of that communication. Moreover, the hearer cannot determine whether the speaker meant to be ironic without making inferences about the speaker's goals, even if the communication has only a tolerable amount of vagueness—in Morgan's theory, irony is an instance of the sincerity danger.¹⁵² In other words, cleanly isolating one danger from the others is impossible, as is eliminating implicit conventions from communication.

One might consider ambiguity in a communication obvious—so obvious that the factfinder would know that inferring from the communication a fact at issue is risky regardless of the role that the

148. Verbal ability is sometimes referred to as the speaker's narration or the statement's ambiguity. If honesty-sincerity and verbal ability are taken in sum, they raise the issue of whether the description of the speaker's beliefs as conveyed by the communication is accurate. The factors are often grouped together, in the terminology of Tribe's triangulation of hearsay, as the left-leg dangers. Laurence H. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 959 (1974).

149. Perception and memory together raise the question of whether the declarant's beliefs are likely to be correct. Under Tribe's terminology, they are known as the right-leg dangers. *Id.*

150. An inferential strategy such as Grice's maxims is indispensable in evaluating hearsay, a task which otherwise would result in a combinatorial explosion. See Schum, 14 Cardozo L. Rev. at 43-47 (cited in note 22). The computational complexity would be even greater in multiple hearsay. Richard D. Friedman, *Infinite Strands, Infinitesimally Thin: Storytelling, Bayesianism, Hearsay and Other Evidence*, 14 Cardozo L. Rev. 79, 79 n.3 (1992).

Information showing that the statement is useful often will be part of the proffer, such as with a present sense impression. F.R.E. 803(1). A system of standards nevertheless is very useful for decisionmaking when the proffering party cannot, or chooses not to, supply such information. See notes 243-49 and accompanying text.

151. The Advisory Committee's Note to Article viii of the Federal Rules chiefly concerns the risk of insincerity. For the text of the note, see note 176. See also Noto, 93 Harv. L. Rev. at 1797 (cited in note 98). The dangers are entangled, however—an attempt to analyze one necessarily concerns the others. Mueller, 76 Minn. L. Rev. at 384-85 & n.55 (cited in note 5); Schum, 14 Cardozo L. Rev. at 59 (cited in note 22). Imwinkelried, 41 Fla. L. Rev. at 218, 223-28 (cited in note 40), reports psychological research revealing that potential inaccuracies in the witness's memory are "a far more important cause of testimonial error than subjective insincerity." Compare Rice, 65 Temple L. Rev. at 532 (cited in note 8) (explaining that "because speech is almost always intended as an assertion of something to someone, it always carries with it the inherent danger of insincerity").

152. See, for example, Rice, 65 Temple L. Rev. at 534 (cited in note 8).

speaker's implicit claim of co-operation plays in the communicative process.¹⁵³ While deciding to exclude utter gibberish may be easy,¹⁵⁴ the dangers of ambiguity do not disappear when inferential tasks become more subtle. The dangers of ambiguity present more than a trivial reiteration of a baseline relevance test under Federal Rule of Evidence 401 in situations in which no reasonable person could ever decide what the speaker meant to convey. Ambiguity instead intertwines with problems of inferring the speaker's goals and accuracy. For example, suppose a salesperson's statement, "I'm sure that this Amalgamated Motors Zoomer is defect free," is offered to show the car's condition when it left the showroom immediately before an accident. The word "sure" can cover numerous bases for the salesperson's professed opinion of the car, including the salesperson's thorough and competent examination of the car immediately preceding the statement. Some possible meanings may involve elevated risks of memory, perception, or sincerity; others may not. Difficulties of ambiguity, vagueness, or narration are not independent of other hearsay risks.

Some courts and commentators rely on the dangers analysis in claiming that admission of implied assertions (the contents of communication inferred from the implicit claim of co-operation) creates fewer inferential risks than would admission of express assertions (words or actions standing alone).¹⁵⁵ Empirical research, however, shows that it is actually a more difficult inferential task for a hearer to decide whether the speaker believed a *possible* implication than for the hearer to decide whether the speaker believed a *logically or practically necessary* implication.¹⁵⁶ The empirical evidence therefore contradicts arguments that treat the use of implicit conventions as a less tricky inferential problem than typical inference from communications.¹⁵⁷

153. See, for example, Tribe, 87 Harv. L. Rev. at 969 n.42 (cited in note 148).

154. Excluding communications in which the speaker obviously suffered from a lack of memory or perception, or in which the speaker was obviously joking, would be similarly easy. It is doubtful that occasional obvious cases of ambiguity distinguish it from other dangers.

155. See, for example, *United States v. Short*, 790 F.2d 464, 467 (6th Cir. 1986); *United States v. Zenni*, 492 F. Supp. 464, 467-68 (E.D. Ky. 1980); Lempert and Saltzburg, *A Modern Approach to Evidence* at 367-68 (cited in note 38); Finman, 14 Stan. L. Rev. at 685 n.12 (cited in note 28).

156. Gibbs, *Contextual Effects* at 10 (cited in note 77).

157. See Adrian A.S. Zuckerman, *Principles of Criminal Evidence* 197-98 (Oxford U., 1989) (warning that the dangers of reliance on express assertion are "equally present when we are asked to infer the same fact" from an implied assertion).

Professor Rico has a different, but certainly telling, response to claims that implied assertions are necessarily less dangerous evidence than express assertions. He argues that whenever the speaker is engaged in a communicative act, Rice, 65 Temple L. Rev. at 536 (cited in note 8), the act "carries with it the inherent danger of insincerity." *Id.* at 532. "As a chain can be no stronger than its weakest link," implied assertions can be no less dangerous than the communications that imply them. *Id.* at 538. The difference between the co-operative theory and Professor Rice's

Realizing that the act of communication includes more than literal declaration and that Morgan's dangers test does not provide a complete map of the inferential risks hearsay evidence presents is critical to understanding the relationship between hearsay doctrine and informal reasoning. In light of co-operative theory, the Article now more precisely develops and articulates the distinction between hearsay and nonhearsay.

B. Functional Distinctions Between Hearsay and Nonhearsay

Understanding the inferential process necessary to evaluate communications simplifies distinctions between hearsay and nonhearsay. First, substantive law often makes statements nonhearsay. The statements are nonhearsay not because of a perception that such statements are always honest and accurate, or because they fail to assert the proposition for which they are offered, but because the factfinder has no significant¹⁵⁸ need to ascertain the speaker's goal, or to assess whether the speaker's implicit claim of co-operation is accurate, before evaluating the communication for the purpose for which it is offered.

In some cases, a communication must reflect a precise formula, such as "I do" or "I will" in a wedding ceremony, to be nonhearsay. In other cases, the communication need not adhere to a precise formula; rather, it is nonhearsay because (i) it would be sufficient, under the circumstances, to establish an element of a claim or defense, and (ii) the accurate assessment of the speaker's implicit claim of co-operation is not indispensable to determining the communication's probative value for the purpose for which it is offered.

theory lies chiefly in Professor Rice's willingness to circumscribe the scope of an assertion by the matters the assertion conveys verbatim, id. at 532, and in his focus on reliability as a justification of the hearsay rule. Contrast notes 173-88 and accompanying text (scope of assertion); notes 101-106, 229-31, and accompanying text (reliability). Setting aside those differences, Professor Rice clearly believes that the literalist approach is unsound, see Rice, 65 Temple L. Rev. at 532, and suggests a construction that might yield the same results as the co-operative approach—namely, reading the phrase "if it is intended by the person as an assertion" at the end of Federal Rule 801(a) to refer only to the reference to "nonverbal conduct of a person" that immediately precedes it in Rule 801(a)(2). Seidelson, 24 Duquesne L. Rev. at 764 (cited in note 36), advocates the same construction.

Classifying implied assertions as nonhearsay creates a narration problem of its own—sophisticated (and somewhat unscrupulous) witnesses would simply reword hearsay statements merely to imply a proposition that the proffering party wished to show, making the statement nonhearsay to prove the proposition. *Park v. Huff*, 493 F.2d 923, 927-28 (5th Cir. 1974), withdrawn on other grounds, 506 F.2d 849 (5th Cir. 1975) (en banc).

158. The Article uses the term "significant" here because the factfinder must be able to conclude that the hearer *could* have understood the statement to refer to something in issue. This conclusion would involve a minimal judgment about the speaker's implicit claim: that the hearer could have thought that the communication warranted his attention.

*Smedra v. Stanek*¹⁵⁹ illustrates the distinction between the inadmissibility of a statement for a hearsay purpose and the admissibility of the same statement when substantive law would encourage further action¹⁶⁰ based on it. The plaintiff brought an action against a surgeon alleging that the surgeon failed to remove a surgical sponge from her body before closing the incision.¹⁶¹ The plaintiff offered a witness who would testify that before the surgeon closed the incision, someone said, "The sponge count did not come out right."¹⁶² The court held that the witness's statement was not hearsay to show that the surgeon had reason to recheck the site of the operation for a sponge.¹⁶³ In cases such as *Smedra*, in which a statement is offered to show notice or warning, the substantive law treats the statement as non-hearsay evidence that the hearer had notice of a possible defect or danger. In the absence of information showing that the warning was inaccurate or that the hearer was entitled to conclude that the statement did not refer to the relevant risk, the underlying rule required the hearer to attempt to determine whether danger existed.¹⁶⁴ Accordingly, without evidence that either contradicted the statement about the sponge count or showed that the hearer knew the statement did not convey any risk, the jury should be entitled to rely on the statement to find that the surgeon had notice of possible danger.¹⁶⁵ The statement, therefore, is nonhearsay.

The *Smedra* court, however, noted the statement's inadmissibility to show that the surgeon actually had closed the incision with-

159. 187 F.2d 892 (10th Cir. 1951). For a discussion of the role that the negligence standard plays in structuring actors' out-of-court decision-making strategies, see Cherniak, *Minimal Rationality* at 100-07 (cited in note 58).

160. Such action would include the hearer's reconsideration of evidence available to the hearer at the time of the communication.

161. *Smedra*, 187 F.2d at 892.

162. *Id.* at 893.

163. *Id.* at 894.

164. *Id.* See Cherniak, *Minimal Rationality* at 100-07 (cited in note 58).

165. Numerous scholars have discussed the status of performative statements, or statements that in themselves perform a function and seemingly cannot be true or false. Examples include naming a ship, or the utterance, "I apologize." See, for example, Mueller, 76 *Minn. L. Rev.* at 416-22 (cited in note 5); Park, 65 *Minn. L. Rev.* at 447 n.77 (cited in note 8); Weissenberger, 65 *Temple L. Rev.* at 861-62 (cited in note 8). The term "performative" comes from J.L. Austin, *How to Do Things With Words* 6 (Oxford U., J.O. Urmson & Marina Sbisa, eds., 2d ed. 1975). Performative statements often are nonhearsay as a matter of substantive law. Performative statements also may be nonhearsay as a matter of social convention, rather than as an implication of substantive law, that is, nonhearsay because the speaker's goal and implicit claim of co-operation are not significant in determining the statements' probative value. On the other hand, the performative statement, "I congratulate you on your performance," *id.* at 40, should be hearsay if offered to show that the performance was good.

out removing a sponge.¹⁶⁶ For that purpose, an assessment of the speaker's implicit claim would be necessary. The speaker could have intended to upbraid someone else because the records showed a count that was too high. In addition, the sources on which she relied in making her statement may have been inaccurate, or she may have misinterpreted them. Finally, the unknown identity of the speaker compounded the difficulty of assessing her implicit claim.

Another statement that substantive law classifies as nonhearsay, "I agree to this contract," is offered to show formation of a contract when an objective contract formation theory applies. In the contract case, the substantive rule is designed to allow the hearer to rely on the existence of a contract while devoting only minimal resources to determining the speaker's intentions, for example, ensuring that the speaker's statement is not a joke if the context indicated it might be one. The statement, therefore, should be sufficient to support a finding that the utterer agreed to the contract, in the absence of conflicting or undermining evidence.

A second, closely related class is composed of communications that the substantive law considers nonhearsay because hearers might take some action based upon them. Defamatory statements, on which hearers might rely in changing, terminating, or avoiding relationships with the subjects of the statements, are one example of this class.¹⁶⁷ Threats made through words or conduct, offered to show that the recipient had reason to be fearful, are another.¹⁶⁸

A final class of nonhearsay does not result from substantive law. This class includes communications offered to show a proposition, when the communication's probative value for that

166. *Smedra*, 187 F.2d at 894. Holding the statement hearsay for one purpose and nonhearsay for another raises the question of the extent to which juries will follow limiting instructions. The issue is beyond the scope of this Article, except to note that despite arguments to the contrary, some empirical evidence reveals that jurors seem to comply with limiting instructions. See Reid Hastie, Steven D. Penrod, and Nancy Pennington, *Inside the Jury* 231-32 (Harvard U., 1983). See also Peter Miene, Roger C. Park, and Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 Minn. L. Rev. 683, 695-96 (1992). Professor Nance offers an interesting theory of the role of limiting instructions: the instruction notes that while the evidence is admissible on issue A, the party offered less than optimal evidence on issue B, which the court does not condone. He also notes that F.R.E. 105, Advisory Committee's Note, allows the judge to exclude the evidence when even the most conscientious juror, with a limiting instruction, could not ignore the improper inference. Nance, 73 Iowa L. Rev. at 293 & n.313 (cited in note 73). See also Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 Nw. U. L. Rev. ____ (forthcoming 1994) (manuscript at 50-51, on file with the Author) (defending limiting instructions as efforts to maintain the integrity of the trial process, regardless of their effect on jury deliberations).

167. See, for example, W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts*, § 112 at 791-92 (West, 5th ed. 1984).

168. See, for example, *United States v. Williams*, 993 F.2d 451, 457-58 (5th Cir. 1993).

proposition does not depend on the speaker's goal or implicit claims about the communication. Suppose that the plaintiff in a wrongful death case offered the testimony of a highway patrol officer who heard the person behind the wheel of a wrecked car say, "I'm alive." The plaintiff offers the statement to show that the driver survived the accident. The evidence is admissible because its probative value does not depend on the speaker's goals or implicit assurances—if the speaker could speak, the speaker would necessarily be alive.

In contrast, whenever a proponent offers a communication for a hearsay purpose, information concerning the speaker's goal or implicit claims about the communication is important for the factfinder's evaluation of the statement's probative value.¹⁶⁹ The exceptions to the current hearsay rule may not supply this data most effectively, yet they generally require the proffering party to provide information about the speaker's goal, implicit assurance, or both.¹⁷⁰ Moreover, if judges received hearsay without such a foundation, the jury might erroneously believe that the court endorsed the evidence.¹⁷¹ The more complete the relevant data that accompany a piece of possibly useful

169. For discussions of the role of hearsay rules in promoting the factfinder's ability to evaluate out-of-court statements, see, for example, Nance, 73 Iowa L. Rev. at 282-84 (cited in note 73); Seigel, 72 B.U. L. Rev. at 896-97 (cited in note 55); Swift, 75 Cal. L. Rev. at 1354-61 (cited in note 5); Mary Morton, Note, *The Hearsay Rule as Epistemological Suicide*, 74 Georgetown L. J. 1301, 1307-11 (1986).

170. See notes 232-41 and accompanying text. The exclusions from the hearsay rule essentially operate to provide the jury with more information to use in evaluating the prior consistent or inconsistent communications of testifying witnesses, F.R.E. 801(d)(1), or to force parties likely to control evidence bearing on evaluation of their own or their agents' statements to do so. F.R.E. 801(d)(2). Each exclusion maximizes the likelihood of offers of explanation, refutation, or contextualization (with the possible exception of co-conspirator's statements and statements of former agents offered against the former principal) and thus facilitates assessment of the speaker's implicit claim of co-operation. See Mueller, 76 Minn. L. Rev. at 385-86 (cited in note 5).

171. See notes 87-97 and accompanying text. The jury would infer that the court, having already screened the evidence itself, did not provide them with further data because the data were irrelevant. When a court receives hearsay, "it becomes important to determine to what extent the reception of the data under conditions which do not satisfy the usual protective tests will serve to accomplish the objectives of the trial and yet not expose the trier to appreciable danger of being misled." Morgan, 62 Harv. L. Rev. at 185 (cited in note 5).

F.R.E. 104(a) technically would permit the proffering party to offer data to satisfy the conditions of the exceptions solely in the jury's absence, although this procedure is rare, to say the least, and would only affect the supply of data for evaluation of statements in a jury trial. Even if the proffering party chose to follow this procedure, it would have an incentive to repeat much of the information before the jury to keep the narrative of events complete, to increase the effect of its evidence, or both. Moreover, proving an exception in the jury's absence would provide the opposing party or the judge with information on which to premise further examination of the witness and counter-argument in the opponent's case. Further examination or counter-argument would provide information helpful to the jury's evaluation of the evidence. If no one chose to engage in further questioning or counter-argument, the jury could make the essentially accurate assumption that the courts and the opponents, despite adequate opportunity to do so, did not challenge the evidence.

evidence, the less likely the jury will mistakenly conclude that the court has already decided the evidence is inherently reliable. Finally, to the extent courts receive communications that do not seem to justify the effort to evaluate them, jurors may ignore the presentations at trial and decide facts based on pre-existing extrinsic assumptions.¹⁷²

C. *Interpreting Federal Rule 801 with the Co-operative Theory*

The approach to distinguishing hearsay from nonhearsay that this Article advocates, called the co-operative theory after Grice's maxims, fits the language of the Federal Rules at least as well as its competitors. The authors of *McCormick on Evidence*, as well as others,¹⁷³ staunchly maintain that the Advisory Committee that drafted the Federal Rules of Evidence intended to classify implied assertions (such as the communication about the shell casing in the initial hypothetical) as nonhearsay. These authors argue that a statement does not *assert* implied assertions.¹⁷⁴ No coherent interpretation of the language of the Rules and comments supports their argument, however, which indicates that Congress did not intend to enact the literalist heuristic when it adopted the Rules.¹⁷⁵ If anything, reliance on Grice's maxims as an interpretative guide imputes to Congress a plausible, consistent intent in its enactment of Rule 801.

The Federal Rules themselves do not define the term "assertion." The Committee's note to Federal Rule 801(a)¹⁷⁶ offers these guideposts:

172. See note 85 and accompanying text. See also Bergman, 75 Ky. L. J. at 861-63 (cited in note 9) (explaining that humans augment information communicated to them by adding details from their own experience).

173. See, for example, Weissenberger, 64 Temple L. Rev. at 146-52 (cited in note 40).

174. See note 31 and accompanying text.

175. Scholars generally agree that the Advisory Committee intended to encourage use of the literalist heuristic. See, for example, Graham, *Handbook of Federal Evidence* § 801.7 at 714 (cited in note 88). However, many doubt that the Committee's language accomplished that end. In any event, "there is nothing in the legislative history to indicate that Congress affirmatively acquiesced in the Advisory Committee's conclusion that [implied assertions from communicative conduct] should be treated as nonhearsay." Seidelson, 24 Duquesne L. Rev. at 758 (cited in note 36) (footnote omitted).

176. F.R.E. 801(a), Advisory Committee's Note, provides:

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

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

(i) The definition of statement¹⁷⁷ excludes "all evidence of conduct, verbal or nonverbal, not intended as an assertion."¹⁷⁸

(ii) No action should be considered an assertion "unless intended to be one."¹⁷⁹

(iii) "[A]n assertion made in words is intended by the declarant to be an assertion."¹⁸⁰

(iv) "[N]onassertive verbal conduct [or] verbal conduct which is assertive but offered as a basis for asserting something other than the matter asserted" is excluded from hearsay¹⁸¹ under 801(c), which itself says that to be hearsay, a statement must be "offered in evidence to prove the matter asserted."¹⁸²

(v) If "evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is [sic] intended."¹⁸³

tive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. [Citations omitted.] Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. [Citation omitted.] 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).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. [Citations omitted.]

177. F.R.E. 801(a), Advisory Committee's Note.

178. *Id.*

179. *Id.*

180. *Id.* Points (ii) and (iii), of course, commit the classic lexicographer's sin of defining a term with reference to itself.

181. *Id.* One could point out, as Professor Seidelson has, that the phrase "the matter asserted" could refer to matters implicitly asserted. Seidelson, 24 *Duquesne L. Rev.* at 759 (cited in note 36). That argument is essentially a variant of the argument in the text of this Article.

182. F.R.E. 801(c).

183. F.R.E. 801(a), Advisory Committee's Note.

The comment's language is difficult to apply coherently without employing some form of co-operative analysis. Consider, for example, the statement with which this Article began, "Yup. Way to go Daryl, way to handle the shell casing flawlessly." Under (iii), Reporter's statement would be "an assertion," that is, intended to assert something. Otherwise (iii) would be meaningless, merely stating that an assertion is an assertion. By negative implication, if under (ii) those things that are intended as assertions should be treated as "assertion[s]," one must treat Reporter's utterance as a statement under (i). Similarly, (v) would only require the prosecutor to prove Reporter intended an assertion if it appeared she did not intend an assertion—which (ii) resolves in favor of treating Reporter's utterance as an assertion.

The categories referred to in (iv) provide the pigeonholes in which the Committee probably intended to place communications offered to prove implied assertions. In light of the Committee's own comment, however, Reporter's utterance would be an assertion, which appears to bring it under the hearsay rule, unless one can show that Reporter did not intend to assert the proposition for which the statement is offered. The defense could best argue that (iii) implies that a speaker only intends to assert the propositions that the speaker puts into words. The comment does not appear to lend itself to that construction, however; after stating that an "assertion made in words" is intended as an assertion, it goes on to discuss nonverbal conduct that may be an assertion, indicating that verbalization is not necessary. Moreover, the argument that Reporter did not intend to criticize Daryl would be inconsistent with the defense's theory.

The literalist theory's construction of (iii) poses a major problem—communicators intend their communicative behavior to convey the fact that they are employing the implicit conventions of communication. That intention may not be uppermost in their minds, but they certainly expect their hearers to rely on the conventions. If, for instance, a law partner giving an associate a research assignment were to use a metaphor such as "leave no stone unturned," the partner would expect the associate to understand that she was giving directions about the degree of thoroughness with which she expected the associate to research, rather than conveying advice about rock inversion. Accordingly, the communicator's intention,¹⁸⁴ combined with the act of communication, makes that act assertive of the communicator's compliance with the communicative conventions, in

184. Id.

addition to the matters that may be the direct focus of any communication.¹⁸⁵

To put it differently, if the literalist theory's construction of (iii) applies to verbal conduct only, it conflicts with other comment language referring to nonverbal conduct that may be hearsay. If Reporter behaved in a way that indicated she believed Daryl erred, and the defense offered that action to show that Daryl did so, the action would be hearsay if intended as "the equivalent of words."¹⁸⁶ A verbal communication conveys ideas in "the equivalent of words" that it does not articulate.¹⁸⁷ Adopting the literalist theory's construction of the comment would classify verbal conduct as nonhearsay to convey those ideas, even though nonverbal conduct that intended to convey the same ideas would be hearsay. It is clear that the Committee considered the dangers of drawing inferences from nonverbal conduct minimal in the absence of "an intent to assert."¹⁸⁸ If anything, the Committee intended to make nonverbal conduct less subject to the hearsay rule than verbal conduct. The literalist heuristic contradicts that intent.

Rather than adhere to a requirement that a statement directly articulate a proposition in order to assert it, supporters of the literalist heuristic might say that intent is critical, and that if Reporter intended to be ironic, then her statement asserts criticism of Daryl's handling of the shell casing. If the supporters use such analysis often, literalist analysis would hold that a communication would only assert

185. Wellborn, who is critical of general intent tests, nevertheless nears this point when he notes, "If the expression is one that would support an inference of belief, normally the speaker or writer would have been aware at least of the possibility of such an inference, and therefore the possibility that he intended it would also exist." Wellborn, 61 Tex. L. Rev. at 67 (cited in note 17). Wellborn states that such a possibility "must be regarded as far more significant in the ordinary case of apparently non-assertive words" than in that of nonverbal conduct. *Id.* See also note 196 and accompanying text.

186. F.R.E. 801(a), Advisory Committee's Note. See note 176.

187. Interpretation of the Committee's note poses two other problems. First, if courts apply some sort of "explicitness" or "literalness" criterion in deciding whether a statement asserts a proposition, implications from verbal behavior are nonhearsay, while implications from conduct are hearsay. An advocate of this distinction might say that nonverbal conduct can be misunderstood more easily; accordingly, the court should be more careful in admitting nonverbal assertions. Finman, 14 Stan. L. Rev. at 682-91 (cited in note 28). That distinction, however, would rest on the assumption that one can understand language without considering the author's intention or state of mind, while the actor's reason for engaging in a physical act is much more uncertain. That assumption would be controversial at best. See note 217 and accompanying text.

Second, treating assertions implied from communicative conduct as unasserted, in accordance with the note, makes them "similar" to nonassertive nonverbal conduct, as to which the note claims the hearsay risks are "minimal in the absence of an intent to assert." F.R.E. 801(a), Advisory Committee's Note. That conclusion is implausible when one considers the dangers of perception, sincerity, narration, and memory that evaluating propositions implied in communications poses. Seidelson, 24 Duquesne L. Rev. at 756 (cited in note 36).

188. F.R.E. 801(a), Advisory Committee's Note. See note 176.

the propositions it directly articulated in words, except when the speaker might have intended irony or metaphor, in which case the assertion would encompass the speaker's intended message—an approach with extremely uncertain applications. No inference that a speaker intended to use irony or metaphor could rely exclusively on words. Assertions would not include contents based on the implicit conventions of communication because, although intended, those contents are not conveyed in words. This variation of the literalist heuristic thus enables one to use evidence other than words to infer that an ironic or metaphoric statement was part of the communication, but otherwise forbids reliance on the implicit conventions necessary to a communication to determine its content. The speaker, however, certainly intends to rely on the implicit conventions, and expects her hearer to do so as well.

D. A Co-operative Restatement of the Definition of Hearsay

Adherents of the conventional views doubtless will maintain that cognitive theory cannot articulate a distinction between hearsay and nonhearsay any clearer than those distinctions drawn by conventional theories. A distinction between hearsay and nonhearsay based on Gricean analysis, however, is clearer than the literalist theory's distinction, fits the language of the Rule, and conflicts with the advisory comment as little as possible, given the confused nature of that comment. First, under the theory offered here, an out-of-court act can only be hearsay if it is communicative. Thus, the act in question, and the context within which the actor did the act, must indicate that the actor had a belief about a condition sought to be proved. Second, the act and its context must indicate that the actor generally intended to inform an audience of that belief.¹⁸⁹ If the act satisfies those two criteria, it is a communication. Finally, the communication is hearsay (i) if the proponent offers it to establish any inference that the actor generally would have intended¹⁹⁰ the

189. Grice states that a communication must indicate a belief and the intent to communicate that belief. See, for example, Grice, *Studies in the Way of Words* at 103 (cited in note 51). The actor, or declarant, may herself be the audience, as when she makes a record or diary for later consultation, see F.R.E. 803(6), or when she talks to herself for any number of purposes: self-encouragement, venting emotions, or examining how ideas sound—the oral equivalent of scratch paper.

190. The use of general intent here is important for at least three reasons. First, attempting to decide whether an actor, even in context, specifically or consciously intended to assert a proposition essentially imposes a literalist construction on the communication, and suffers from the same linguistic weaknesses. See notes 42 and 139. Paul S. Milich, *Re-Examining Hearsay*

audience to draw from the communication,¹⁹¹ and (ii) if assessment of the degree of accuracy of the actor's implicit claim of co-operation would be essential to a thoughtful, unprejudiced¹⁹² factfinder's determination of the inference's reliability.

In other words, according to the co-operative theory of hearsay, the communication is an *assertion* of the propositions its author would generally intend it to convey under the circumstances. It is *offered for*

Under the Federal Rules: Some Method for the Madness, 39 Kan. L. Rev. 893, 910-12 (1991), provides the clearest example of a specific intent theory of communication for hearsay purposes.

Second, suppose one could be confident that an actor who engaged in such a communication would be unlikely (to some threshold level of likelihood) to intend specifically to assert the proposition for which the communication was offered. Even then, specific intent would be a poor criterion. Distinguishing hearsay from nonhearsay in reliance on specific intent would presume that no one could intend to deceive or mislead about proposition P if they did not consciously endeavor to assert P. Thus, if one accepts the literalist theory that the risk of insincerity is critical to deciding whether a communication is hearsay, see note 42, only the specifically intended communication could be hearsay. Assuming that one can somehow isolate the sincerity danger to make it determinative, however, is erroneous. See notes 147-54 and accompanying text. Even if one could isolate the sincerity danger, the argument would be flawed because effective deceivers often prefer to mislead by implication rather than by express false statement. See note 42.

Finally, the notion of intent supporting this standard would be very curious. If someone were to drive a nail with a hammer, that would entail contracting his forearm muscles. Were a friend to ask him afterwards if he intended to contract them, he might say he was not conscious of it, even though he intended, in some sense, to do anything necessary to drive the nail. On the other hand, suppose a bystander who saw him lining up the nail held out her hammer and said, "Here's my hammer." If he asked her whether she meant to convey that the hammer would be useful, or suitable, she likely would consider the question silly, because the intent to convey the hammer's suitability, if not uppermost in her mind, is indispensable to the exchange. See notes 79-86 and accompanying text. A particularly zealous dissenter might argue that the statement would not be hearsay to show that the hammer was her property, on the theory that she assumed it was, and only meant to convey that it would be proper for him to use the hammer. See Friedman, *The Elements of Evidence* at 143 (cited in note 10). That construction would violate Grice's maxims, however, by assuming that the word "my" was surplusage and an unnecessary communication. See notes 79-80 and accompanying text.

191. This view nearly parallels Morgan's understanding of the concept of an assertion. "[T]he word must be, and generally is, taken to include not only a combination of words but also nonverbal conduct . . . which is offered as evidence of the truth of the matter intended, or assumed by the proponent to have been intended, to be communicated." Morgan, 62 Harv. L. Rev. at 216 (cited in note 5). A similar approach claims that "only conduct apparently intended to convey thought can come under the ban of the hearsay rule." Seligman, 26 Harv. L. Rev. at 143 (cited in note 31). McCormick calls Morgan's approach "less helpful than his other writings," without giving any reasons. 2 McCormick 4th, § 246 at 98 n.5 (cited in note 8). That criticism seems inconsistent with McCormick's (i) argument that the meaning of "assertion" in the Federal Rules is clear, although undefined, and (ii) acknowledgement that the treatise relies on a definition of the term it concedes is obsolete. *Id.* at 97-98 & n.5.

A proponent who argued that a communication C was nonhearsay might contend that, although C was a communication, the actor's intent with respect to proposition P was so uncertain that C should be nonhearsay to prove P. Assuming that C would not be sufficient for a thoughtful judgment as to P without considering the actor's implicit claim, see notes 164-68 and accompanying text, the argument is too clever by half. If the proponent cannot show circumstances in which the actor did C such that a reasonable person would expect the audience to make or reinforce assumptions about P as a result of the communication, see note 139, then C likely would be irrelevant.

192. This requirement conforms the co-operative approach to F.R.E. 403.

*the truth of the matter asserted*¹⁹³ if the factfinder would need more than minimal information about the nature and accuracy of the beliefs the actor communicated to evaluate the degree to which the communication proved the fact at issue. To illustrate the term "minimal," recall the discussion of *Smedra v. Stanek*.¹⁹⁴ The statement about the sponge count was nonhearsay to show that the surgeon had notice that a sponge might be in the patient when he closed the incision. Only minimal information about the nature and accuracy of the speaker's beliefs is necessary for that purpose—as long as it was not obvious that the speaker's statement had no bearing on the surgeon's conduct, the statement would be admissible to show a warning. On the other hand, the statement would be hearsay to show that a sponge was in fact in the patient when the surgeon closed because knowledge about the accuracy and sources of the speaker's beliefs about the sponges is necessary to a thoughtful evaluation of the statement's probative value on that issue.¹⁹⁵

The Federal Rules and the comments are thus consistent with treating a communication as hearsay when its proponent offers it to show propositions that the speaker would generally intend¹⁹⁶ the hearer to infer from the communication. These propositions include

193. Thus, under the co-operative approach, false statements of third persons associated with the party against whom the statements are offered are nonhearsay to show the third person lied because she believed that the person against whom the evidence was offered was guilty or liable. See Park, 65 Minn. L. Rev. at 426 (cited in note 8). This use of the false statement does not entail reliance on the nature and accuracy of the beliefs communicated. This statement does not mean, however, that the court should not ask itself whether the third person was sufficiently connected to the opponent of the evidence to make the false statement probative, or whether the statement carries the risks associated with non-communicative conduct. See notes 205-18 and accompanying text.

194. 187 F.2d 892 (10th Cir. 1951), discussed in notes 159-66 and accompanying text.

195. See note 166 and accompanying text.

196. Wellborn, 61 Tex. L. Rev. at 77-79 (cited in note 17), argues that this interpretation involves an excessively subjective standard, yet he praises the objectivity of an essentially identical standard, that of Stephen A. Saltzburg and Kenneth R. Redden, *Federal Rules of Evidence Manual* 511 (Michie, 2d ed. 1977). Wellborn criticizes Saltzburg and Redden's standard because it would not treat as hearsay the implicatures (see note 140) that the speaker possibly might have intended. Wellborn, 61 Tex. L. Rev. at 80-81. Without stretching the discussion, it seems that without supporting proof, the basis for that kind of implicature is uncertain, providing insufficient reason to treat it as communicated. F.R.E. 801(a), Advisory Committee's Note. Compare Sperber and Wilson, *Relevance: Communication and Cognition* at 200-01 (cited in note 37) (discussing computability requirements for implicatures). Extreme uncertainty about whether the speaker generally would have intended the hearer to make or strengthen an assumption would make the communication irrelevant. See note 191.

the speaker's goal and implicit claim that the communication complied with the maxims of co-operation.

Those who disagree with this position, as McCormick does, would contend that the meanings of the terms "assert," "assertive," and "assertion" are perfectly obvious.¹⁹⁷ McCormick admits, however, that some people, such as Professor Morgan, do not agree with McCormick's understanding of the term.¹⁹⁸ Judges in at least five circuit courts of appeal currently belong to the group that disagrees with McCormick's interpretation.¹⁹⁹ Philosophers²⁰⁰ and cognitive scientists²⁰¹ agree that the prototypical statement or assertion²⁰² evidences its intent with little indirection. These scholars also note, however, that the speaker may endeavor to convey more than one idea with a prototypical assertion²⁰³ and that the usual meaning of a particular set of words may not, in itself, reflect the proposition that a particular speaker intends to convey under particular circumstances.²⁰⁴ The classic use of hearsay is the proponent's use of an out-of-court utterance to prove a fact at issue by arguing that the communication reflects its speaker's beliefs about events that tend to show that fact, and that the belief is evidence of that fact. In this instance, inferences about the speaker's intended meaning are indispensable. The utterance, "Could it be a little more quiet in here?" may relate the speaker's opinion that the stereo is too loud, rather than a question about applied acoustics.

197. 2 *McCormick 4th*, § 246 at 98 n.5 (cited in note 8).

198. See note 191.

199. See *United States v. Garcia*, 718 F.2d 42 (2d Cir. 1983); *United States v. Reynolds*, 715 F.2d 99 (3d Cir. 1992); *United States v. Maher*, 801 F.2d 426 (6th Cir. 1986); *United States v. Parker*, 991 F.2d 1493 (9th Cir. 1993); *United States v. Allen*, 960 F.2d 1055 (D.C. Cir. 1992). In addition, although the facts are not entirely clear, *United States v. Redriguez*, 993 F.2d 1170, 1174 (5th Cir. 1993), seems to ignore the literalist heuristic, consistent with *Park v. Huff*, 408 F.2d 923 (5th Cir. 1974), and *United States v. Brown*, 548 F.2d 1194 (5th Cir. 1977), but contrary to *United States v. Mazyak*, 650 F.2d 788 (5th Cir. 1981).

200. See, for example, Searle, *Expression and Meaning* at 12 (cited in note 76).

201. See, for example, Sperber and Wilson, *Relevance: Communication and Cognition* at 246 (cited in note 37).

202. See, for example, Grice, *Studies in the Way of Words* at 121 (cited in note 51).

203. See, for example, id.; Searle, *Expression and Meaning* at 30 (cited in note 76).

204. See, for example, Grice, *Studies in the Way of Words* at 117-18 (cited in note 51); Searle, *Expression and Meaning* at vii-ix (cited in note 76).

E. Narrowing the Dangers Approach: Non-Communicative Conduct

Proponents²⁰⁵ of Professor Morgan's dangers theory²⁰⁶ could argue that one should extend the definition of hearsay beyond the co-operative analysis to include inferences based on conduct that outwardly does not intend to communicate any information. That extension would apply the hearsay rule to problems to which the rule and its exceptions are ill-adapted.²⁰⁷ While cognitive science's teachings are similar to the classic hearsay dangers approach, co-operative analysis breaks with the treatment of non-communicative conduct that the dangers approach implies.²⁰⁸ Suppose that the following evidence is offered to show that it rained on a day in late April: Trey looked out his office window, removed a trenchcoat from his closet, donned it, and left his office at 3:30 p.m. To evaluate that evidence,²⁰⁹ the decisionmaker must decide whether Trey believed that rain was occurring or impending, and whether Trey's belief was accurate.

The dangers test indicates that Trey's action should be hearsay. Because there is no reason to infer that Trey was trying to communicate anything, his sincerity may not be a substantial issue.²¹⁰ On the other hand, ambiguity, or the problem of determining the actor's motivation for the action, is particularly pressing with non-communicative conduct.²¹¹ Trey may have put on the coat simply

205. The degree of adherence ranges from Professor Graham's approach, which considers a statement hearsay if, to make it relevant, one must rely on the content of the declarant's belief or on that belief as establishing the truth of that belief, regardless of the magnitude of the risk, Graham, *Handbook of Federal Evidence* § 801.1 at 688 (cited in note 88), to Professors Lempert and Saltzburg's approach, which considers the statement "I don't love you anymore" by a wife to her husband not hearsay to show her lack of affection because the degree of risk that the statement would be inaccurate is slight. Lempert and Saltzburg, *A Modern Approach to Evidence* at 363-64 (cited in note 38). Other adherents include Professor Tribe, 87 Harv. L. Rev. at 959 (cited in note 148), and possibly Friedman, 96 Yale L. J. at 687 (cited in note 22).

206. See notes 145-52 and accompanying text.

207. For a discussion of the exceptions, see notes 219-41 and accompanying text.

208. See, for example, Finman, 14 Stan. L. Rev. at 682-91 (cited in note 28); Tribe, 87 Harv. L. Rev. at 972-73 (cited in note 148). Compare Friedman, 96 Yale L. J. at 723-29 (cited in note 22) (arguing that the admissibility of the letters in *Wright* should not turn on whether the conduct was assertive).

209. Assuming relevance, it is *more likely* that Trey would wear the trenchcoat if it were raining than if it were not.

210. See, for example, Graham, *Handbook of Federal Evidence* § 801.3 at 692 (cited in note 88); Lempert and Saltzburg, *A Modern Approach to Evidence* at 368 (cited in note 38). Of course, there may occasionally be some risk that Trey intended to communicate and simply concealed it. Finman, 14 Stan. L. Rev. at 697 (cited in note 28). The comment to Federal Rule 801(a) allows the objecting party to raise Trey's intent to assert as a preliminary issue. F.R.E. 801(a), Advisory Committee's Note.

211. Lempert and Saltzburg, *A Modern Approach to Evidence* at 368 (cited in note 38); Finman, 14 Stan. L. Rev. at 688-89 (cited in note 28); Tribe, 87 Harv. L. Rev. at 972 (cited in note 148).

because he preferred not to carry it. He may also have decided a trenchcoat was desirable because the area near the window was cold, or perhaps he inaccurately believed rain was impending, or maybe he saw others wearing their coats. Thus, Trey's actions generate substantial uncertainty about the content of his beliefs about the weather.

The problems with Trey's perception and memory are somewhat similar. Even if Trey believed that rain was occurring or impending, assessing the accuracy of Trey's belief entails judgments about his perception, if not his memory. Trey's actions pose these problems to the same extent as would Trey's explicit statement that it was raining, which would be hearsay.²¹² Regarding Trey's perception, poor background contrast could make it difficult to determine whether or not it was raining out, particularly if his window were poorly located.

Some non-assertive actions in reliance on a belief might be specific enough to avoid any misunderstanding of the actor's belief,²¹³ or sufficiently spontaneous²¹⁴ or detrimental²¹⁵ to the actor to make it likely that the actor's belief was accurate. Nevertheless, there is no real reason to conclude non-communicative actions pose a lesser degree of classic hearsay risks than would inferences from the words of a verbal statement. Under a dangers approach, therefore, any act used to show a belief as a basis for inferring the proposition believed can be hearsay.²¹⁶

212. F.R.E. 803(1) would except the statement as a present sense impression.

213. Opening an umbrella on the street exemplifies this type of action. Graham, *Handbook of Federal Evidence* § 801.3 at 692 (cited in note 88).

214. *Id.*

215. See, for example, Morgan, 48 Harv. L. Rev. at 1158-59 (cited in note 47). But see Finman, 14 Stan. L. Rev. at 692 (cited in note 28) (explaining that non-communicative conduct does not always assume such importance).

216. Advocates of the dangers test occasionally strain on this point. Professor Graham, a fairly staunch advocate of the dangers test, see note 205, believes that non-assertive conduct is not hearsay under that test because the sincerity risk is completely absent. Graham, *Handbook of Federal Evidence* § 801.3 at 692 & n.3 (cited in note 88). There is always the chance that the actor's intent to communicate could have been missed, however, in which case a sincerity risk exists. See note 210. Cross-examination, which Graham considers the most important reason for the hearsay rule, is relatively ineffective at revealing insincerity. Morgan, 62 Harv. L. Rev. at 188 (cited in note 5). Finally, if the complete absence of dangers such as perception and memory would make a statement nonhearsay, there would be no reason, under the dangers test, for the present sense impression and state of mind exceptions; everything they admit would be nonhearsay.

Seigel, 72 B.U. L. Rev. at 930 n.118 (cited in note 55), argues that "most" non-communicative conduct should be hearsay if offered to show the actor's belief because a party might choose to offer the conduct instead of live testimony as a strategic matter. This argument seems to be over-inclusive for several reasons. Conduct that indicates the actor had a certain state of mind but is not communicative does not convey the implicit claim of co-operation, and therefore does not pose the same inferential task for the factfinder that communicative conduct poses. If, on the other

The argument equating verbal and nonverbal conduct fails, however, because the process of inference from communication differs from the process of inferring the actor's state of mind from physical behavior. Although one may recognize the sounds a speaker may utter, those sounds will not convey a proposition unless the hearer can make inferences about the speaker's goals and implicit assurance of the statement's utility and can evaluate the communication in that light. This statement is not true of inferences drawn from objectively observable physical action—for example, conclusions one might draw from sitting at the window of a second-floor study watching a child, who is unaware of the observation, swing a baseball bat. The person observing the swing has at least one fairly firm piece of evidence of the actor's state of mind, the clear physical behavior, while the hearer's perception and interpretation of verbal behavior vary with the hearer's inferences about the speaker's state of mind.²¹⁷

More importantly, when the proffering party submits an apparent out-of-court communication for the factfinder's consideration, it not only submits the words, or the physical conduct, but also the speaker's (or actor's) implicit assurance that the communication was relevant to the hearer's purposes—that a basis for the utterance or action sufficient to commend it to the hearer's attention existed. Inference from mere physical conduct involves no such convention.²¹⁸ Conduct, therefore, should not be treated as the equivalent of hearsay when there is insufficient reason to believe that the actor intended to convey any proposition to any observer through the conduct. That is

hand, the conduct was such that the actor should have expected it to convey beliefs to the observers, then it is hearsay if evaluating the implicit claim of co-operation would be essential to a thoughtful determination of the issue for which the conduct is offered. Finally, the argument sweeps into hearsay evidence such as third parties' habits, F.R.E. 406, on the theory that in-court observation and cross-examination might benefit the factfinder, a proposition that confuses tools for obtaining data for the factfinder with the factfinding process itself. Although the factfinder might benefit from observation or cross-examination, these preconditions need not be mandated for such evidence. See notes 219-28 and accompanying text. On the other hand, Professor Seigel is primarily concerned with making non-communicative conduct hearsay to subject it to a rule of preference. Seigel, 72 B.U. L. Rev. at 930. Some uses of non-communicative conduct may require such a rule, but not because they pose the same inferential problems as hearsay.

217. For discussion of the difficulty of accurately reporting words, as opposed to conduct, see, for example, Allen and Kuhns, *An Analytical Approach to Evidence* at 489-90 (cited in note 15); *Report of the Committee on the Model Code of Evidence*, 19 Cal. St. B. J. 262, 274 (1944); Park, 70 Minn. L. Rev. at 1059 (cited in note 117); Park, 86 Mich. L. Rev. at 56-58 (cited in note 51).

218. If the communicative nature of an act is in question, that problem can be resolved according to the Advisory Note. See note 176.

Scholars commonly argue that the hearsay rule should be read to promote cross-examination whenever it would be useful, and because cross-examination of non-communicative conduct could be helpful to the jury, that conduct should be classified as hearsay if offered to show the actor's belief. See, for example, Finman, 14 Stan. L. Rev. at 685 (cited in note 28). That argument somewhat over-estimates the utility of cross-examination. See notes 219-28 and accompanying text.

not to say that non-communicative acts should be freely admissible, but only that other measures, such as Federal Rule 403, can best assess their probative utility. Moreover, the current exceptions to the hearsay rule primarily address verbal expressions, making them an unwieldy device for assessing actions. For example, without evidence that the actor intended to communicate by limping, it would not make sense to assess out-of-court limping offered to show an injury under the exceptions for present sense impressions or for statements of then-existing physical condition. If available evidence indicated that the actor was trying to convey information with the limp, then the exceptions would require the proffering party to offer the evidence needed to evaluate the behavior at trial.

F. Cross-Examination and the Conventional Rationale for Exceptions

A frequent argument supporting the distinction between hearsay and nonhearsay drawn by the dangers approach posits that the hearsay rule intends to limit the admissibility of out-of-court actions when a factfinder's judgment might benefit from observing a cross-examination of the actor.²¹⁹ Even if one declines to accept Wigmore's dictum that cross-examination is "the greatest legal engine . . . for the discovery of truth,"²²⁰ cross-examination obviously produces a good deal of information that is helpful to the factfinder. The point, however, is that cross-examination helps the factfinder—not that it is good in itself. The availability of cross-examination also cannot guarantee that the jury will hear supporting data necessary to appraise testimony; the opponent may choose to forgo cross-examination to de-emphasize the testimony,²²¹ or may simply do a poor job of cross-examination.²²² In addition, Professor Morgan points out that cross-examination is often an ineffective test of the witness's sincerity.²²³ Worse, cross-examination may cloud the issues if, for example, the cross-examiner focuses the jury's attention on irrelevancies in order to confuse their perception of the critical

219. See, for example, Allen and Kuhns, *An Analytical Approach to Evidence* at 319-20 (cited in note 15); Finman, 14 *Stan. L. Rev.* at 684-85 (cited in note 28).

220. James H. Chadbourn, ed., 5 *Wigmore on Evidence* § 1367 at 32 (Little, Brown, 1974).

221. See Note, 93 *Harv. L. Rev.* at 1788 n.9 (cited in note 98).

222. Of course, the party's incentive to cross-examine may not perfectly coincide with the factfinder's wish for further information. See notes 124-25 and accompanying text.

223. Morgan, 62 *Harv. L. Rev.* at 188 (cited in note 5); Note, 93 *Harv. L. Rev.* at 1793 (cited in note 98).

issues.²²⁴ Moreover, it is difficult to view the absence of cross-examination as the core reason for caution regarding hearsay evidence when a large number of exceptions to the hearsay rule allow the admission of hearsay uttered by a person who would be available to testify, but need not be called to the stand.²²⁵ Finally, parties may prefer to test other sorts of evidence by cross-examination, evidence few consider hearsay. For example, a third party may make a repair on a negligently manufactured product that remedies the alleged defect.²²⁶ The repair would be admissible if offered by plaintiff to show that the product was defective.²²⁷ The most thorough appraisal of the evidence, however, would require cross-examination of the third party to ascertain that party's perception of the product before the repair and her motivation for making the repair. Even dangers test advocates are unlikely to consider the repair hearsay.

The frequency with which some hearsay commentators emphasize the importance of cross-examination as the justification for the hearsay rule, in lieu of the inferential process that cross-examination serves, is reminiscent of another confusion between tools and thought pointed out by the German psychologist Gerd Gigerenzer.²²⁸ Some psychologists have relied on the usefulness of statistics as a check on human reasoning to argue that reasoning under conditions of uncertainty inherently conforms to a particular statistical theory, thus erroneously transforming a tool for analyzing thought into a theory about the essential nature of thought. Cross-examination may provide the best tool for testing testimonial evidence, but it is not the equivalent of the inferential process it serves.

224. Compare Paul Roberts and Chris Wilmore, *The Royal Commission on Criminal Justice: The Role of Forensic Science Evidence in Criminal Proceedings* 127 (HMSO, 1992) (discussing the use of this technique to discredit expert witnesses).

225. See F.R.E. 803(1)-(4), 803(6)-(23); Nance, 73 Iowa L. Rev. at 282 (cited in note 73). Moreover, if correcting for the absence of cross-examination were the purpose of the hearsay rules, statements of all unavailable declarants, who cannot be cross-examined, would be admissible.

226. See F.R.E. 407.

227. *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1524 (1st Cir. 1991); *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 887-88 (9th Cir. 1991). *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2797-98 (1993), relies heavily on cross-examination, yet considers peer review of novel scientific theories or methods an important determinant of the probative value of such theories or methods. Strongly emphasizing the importance of cross-examination (more strongly than apparent in *Daubert*) would require the persons conducting the peer review to testify in order for the novel theory to be admissible.

228. Gerd Gigerenzer, *From Tools to Theories: A Heuristic of Discovery in Cognitive Psychology*, 98 Psychol. Rev. 254, 259-64 (1991). See also Mueller, 76 Minn. L. Rev. at 382 (cited in note 5) (stating, "The point of the conventional argument is not that statements are unreliable unless cross-examined, which truly would be preposterous, but that factfinders—judges and juries alike, but especially juries—lack what they need to evaluate most untested statements.").

The conventional rationale for exceptions to the hearsay rule maintains that the data those exceptions admit without cross-examination are both necessary and reliable (or trustworthy).²²⁹ Each is a curious criterion. The use of the term "necessary" seems to imply that because the other data supporting a proposition at issue are thin, admission of the evidence is imperative. If the data supporting a proposition are thin, however, and that thinness would be the critical reason for admitting the evidence in question, then the court should simply exclude the evidence. The court could then allow the proffering party's opponent to move for a directed verdict.²³⁰ Otherwise, the court would allow the proponent to prolong a futile argument.

Premising exceptions on rulemakers' categorical judgments of reliability or trustworthiness is flawed in several ways.²³¹ First, despite claims to the contrary, rulemakers and courts that reflected on the question would likely concede that not all the evidence that meets the exceptions is necessarily sound. Otherwise, one excited utterance would withstand a motion for a new trial or a directed verdict. Judgments about the probative worth of evidence are highly qualified and *ex ante*. Second, courts or rulemakers who decide whether categories of evidence are categorically reliable thereby usurp the rightful function of factfinders who will hear the evidence in individual cases. The only support for that usurpation assumes that individual factfinders cannot evaluate evidence adequately, an implausible contention that also conflicts with the theoretical basis for using factfinders in litigation.

229. See, for example, John Henry Wigmore, *Evidence in Trials at Common Law* § 1420 at 204 (Little, Brown, 3d ed. 1940). If the term "necessity" refers to evidence that the party would consider necessary because of a lack of further evidence, then the necessity criterion essentially allows the proponent of the evidence to make a claim that otherwise inadmissible evidence should be admissible because the "proponent needs it to win." Swift, 75 Cal. L. Rev. at 1371 (cited in note 5). Note, 93 Harv. L. Rev. at 1800-03 (cited in note 98), points out that the necessity principle makes evidence admissible when its proponent needs it most, creating the greatest risk that the factfinder may overvalue it, and inadmissible when the proponent needs it least and there is thus minimal risk of overvaluation. *Id.* Moreover, a necessity standard seems to make admissibility turn on manipulations of the order of proof. *Id.*

230. The opposing party also might request a peremptory instruction.

231. This Article assumes, in accordance with such arguments, that reliability and trustworthiness imply a higher standard than the *ex ante* determination of utility the co-operative theory requires. See notes 98-106 and accompanying text. Professor Swift has pointed out that courts have used notions of trustworthiness or reliability to erode the categorical limits in various exceptions, particularly the residual exceptions. Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 Minn. L. Rev. 473, 492, 495, 503-04 (1992).

G. The Exceptions

1. A System of Rules that Requires Data to Facilitate the Evaluation of Communications

Critics of existing hearsay doctrine often assume that the only reason to classify a statement as hearsay is to render that statement inadmissible. As Morgan pointed out, that is not the case.²³² Instead, classifying a communication as hearsay creates an incentive for its proponent to produce information about the declarant, or the circumstances in which she communicated, to enable the factfinder to appraise the statement's probative value more efficiently. The exceptions require the proponent to produce data that, together with the statement, improve the utility of the evidence on the point for which the proponent offered it.²³³ Classifying a statement as nonhearsay, then, reduces the proponent's incentive and ultimately the availability of that information. Similarly, a court may classify a physical object as a document under the best evidence rule²³⁴ for reasons other than categorical exclusion. Two of these reasons relate to evaluation of the object: (i) having an original, or a good, copy of the object facilitates the evaluation of its probative value, and (ii) knowing that an object is an original or reasonably accurate copy ensures that the effort to evaluate the object is worthwhile.²³⁵

In a slightly different light, the exceptions to the hearsay rule require some minimal standard of possible impact, or likelihood of effect on the factfinder's decision, to warrant the jury's effort to evaluate the data. This standard reflects compliance with the co-operative strategy implicit in communication.²³⁶ If a statement is offered under Federal Rule 801 for the "truth" of the matter "asserted," in evaluating the evidence's probative value, the jury must infer the propositions that the statement communicated²³⁷ and the extent to which the statement indicates the truth of one or more of those propositions. The exceptions' requirements for supporting data help to

232. Morgan, 48 Harv. L. Rev. at 1147 (cited in note 47).

233. Because many statements represent familiar situations, the jury may simplify its task by using familiar knowledge in memory. See notes 54-72 and accompanying text. The large number of exceptions allowing admissibility of written statements may reflect relatively low need for further proof of context to allow interpretation of those statements, given the normally increased precision in writing. See Park, 86 Mich. L. Rev. at 72 n.85 (cited in note 51).

234. See F.R.E. 1001 et seq.

235. See Nance, 73 Iowa L. Rev. at 257 (cited in note 73).

236. See notes 54-65 and accompanying text.

237. See notes 189-91 and accompanying text.

conform the jury's inferential task to the demands those factfinders face in ordinary life—the source of the jury's expertise.²³⁸

This Article does not claim that the exceptions in the Federal Rules reflect optimum formulations for insuring that hearsay evidence warrants the processing effort necessary to evaluate it. The exceptions to the hearsay rule, however, provide data that help the factfinder to infer whether the speaker complied with the maxims of communication and the extent to which any compliance makes the statement useful evidence.²³⁹

The co-operative theory offered here accounts for class exceptions and is consistent with the existing class exceptions. The hearsay rule and its exceptions may seem an excessively complex scheme for governing inference. Considering the way people ordinarily convey knowledge about decisionmaking, however, the use of rules is fairly common. One study argues that using rules is an unavoidable step in teaching decisionmaking.²⁴⁰ Four cognitive scientists have demonstrated that a system involving a general rule, operating in default of exceptions that are in turn subject to a number of other exceptions, is more efficient for modeling a decision-making procedure than a single rule system or a system of several co-ordinate rules.²⁴¹

2. The Complexity of the System of Exceptions

Proponents of hearsay reform, or abolition of the hearsay rules, often argue that the system of exceptions and exclusions is too complicated and that the hearsay system makes too many unjustified categorical judgments about the utility of evidence.²⁴² They advocate flex-

238. In light of the residual exceptions to the hearsay rule, arguing that a particular piece of hearsay should be admitted because it is not dangerous assumes the hearsay should be exempt from the residual exceptions' notice requirements. See note 255 and accompanying text.

239. A discussion of specific exceptions would make this already lengthy Article unwieldy. For now, it is enough to note that Professor Swift's belief that the foundation for the excited utterance exception, F.R.E. 803(2), is too thin to ensure utility seems correct. Swift, 75 Cal. L. Rev. at 1405 (cited in note 5). On the other hand, the utility of evidence admissible under the business records exception, F.R.E. 803(6), is relatively uncontroversial. See, for example, Seigel, 72 B.U. L. Rev. at 934 (cited in note 55); Swift, 75 Cal. L. Rev. at 1359-60.

240. Hubert Dreyfus and Stuart Dreyfus, *Mind Over Machine: The Power of Human Intuition and Expertise in the Era of the Computer* 20-22 (New York Free Press, 1986).

241. John N. Holland, et al., *Induction: Processes of Inference, Learning, and Discovery*, 29-67 (M.I.T., 1986).

242. See, for example, Edmund M. Morgan and John M. Maguire, *Looking Forward and Backward at Evidence*, 50 Harv. L. Rev. 909, 921 (1937); Weinstein, 46 Iowa L. Rev. at 344-46 (cited in note 5); Brysh, Comment, 35 U. Pitt. L. Rev. at 615-16 (cited in note 5). Certainly, perceptions of the data that support a communication's utility have changed over time. See, for example, Inwinkelried, 41 Fla. L. Rev. at 231-39 (cited in note 40); Park, 70 Minn. L. Rev. at 1069 (cited in note 117).

ible standards, which would make the admissibility of hearsay dependent on criteria such as Federal Rule 403 or on the satisfaction of more general criteria such as the unavailability of the speaker or evidence about her honesty.

Although some current exceptions may require revision, using rules to separate admissible hearsay from inadmissible hearsay is beneficial for several reasons.²⁴³ Assume for the sake of argument that a class of hearsay exists that would always satisfy the criteria for optimal exceptions, or would satisfy them so often that a simple proviso to a rule admitting that category of data would be appropriate. Excepting that class of data from the hearsay prohibition would save a court time and conserve its resources by minimizing arguments over the admissibility of such data at trial. Such an exception also would conserve resources at the appellate level by specifying the criteria that the trial judge and the appellate court must use.²⁴⁴ To the extent that evidence rules can affect out-of-court conduct (such as a business record rule), these rules encourage persons to preserve evidence that is admissible under the rule and to adopt protocols, such as recordkeeping, that provide better evidence of their activities.²⁴⁵ More flexible standards would require parties to expend more resources to assure admissibility or forgo the benefits of advance planning.²⁴⁶

The benefits of categorical rules excluding evidence,²⁴⁷ such as Federal Rule 803(3)'s exclusion of "statements of memory or belief to prove the fact remembered or believed,"²⁴⁸ are similar. Such rules allow courts to dispose of frequently occurring problems with minimal

243. See Tillers and Schum, 76 Minn. L. Rev. at 857-58 & n.55 (cited in note 22).

244. Kaplow, 42 Duke L. J. at 563 (cited in note 54). Professor Swift points out one of the problems in relying on general rules, such as relevancy or F.R.E. 403, to govern the admissibility of hearsay: these rules are not sufficiently fine-grained to deal with the problems hearsay poses without reinstating a new system of common-law exceptions, in the case of relevancy, or employing an inapposite test, in the case of Rule 403. Swift, 75 Cal. L. Rev. at 499-503, 516 (cited in note 114). Finman, 14 Stan. L. Rev. at 702 (cited in note 28), referring to Rule 403's intellectual predecessor, agrees.

Moreover, any attempt to use a discretionary standard in lieu of the exceptions to simplify the admissibility rules is likely to fail. Mueller, 76 Minn. L. Rev. at 397 (cited in note 5), and Seigel, 72 B.U. L. Rev. at 914 (cited in note 55), point out that unless discretion under the standard is complete, it merely will substitute case-based complexity for rule-based complexity.

245. Kaplow, 42 Duke L. J. at 564 (cited in note 54). See Seigel, 72 B.U. L. Rev. at 914 (cited in note 55).

246. Kaplow, 42 Duke L. J. at 621. While hearsay rules may differ from the rules usually referenced in discussions of planning, for example, commercial and tort law, discussions of hearsay reform repeatedly stress the goal of avoiding unfair surprise. See, for example, Mueller, 76 Minn. L. Rev. at 396-97 (cited in note 5); Park, 86 Mich. L. Rev. at 62-63 (cited in note 51); Weinstein, 44 F.R.D. at 380 (cited in note 98).

247. Professor Seigel misunderstands the point in the text. Seigel, 72 B.U. L. Rev. at 915 n.69 (cited in note 55). The theory depends very little on categorical rules of inadmissibility, although some may be warranted.

248. F.R.E. 803(3).

resource expenditures. To the extent that exclusion of the evidence clearly affects the parties' relative likelihood of success, such rules encourage settlement and dispose of weak or questionable claims.²⁴⁹

Complaints about the number and complexity of hearsay exceptions generally are overstated. Because many cases involve only a few hearsay exceptions, and because particular exceptions such as the provision for records of religious organizations are used infrequently, the de jure number of exceptions can create a mistaken impression. The de facto²⁵⁰ complexity of the hearsay system is considerably less than one might think, particularly if one is currently studying for an evidence examination, or trying to draw distinctions between two related, seldom-used exceptions.²⁵¹

The residual exceptions²⁵² counter-balance the rigidity of the categorical exceptions. If data that do not fit a categorical exception nevertheless reveal that a communication has sufficient marginal utility for factfinding, the court may admit the data under a residual exception. Accordingly, arguments that particular sorts of communication should not be hearsay because they are reliable or trustworthy essentially parallel arguments that the proponent should not be subject to the requirements of the residual exceptions. In other words, these arguments not only would allow the proponent to dispense with

249. See note 117 and accompanying text.

250. See Kaplow, 42 Duke L. J. at 557 (cited in note 54).

251. For example, a search on the Westlaw system in the ALLFEDS data base on July 22, 1993, using the query EVI.R! FED.R.E.! F.R.E. F.R.EV! EVID! FED.EV! RULE FED.RULE! /3 (803 + 2 11 12 13 15 19 23) 803(11) 803 (12) 803 (13) 803 (15) 803 (19) 803 (23), yielded a total of seven citations for four hearsay exceptions. *Roberto v. Commissioner of Internal Revenue*, 774 F.2d 61 (2d Cir. 1985) (F.R.E. 803(11)); *Hall v. Commissioner of Internal Revenue*, 729 F.2d 632 (9th Cir. 1984) (same); *Benjamin v. Kelly*, No. 91 Civ. 0164 (VLB), 1993 WL 120379 (S.D.N.Y. Apr. 14, 1993) (F.R.E. 803(12)); *McMorrow v. Schweiker*, 561 F. Supp. 584 (D. N.J. 1982) (F.R.E. 803 (12) and (13)); *Compton v. Davis Oil Co.*, 607 F. Supp. 1221 (D. Wyo. 1985) (F.R.E. 803(15)); *DeRochemont v. Commissioner*, 62 T.C.M. (CCH) 1384 (T.C. 1991) (same).

252. F.R.E. 803(24), 804(b)(5). References to these exceptions do not imply that they are flawless, particularly in application. Their references to "equivalent circumstantial guarantees of trustworthiness" invite judges to substitute their judgments of the worth of evidence for criteria that facilitate the factfinders' evaluation of the evidence. "[I]f a federal judge believed that the Portuguese gentleman's statement was made under conditions suggesting its trustworthiness, Sir Walter [Raleigh] might fare no better today than he did under Elizabeth." Bergman, 75 Ky. L. J. at 883 (cited in note 9). For discussions of the difficulties with the residual exceptions, particularly as applied, see, for example, Imwinkelried, 41 Fla. L. Rev. at 246-50 (cited in note 40); Myrna Raeder, *The Hearsay Rule at Work: Has It Been Abolished by Judicial Discretion?*, 76 Minn. L. Rev. 507 (1992).

the notice requirement of the residual exceptions,²⁵³ but also to dispense with the requirement that the evidence be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."²⁵⁴ Avoiding the notice requirement would be incompatible with many suggestions for hearsay reform.²⁵⁵ In addition, eliminating the requirement that the court weigh probative value undermines the argument that the evidence should be considered nonhearsay because of its probative value.

Finally, persons who argue for more flexible, or less fact-based, standards of admission ignore humans' tendency to develop fixed criteria based on their prior decisions and experience. In other words, courts will inevitably develop fact-based exceptions, as illustrated in the highly questionable line of cases holding that questions do not fall within the hearsay rule because they are not statements.²⁵⁶ Such exceptions may unwisely allow the admission of an utterance such as, "Don't you think X is the murderer?" to show that X was the murderer on the theory that the communication was not a statement. While no formulae will avoid all anomalies, well-formulated rules can help the judge make efficient and effective admissibility decisions.²⁵⁷

A co-operative analysis of the flaws in the dangers theory indicates why hearsay doctrine must distinguish between communicative and non-communicative conduct and explains the role of the exceptions in winnowing useful hearsay from the chaff. The Article turns now to the main source of the complexity in American hearsay doctrine, the literalist heuristic and related strategies for truncating the definition of hearsay, to remove implied assertions from the reach of the hearsay rules.

253. Park, 74 Minn. L. Rev. at 838 (cited in note 5), argues that classifying implied assertions as hearsay would subject too much useful evidence to the notice requirements.

254. F.R.E. 803(24)(B), 804(b)(5)(B).

255. See, for example, Mueller, 76 Minn. L. Rev. at 410 (cited in note 5); Park, 86 Mich. L. Rev. at 117-18 (cited in note 51). See note 246.

256. See note 34 and accompanying text. Additionally, local practice frequently excludes from hearsay statements made in the presence of the party against whom they are offered. 2 *McCormick 4th*, § 246 at 98-99 (cited in note 8).

257. Consider F.R.E. 803(7) and 803(10), inserted to point out that the absence of entries in records, which is not hearsay under the rules, is admissible. The Committee inserted those rules to remedy frequent errors. F.R.E. 803(7) and 803(10), Advisory Committee's Notes.

V. THE CO-OPERATIVE THEORY IN PRACTICE

A. *Less Than Words Can Say: Implication in Communicative Conduct*

1. The Prototypical Case

Every analysis of implied assertions touches on *Wright v. Doe d. Tatham*.²⁵⁸ In *Wright*, the court examined whether certain letters²⁵⁹ sent to the testator should be admissible to show his competence. Although the letters each expressed some regard or respect for the testator, and two asked him to undertake some action,²⁶⁰ none explicitly addressed the testator's mental capacity. The court excluded the letters, offered to show the testator's mental capacity, as hearsay.²⁶¹ The case apparently has been debated ever since.

Under the co-operative theory, the letters are hearsay if offered to show the testator's competence because they are offered to show the writers' beliefs about the testator's cognitive capacities, a set of inferences that the writers would have generally intended²⁶² the testator to make. Consider, for instance, the statement of one of the writers, the testator's cousin, who said, "You should have been the first person in the world I would have wrote to. . . ." ²⁶³ The cousin could have meant to express, in varying degrees, respect, affection, solicitude given the testator's delicate condition,²⁶⁴ or any combination of the three. The cousin also might have meant to reassure the testator by falsely stating his opinion of the testator—tolling an innocuous he.

258. 7 Eng. Rep. 559 (H.L. 1838). For cases that consider *Wright* good law under the Federal Rules, see, for example, *Lyle v. Koehler*, 720 F.2d 426, 429-35 (6th Cir. 1983); *United States v. Ariza-Ibarra*, 605 F.2d 1216, 1222 (1st Cir. 1979). But see *United States v. Singer*, 687 F.2d 1135, 1147 (8th Cir. 1982), reh'g, 710 F.2d 431 (8th Cir. 1983), on remand, 575 F. Supp. 63 (D. Minn. 1983); *United States v. Snow*, 517 F.2d 441, 443-45 (9th Cir. 1975).

259. The lower court's opinion sets out all the letters. *Wright v. Doe d. Tatham*, 112 Eng. Rep. 488, 490-92 (Ex. Ch. 1837), aff'd, 7 Eng. Rep. 559 (H.L. 1838).

260. A letter from the vicar of Lancaster asked the testator to settle some litigation and to reply to the letter. *Wright*, 7 Eng. Rep. at 561. The testator's cousin asked him to relay greetings to relatives. *Id.* at 560.

261. *Id.* at 565, 575, 579, 583-84, 587, 592, 595-97.

262. Professor Park relies on his theory of communicative intention to smooth the roughest edges of the literalist heuristic. His theory, however, seems to use specific intention regarding *Wright*: "[I]t would violate ordinary conventions of language to say that the letters in *Wright v. Tatham* are offered to prove the truth of what they assert." Park, 74 Minn. L. Rev. at 800-01 (cited in note 5).

263. *Wright*, 7 Eng. Rep. at 560.

264. The Exchequer Chamber's decision reveals a fair amount of evidence suggesting that the testator was mentally unbalanced and perceived as such in the community. *Wright*, 112 Eng. Rep. at 490.

Without more data, the meaning that the cousin intended to convey is highly questionable. So too is the cousin's goal in communicating. Thus, without more evidence of the intentions of Marsden's correspondents, the letters' value as evidence does not warrant the effort necessary to evaluate them.²⁶⁵

Hearsay literalists and dangers approach advocates each tend to treat the correspondents' dispatch of the letters as the equivalent of nonverbal conduct.²⁶⁶ Apparently, they believe the letters are conduct rather than assertions because the letters do not precisely declare the testator's competence. This assumption ignores both empirical research and common experience. It ignores empirical evidence that the understanding of language is inherently inferential²⁶⁷ and an attempt to impose "literal" construction on assertions is therefore doomed to fail. Communication proceeds implicitly as well as explicitly. There is no reason to suppose that the writers in *Wright* would not have expected Marsden to make inferences about their opinions of him based on the letters.²⁶⁸ Writing Marsden would be pointless unless they could expect him to credit them with co-operation. Even if a declarant were to write, "While I don't necessarily agree with her conclusion, you might want to consider that Zelda is of opinion X," the declarant is, at the least, representing that Zelda's judgment X may be worthy of consideration.

Certainly there is no reason to treat a letter as anything other than an assertion²⁶⁹—it is, after all, meant to communicate. The question then is how one determines the scope of the assertion. If the hearsay rules serve a purpose that coheres with ordinary reasoning, the *Wright* letters should be hearsay for the purpose for which they were proffered. Further proof about the authors' intentions and co-operation is necessary to evaluate the letters as proof of Marsden's competency. In other words, further data are needed to (i) render the likely probative value of the evidence sufficient to warrant the

265. In any event, the letters were irrelevant. See note 274 and accompanying text.

266. See Wellborn, 61 Tex. L. Rev. at 58 (cited in note 17). Even Morgan, a dangers advocate who labelled the letters hearsay, may have considered the letters the equivalent of non-communicative conduct. Morgan, 62 Harv. L. Rev. at 207 (cited in note 5).

267. See notes 74-86, 134-54, and accompanying text.

268. See, for example, Vaughn C. Ball, *The Changing Shape of the Hearsay Rule*, 38 Ala. Law. 502, 507 (1977). Arguments that the letters do not convey any information about the recipient's mental abilities, yet are probative on the issue of competence, are anomalous; they are tantamount to arguing that mail addressed to "Occupant" should be admissible to show the recipient's competence.

269. McCormick concedes this point. 2 McCormick 4th § 250 at 111 (cited in note 8).

cognitive effort necessary to evaluate the letters and (ii) avoid any implication that the court endorsed evidence of questionable value.²⁷⁰

Dangers test advocates occasionally argue that the *Wright* letters are nonhearsay, contending that the letters do not pose hearsay dangers²⁷¹ sufficient to make the letters hearsay.²⁷² This position is another version of the argument that categorical reliability should determine whether hearsay is admissible.²⁷³ Even if reliability were the criterion, it would not save the *Wright* letters. In *Wright*, the letters were written no less than twenty-three years before the execution of the will in question, and twenty-six years before the codicil.²⁷⁴ Under those circumstances, and in view of the hearsay nature of the letters, their probative value did not warrant the factfinder's cognitive effort to evaluate them and they were rightfully excluded.

B. Related Techniques for Truncating Hearsay Rules

Hearsay reformers often have tried to remove statements from the definition of hearsay that even the literalist approach might otherwise treat as hearsay,²⁷⁵ many of which would be admissible under exceptions in any event.²⁷⁶ While the difference may seem trivial in many cases, it can cause considerable mischief in others.²⁷⁷ This subpart explores two attempts to truncate the reach of the hearsay rule.

1. Inferring Events from Knowledge

In *Bridges v. State*,²⁷⁸ the court held admissible as nonhearsay a child's description to police of the room in which she allegedly had been sexually molested, reasoning that the specificity of her description indicated she had knowledge of the defendant's room, which

270. See notes 87-90 and accompanying text.

271. These advocates may contend that the letters simply do not pose one specific danger: sincerity. See, for example, Allen and Kuhns, *An Analytical Approach to Evidence* at 321 (cited in note 15).

272. Lempert and Saltzburg, *A Modern Approach to Evidence* at 366-69 (cited in note 38).

273. See notes 229-31 and accompanying text.

274. Morgan, 62 Harv. L. Rev. at 208 n.67 (cited in note 5).

275. See, for example, 2 *McCormick 4th* § 249 at 102, 113-15 (cited in note 8).

276. Most so-called verbal parts of an act would be admissible as present sense impressions or declarations of present state of mind. McCormick also tries to exempt from hearsay treatment the statement "I believe I am Henry the Eighth" offered to show insanity, when it would be admissible under the state of mind exception, for essentially the same reasons that exception exists. *Id.* § 274 at 233.

277. See notes 299-300, 312-17, 321-23, and accompanying text.

278. 247 Wis. 350, 19 N.W.2d 529 (1945).

provided circumstantial evidence that she had been in the room.²⁷⁹ McCormick claims that other means of knowledge were eliminated in *Bridges*.²⁸⁰ That assumption is questionable,²⁸¹ but even if McCormick were correct, the appellate court in *Bridges* noted that the child's original out-of-court statement, made before there was any opportunity for police influence, was "not too much out of line, although it was not distinctive enough to be of much value either way."²⁸² This observation suggests that the child could have formulated the description based on unintentional cues provided by the police or her parents. In addition, if the question is whether a statement is offered "for the truth of the matter it asserts," the matter asserted does not vary with the sources of the declarant's knowledge. The child in *Bridges* implicitly assured the police and her parents that the room description she was providing would be useful in finding the person who had abused her.²⁸³ Jurors could not miss the child's implicit claim of co-operation for those purposes.

Dangers advocates who consider cases such as *Bridges* non-hearsay²⁸⁴ concede that inferences about the probative value of such statements necessarily involve judgments about the declarant's beliefs. They contend, however, that at least where the proffering party can negate a sufficient number of alternative sources of information, the fact that the declarant had sufficient knowledge of a non-public phenomenon to formulate a specific description is sufficient evidence of her access to the phenomenon to make the statement admissible.²⁸⁵ As Judge Weinstein pointed out in *United States v. Muscato*,²⁸⁶ however, such judgments are extremely questionable. In one Swedish case apparently identical to *Bridges*, the child gave a detailed description of the apartment, which authorities thought highly probative. Further inquiry revealed that the child dishonestly formulated a description based on prior exposure to another, basically identical, room in the same dormitory.²⁸⁷

279. *Bridges*, 19 N.W.2d at 535.

280. 2 *McCormick 4th* § 250 at 115 (cited in note 8).

281. Park, 65 Minn. L. Rev. at 438 n.47 (cited in note 8).

282. *Bridges*, 19 N.W.2d at 534.

283. See notes 184-85 and accompanying text.

284. See, for example, Lempert and Saltzburg, *A Modern Approach to Evidence* at 362 (cited in note 38). Contrast Graham, *Handbook of Federal Evidence* § 801.6 at 708 (cited in note 88); Edmund M. Morgan, *Evidence, 1941-1945*, 59 Harv. L. Rev. 481, 544 (1946).

285. See, for example, Lempert and Saltzburg, *A Modern Approach to Evidence* at 362 (cited in note 38). See Friedman, 96 Yale L. J. at 682-83 & nn.38, 40 (cited in note 22) (describing admissibility turning on uniqueness and specificity of description).

286. 534 F. Supp. 969, 977 (E.D.N.Y. 1982).

287. *Id.*

Attempting to distinguish hearsay from nonhearsay based on a conclusion that a particular statement poses only minimal hearsay dangers traps the court in the same logical circle as would any theory based on ex ante judgments of reliability.²⁸⁸ Although the jury is supposed to assess hearsay risks posed by the evidence, the dangers theory requires the court to perform that duty before the evidence is submitted to the jury. The court often would face such an issue in the absence of the data provided by the fulfillment of an exception, information that would make the assessment of those risks easier for the judge.

The point of treating the *Bridges* child's statement as hearsay is not to render it inadmissible,²⁸⁹ but rather to direct questions about the admissibility of the statement and similar communications through a matrix of exceptions that articulate criteria, based on factfinders' needs, for separating evidence that warrants admission from that which does not.²⁹⁰

One might argue that the child's action or assertion is irrelevant, and thus that its classification under the hearsay rule is peripheral. That is not the case, however, if one accepts the argument for nonhearsay treatment: that the statement is nonhearsay because the *Bridges* child had too few alternative sources of information, and so must have received the information from visiting the defendant's room. Adherence to that argument essentially would refute a relevance objection, and probably surmount an objection under Rule 403 as well. Even assuming that good reason to narrow the hearsay rule exists,²⁹¹ Professor Park, among others, has pointed out that makeshift concepts such as inferences from knowledge offered to show the basis for that knowledge²⁹² are vague enough to be troublesome and are essentially unsupported by any justification or criticism of hearsay doctrine.

Professor Bacigal²⁹³ cites a Virginia case, which relies on the same theory as *Bridges*, that might create the potential for an

288. See Note, 93 Harv. L. Rev. at 1805 (cited in note 98).

289. The *Bridges* statement might be admissible under a residual exception, Graham, *Handbook of Federal Evidence* § 801.6 at 708 (cited in note 88), or as a fresh account offered to negate jurors' inferences of recent fabrication, particularly in a child abuse case. Park, 65 Minn. L. Rev. at 441 (cited in note 8).

290. See generally notes 282-41 and accompanying text.

291. See note 17 and accompanying text.

292. For a discussion of such inferences, see *United States v. Muscato*, 534 F. Supp. 969, 974-80 (E.D.N.Y. 1982). Professor Park's discussion is in Park, 65 Minn. L. Rev. at 437-39 (cited in note 8).

293. Ronald J. Bacigal, *Implied Hearsay: Defusing the Battle Line Between Pragmatism and Theory*, 11 S.I.U. L. Rev. 1127, 1141 (1987).

injustice. In *Church v. Commonwealth*,²⁹⁴ the court received a child's statement discouraging her mother from having intercourse with the mother's husband because sex was "dirty, nasty and it hurt." Noting that the prosecution did not offer the statement to describe sex, the court held the statement to be nonhearsay against the mother's husband in a forcible sodomy prosecution to show that the child had "an attitude likely to have been created by a traumatic experience."²⁹⁵ The child's statement to her mother also implicitly communicated that the child had an adequate basis for her conclusion about sex, as part of her implicit claim of co-operation. The record in *Church* included evidence that indicated the child had been sexually abused, and that the husband was sexually aroused in the child's presence.²⁹⁶ The court did not, however, rely on the other evidence relating to the possibility of sexual abuse in admitting the child's statement. With all due respect to the Virginia court, it is extremely easy to imagine several non-traumatic sources for the child's attitude.²⁹⁷

As Professor Park notes, the rationale underlying the classification of statements such as those in *Bridges* and *Church* as nonhearsay, on the theory that they have circumstantial value without regard to their speakers' veracity, would eviscerate the hearsay rule.²⁹⁸ Any out-of-court statement that could accurately depict a phenomenon has some possible value for drawing inferences about that phenomenon; the question is whether the statement is sufficiently valuable to warrant admission. While a defender of *Church* might argue that no prosecutor would proceed without evidence of sexual abuse other than the child's statement,²⁹⁹ or that a trial court could direct a verdict³⁰⁰ for the defendant if the only evidence of sexual abuse were the child's statement, either argument proves too much. If the system were to rely on parties' judgments about the basis for their own claims, or on trial courts' action preempting judgments on thin evidence, rules of evidence, including hearsay rules, would be unnecessary. This Article now explores a

294. 230 Va. 208, 335 S.E.2d 823, 825 (1985).

295. *Id.* at 825-26.

296. *Id.*

297. Bacigal, 11 S.I.U. L. Rev. at 1143 (cited in note 293), notes that the child might have heard a friend make the statement, observed adults engaged in sexual intercourse, or heard the attitude expressed in mass media, particularly drama. Professor Page has told the Author that this attitude is common among children receiving their first information about human reproduction.

298. Park, 65 Minn. L. Rev. at 438 (cited in note 8).

299. On parties' incentives to use hearsay, see notes 114-15, 124-26, and accompanying text.

300. The availability of directed verdicts on such evidence in a civil case is at least suspect. See Swift, 75 Cal. L. Rev. at 503-06, 509-512, 516-18 (cited in note 114).

dramatic attempt to truncate the hearsay rule, ostensibly in the service of reform, that could have led to difficulties in application as well as inaccurate factfinding.

2. Requests as Hearsay

In a recent case from the House of Lords, *The Queen v. Kearley*,³⁰¹ police found amphetamines in Kearley's flat, which he shared with his wife and another man.³⁰² The wife and the other man each were convicted of offenses related to the possession of amphetamines.³⁰³ The police did not find a sufficient quantity of the drug to "give rise in itself to the inference that [Kearley intended to sell it]."³⁰⁴ Kearley was arrested and taken to the police station, but the police officers remained in his flat, receiving a number of telephone calls in which the caller asked for Kearley by a nickname and asked for drugs, apparently unspecified.³⁰⁵ Several visitors to the flat asked for Kearley and made additional unspecified requests for drugs.³⁰⁶ Kearley was either out of earshot or absent when the calls took place.³⁰⁷ The trial court admitted evidence of the calls, and convicted Kearley of possession with intent to supply.³⁰⁸ On appeal to the House of Lords, the issue was stated as whether one call would be admissible to show Kearley's intent to sell the drugs at issue.³⁰⁹ Kearley asserted that the other residents had placed the drugs in his flat and, apparently, had intended to sell the drugs.³¹⁰ The Court of Appeals had held that the calls were nonhearsay because they demonstrated that a market for drugs existed at the flat.³¹¹ The House of Lords held to the contrary, notwithstanding arguments that no call asserted that Kearley was selling drugs and that the Court of Appeals' reasoning was correct.

Taking the issue as posed to the House of Lords, the Crown clearly would have expected the factfinder to infer from the call that Kearley had sold drugs in the past, or had indicated that he was will-

301. 2 App. Cas. 228, 2 W.L.R. 656, 2 All E.R. 345 (H.L. 1992).

302. *Kearley*, 2 App. Cas. at 252, 2 W.L.R. at 673, 2 All E.R. at 361.

303. *Kearley*, 2 App. Cas. at 252, 2 W.L.R. at 673, 2 All E.R. at 361.

304. *Kearley*, 2 App. Cas. at 252, 2 W.L.R. at 673, 2 All E.R. at 361.

305. *Kearley*, 2 App. Cas. at 236, 2 W.L.R. at 658, 2 All E.R. at 347.

306. *Kearley*, 2 App. Cas. at 236, 2 W.L.R. at 658, 2 All E.R. at 347-48. Two visitors asked for the "usual amount." *Kearley*, 2 App. Cas. at 243, 2 W.L.R. at 665, 2 All E.R. at 354.

307. *Kearley*, 2 App. Cas. at 243, 2 W.L.R. at 674, 2 All E.R. at 362.

308. *Kearley*, 2 App. Cas. at 252, 2 W.L.R. at 673-74, 2 All E.R. at 361.

309. *Kearley*, 2 App. Cas. at 242, 2 W.L.R. at 664, 2 All E.R. at 353.

310. *Kearley*, 2 App. Cas. at 252-53, 2 W.L.R. at 674, 2 All E.R. at 361.

311. *Kearley*, 2 App. Cas. at 238, 2 W.L.R. at 660, 2 All E.R. at 349.

ing to do so at the time of the arrest. According to Grice's maxims, given the other evidence in the record, the factfinder could only assume that the caller intended to convey her belief that Kearley might be able and willing to sell her drugs, in reliance on the factfinders' imagination about the world of illegal drug use. Otherwise, the factfinders would conclude that the caller had tried to reach Kearley in a random quest for drugs. A random call would violate the conventions of communication, and create an extreme risk of arrest for those who called in person. Without further proof, however, there is no way to test a single caller's evidence, which would be critical to whether Kearley possessed the drug at issue with intent to sell.³¹² If one distinguishes between hearsay and nonhearsay in light of the jurors' need for information that enables them to assess the dangers of making inferences from a particular extra-judicial communication, a single call should be hearsay. Evaluating the communication would require information relating to the caller's compliance with the conventions of communication—essentially the reason the majority classified it as hearsay.³¹³

Arguing that the numerous calls were admissible to show a drug market existed at the flat is reminiscent of a strategy sometimes used to remove similar calls from the hearsay rule by labelling them verbal acts, or parts of acts. In cases in which police have conducted a raid and answered calls during the raid seeking to place bets or order drugs,³¹⁴ courts often have admitted such calls as verbal parts of acts. If proof of reputation or character of the premises were an element of the crime, classifying the calls as verbal parts of acts "when under the substantive law the pertinent inquiry is directed only to objective manifestations rather than to the actual intent or other state of mind of the actor"³¹⁵ might make sense. If, on the other hand, one argues

312. The buyers might have heard that drugs were available at the house, known Kearley beforehand, and connected the two on their own, demonstrating that Kearley was not necessarily willing to sell the drugs. See Seidelson, 24 *Duquesne L. Rev.* at 767 (cited in note 36) (noting, in a closely analogous hearsay problem, the possibility of alternative explanations for calls offering to place bets, often considered nonhearsay in gambling prosecutions).

313. In reading the *Kearley* case, one should be aware that the hearsay exceptions in English criminal courts are much more narrow than those in the United States. The dissents in *Kearley*, therefore, may have been partially motivated by the vastly increased difficulty of admitting hearsay in English courts.

314. See, for example, *State v. Tolisano*, 136 Conn. 210, 70 A.2d 118 (1949) (admitting testimony that calls were received from parties seeking to place bets as evidence that bets were being placed); *United States v. Gaines*, 726 F. Supp. 1457 (E.D. Pa.), *aff'd*, 902 F.2d 1558 (3d. Cir. 1989) (admitting testimony of the police as to telephone calls received at the defendant's apartment as evidence that the apartment and its occupants were a known source of drugs). See 2 *McCormick 4th* § 249 at 102 n.7 (cited in note 8).

315. See 2 *McCormick 4th* § 249 at 102 (cited in note 8). In *Tolisano*, the defendant was charged with "maintaining a room with apparatus and devices for the purpose of making,

that the call indicates that the callers' willingness to give information about themselves "and speak with anyone who answered is evidence that anyone present likely was"³¹⁶ taking bets or selling drugs, then the calls are not offered to show any objective manifestations in order to satisfy a substantive standard. The callers' putative willingness to buy drugs from Kearley revealed nothing other than, at most, his reputation or prior actions.³¹⁷ Concededly, courts may be willing to ignore the rules governing proof of character or reputation to the extent a large number of calls, which do not seem inspired by the same source, shows that the evidence warrants the factfinders' efforts to evaluate it. That willingness has little to do with the way the callers word their statements, however, or with arguments that proof of the defendant's conduct or intention is somehow subject to an objective standard.

The *Kearley* case was probably correct to classify the calls as hearsay. Certainly, it was correct as the issue was posed to the House of Lords—whether a single call would be hearsay. Without more evidence bearing on the caller's implicit claim of co-operation, and because the other tenants could have been selling the amphetamine, classifying a single call as hearsay would ultimately serve ordinary reasoning. Moreover, classifying the call as hearsay would prevent convictions based on highly risky evidence, which police might otherwise try to fabricate, since the defense could not have effectively refuted police claims that a call had occurred in Kearley's absence.³¹⁸

recording, or registering bets or wages." *Tolisano*, 70 A.2d at 118. From this charge emerges a very weak potential argument about the character of the premises: that the premises were a gambling den, and the defendant had reason to know it.

316. *Gaines*, 726 F.2d at 1468.

317. See *Kearley*, 2 App. Cas. at 273, 2 W.L.R. at 693, 2 All E.R. at 378. Kearley admitted a prior illegal transfer of other quantities of amphetamine. 2 App. Cas. at 252, 2 W.L.R. at 673, 2 All E.R. at 361. He did not argue that he accidentally possessed the amphetamine involved in the count on appeal, but rather that he *did not* possess the amphetamine at issue, nor did he possess it for sale. 2 App. Cas. at 252, 2 W.L.R. at 674, 2 All E.R. at 361.

318. *People v. Scalzi*, 126 Cal. App. 3d 901, 179 Cal. Rptr. 61 (Cal. Ct. App. 1981), a closely analogous California case, reached the same conclusion. The defendant, John Scalzi, arrested at the home of friends during a narcotics raid, testified he was there to borrow grocery money. *Id.* at 61. He was convicted of conspiracy to sell, and possession for the sale of, methamphetamine. *Id.* Evidence linking Scalzi to the drugs was "thin." *Id.* at 62. One policeman testified that during the raid, he answered the telephone at the apartment. The anonymous caller asked if "John was there," "if he had taken care of business," and "if John had gotten it bagged up." *Id.* at 62. The court held the telephone conversation inadmissible hearsay because it was offered to show that Scalzi was bagging drugs for sale. *Id.* at 63-64. No evidence established the source of the caller's information, its reliability, or her motivation to be accurate, making evaluation of her implicit claim impossible. On the other hand, the vast majority of American cases treat such statements as nonhearsay. See, for example, *Mueller*, 76 Minn. L. Rev. at 413 n.133 (cited in note 5).

C. Practical Consequences

Hearsay doctrine has proceeded on somewhat inaccurate assumptions about communication, resulting in a good share of the complexity that engenders criticism of the hearsay rules. Although this Article does not propose any changes in the wording of the Federal Rules, a critic might raise objections, analogous to those Professor Park raised, to the possibility that the rulemakers might adopt the dangers analysis's definition of hearsay. First, whether using the literalist heuristic has led to injustice is unclear.³¹⁹ Second, the courts have evolved a number of standards under the Federal Rules that admit useful evidence, and might be unavailable under other understandings of the definition of hearsay without amendment of the rules.³²⁰

The question of whether the literalist analysis of hearsay leads to injustice depends on the facts in litigated cases. A trial court may admit fairly rank hearsay, yet the appellate court might not reverse if the other evidence of guilt made the error harmless. Although one could not say the trial court worked an injustice, it clearly erred. On the other hand, in cases in which the communication is critical evidence, courts may refuse to rely on the literalist understanding.³²¹ *People v. Scalzi*³²² provides an example. Had the court decided *Scalzi* otherwise, and were the facts as the opinion indicates, the police officer's testimony about the intercepted phone call³²³ would simply be too consistent with a frame-up to warrant a conviction. If the facts were similar to those put to the House of Lords in *Kearley*, and only one call was offered to show possession with intent to sell, a conviction based on that evidence would be dubious at best. The courts in those two cases avoided errors not because they relied on the literalist view, but because they abandoned it. The co-operative theory articulates the intuition on which courts such as those in *Scalzi* and *Kearley* relied to repudiate the literalist heuristic. It appears that adherence to the literalist heuristic may lead to injustice.

319. Park, 74 Minn. L. Rev. at 836 (cited in note 5).

320. *Id.* at 837-38.

321. Park believes this phenomenon explains *Scalzi*. *Id.* at 812-13 n.151. *Park v. Huff*, 493 F.2d 923, 925 (5th Cir. 1974), finding an implied assertion hearsay, noted that the evidence was "crucial" and "devastating." The court likely would examine more closely the wisdom of admitting critical evidence as nonhearsay, and would be more willing to set aside applications of a heuristic principle in such circumstances. Park, 74 Minn. L. Rev. at 827-28 (cited in note 5), notes that courts tend to apply the literalist heuristic "in situations in which the [hearsay] dangers are minimal." On the other hand, the cases do not lend themselves to precise comparisons.

322. 126 Cal. App. 3d 901, 179 Cal. Rptr. 61 (Cal. Ct. App. 1981). See note 318.

323. *Scalzi*, 179 Cal. Rptr. at 62.

Additionally, keep in mind that rules of evidence do not merely restate sufficiency criteria. Admissibility rules seek to tailor the factfinder's task³²⁴ properly by balancing deference to the factfinder with the necessities of communication and the bounds of the jury's role. Admissibility rules do more than avoid the receipt of evidence that inevitably will lead to incorrect verdicts. Receipt of hearsay can be an error, therefore, even though a particular decision to admit evidence may not inevitably lead to an incorrect verdict. If rules of admissibility were equivalent to rules of sufficiency, they would create one of two anomalous outcomes: Judges who refused to admit evidence unless it provided a sufficient basis, in their eyes, for a verdict would have a stranglehold on juries' discretion. Alternatively, judges could rely on their ability to direct a verdict as an *ex post* control, in which case rules of admissibility would be pointless.

Insofar as defenders of the literalist heuristic argue that rulings consistent with the theory admit useful evidence that is not otherwise admissible, the question is why the evidence is useful and why it is not otherwise admissible. If the evidence is inadmissible because it would not satisfy the residual exceptions, then the case for admission is hardly compelling. Similarly, if one argues that the evidence is necessary because the proffering party has little or no other evidence, the lack of evidence, if anything, supports exclusion. On the other hand, the argument might be another way of contending that classifying implied assertions as hearsay would force overuse of the residual exceptions.

Because it seems difficult to square the language of the rule and the Advisory Committee's comment with the literalist heuristic, courts should not impute the literalist view to Congress,³²⁵ and instead should directly confront whether a particular implied assertion fits within an exception. Adopting the co-operative view that implied assertions from communicative conduct are hearsay will encourage more realistic treatment of hearsay reform issues, producing more workable exceptions in the long run (including modification of the residual exceptions).³²⁶ Finally, even if courts who rely on the literalist

324. In narrowing the reach of the hearsay classification, American courts (particularly appellate courts) could be relying on the context in which they address legal problems: primarily in formal writing, in which communication is less context-dependent and in which one can more sensibly speak of the true or timeless meaning of a statement or series of words. Thus, the appellate courts may construe communications more narrowly, as if the communications were on paper.

325. See notes 175-88 and accompanying text.

326. Any argument for classifying implied assertions as nonhearsay under the current rules, rather than remitting them to the residual or other exceptions, would have to rely on the Advisory Committee's Note to 801(a), which predated the current form of Rule 804. Seidelson, 24

heuristic admit useful evidence, the test is hardly an unalloyed blessing. Consider the uniform, virtually automatic classification of questions as nonhearsay. It is doubtful that an approach that encourages such wooden principles is without practical disadvantages. Although judicial intuitions may have prevented any disasters to date, the literalist heuristic's hearsay doctrine is arcane and artificial, and thus fertile ground for formal manipulation in the service of shallow analysis.

VI. CONCLUSION

Cognitive science is rich in new ideas for the study of inference and evidence. It offers insights that courts and commentators can use in the absence of equations or knowledge about artificial intelligence. Findings about the limited nature of humans' mental workspace un-

Duquesne L. Rev. at 750 (cited in note 36). Rule 804, as proposed when the Note was drafted, was more permissive than the current rule. Proposed Rules of Evidence for the United States District Courts & Magistrates, Prop. R. Evid. 8-01(a), Advisory Committee's Note, Prop. R. Evid. 8-04(a) (Prelim. Draft 1969), reprinted in 46 F.R.D. 161 (1969). See Seidelson, 24 Duquesne L. Rev. at 749-50. Accordingly, it is difficult to read the residual exceptions to imply limitations on the treatment of implied assertions in the comment to F.R.E. 801(a). Although classifying implied assertions as nonhearsay might lead to use of the residual exceptions beyond that intended by the Advisory Committee, it is doubtful that Congress intended to adopt the literalist heuristic. In addition, a growing number of scholars believe the residual exceptions are in need of reform in any event. See note 252. Accordingly, the case for admitting hearsay that cannot meet the residual exceptions as written is not particularly compelling.

Professor Weissenberger recently argued similarly that the literalist heuristic suited the rulemakers because it would avoid a number of problems with the *Hillmon* doctrine. He points out that if one offers A's statement, "I'm going to the store tonight with B," along with evidence that A went to the store that night, to show B was present at the store that night, the proffering party is relying on an implied assertion about B's intention—that B has agreed, and indeed plans, to go to the store with A. Weissenberger, 64 Temple L. Rev. at 162-63 (cited in note 40). The literalist approach therefore allows the evidence against B by classifying the implied assertion about B's intention as nonhearsay. This argument has at least two flaws. First, it is doubtful that Congress intended to allow the statement to show B's behavior. See House Comm. on Judiciary, Fed. Rules of Evidence, H.R. Rep. No. 650, 93d Cong., 1st Sess. 13 (1973); 1974 U.S.C.C.A.N. 7075, 7087. Accordingly, the lawmakers most likely did not share Professor Weissenberger's understanding of the effect of Rules 801 and 803(3). Second, and more technically, because the statement about B's plans does not mention the sources of the information contained therein, the statement necessarily communicates A's belief that B planned to go to the store with A. F.R.E. 803(3) would not except A's assertion of belief about B's plans, offered to show the truth of the fact believed, from the hearsay prohibition. Professor Weissenberger does not analyze the apparent conflict between his reliance on the Advisory Committee's assumption that implied assertions are not sufficiently dangerous to warrant exclusion as hearsay and their insistence that statements of belief should be inadmissible to show the truth of the fact believed. F.R.E. 803(3), Advisory Committee's Note. In favor of admission, Professor Weissenberger might argue that a statement like A's would almost always result from B's communication of B's plans, and that A's repetition of those plans might have occurred in a context that would satisfy a hearsay exception. Although accepting that argument might entail abandonment of *Shepard v. United States*, 290 U.S. 96 (1933), overruled on other grounds by *Chapman v. California*, 386 U.S. 18 (1967), this Article sets aside that question, and questions about the proper effect of *Hillmon*, for another time.

underscore the importance of communicating to the jury only those data sufficiently useful to warrant the jury's cognitive effort to evaluate those data. Rules of admissibility need not be drawn from a skeptical view of jurors' abilities; rather, they recognize the value of the jurors' experience in the context of a system in which the factfinder passively depends on the parties, and, in jury trials, on the judge.

More specifically, cognitive research shows that understanding and evaluating communication is an inferential process. When a party offers an out-of-court statement as evidence of an event about which the speaker communicated, the jury's function requires that the parties provide data that will allow the jury to appraise the speaker's intentions in making the statement, as well as the speaker's implicit claim of co-operation. The exceptions to the hearsay rule require that the offering party provide such data as a foundation for hearsay statements.

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. Classifying assertions implied from communicative conduct as hearsay facilitates factfinders' use of their experience in informal reasoning at trial—albeit with a rule some consider elitist.

