

ARTICLE: Assertion and Hearsay

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Highlight

Abstract

This article explores the characteristics and functions of assertion and considers how the term influences the definition of hearsay under Federal Rule of Evidence 801. Rule 801(a) defines hearsay by limiting it to words and conduct intended as an assertion, but the rule does not define the term assertion. Courts and legal scholars have focused relatively little attention on the nature and definition of assertion. That is unfortunate, because assertion is a robust concept that has been the subject of intense philosophic study over recent decades. Assertion is not a mere cypher standing in for whatever speech or conduct one decides to subject to the hearsay exclusionary rule, although that is how the term is often treated by the legal profession. I conclude with recommendations about how to better handle some hearsay problems that center on the definition of assertion.

Text

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Introduction

An utterance ¹has to be an "assertion" to qualify as hearsay under Federal Rule of Evidence ("Rule") ²801, but the rule does not define "assertion." ³Rule 801 limits the definition of hearsay to an out-of-court assertion introduced to prove its truth. ⁴Some jurisdictions have adopted a broader definition under which so-

¹ I use the word "utterance" to refer to speech or writing of whatever sort, whether a "statement" or not, because the word "statement" is a defined term under Federal Rule of Evidence 801(a) that applies only to certain carefully chosen types of utterances. I use "utterance" the way Searle uses it: "Utterance acts consist simply in uttering strings of words." See John R. Searle, *Speech Acts* 24 (1969). See also John L. Austin, *How To Do Things With Words* 2 (2d ed. 1975) (using utterance in a similar way).

² For brevity, I will use the word "Rule" to refer to the Federal Rules of Evidence. All other rules are referred to more specifically.

³ See Fed. R. Evid. 801(a).

called "implied" and "unintentional" assertions come within the definition of hearsay.⁵ The debate about whether the definition of hearsay should cover more than assertions introduced as such has a long and absorbing history. Evidence scholars sometimes treat the [*350] word "assertion" as having a relatively indeterminate meaning, as if the policy underlying the hearsay rule serves to define what is meant by "assertion," rather than the meaning of "assertion" working to define hearsay.⁶ But the concept of assertion deserves better. Assertion is not an indeterminate placeholder used in Rule 801 to signify "whatever utterances should be excluded under the policies driving the hearsay rule." The meaning of assertion is independent of the hearsay rule and quite determinate. Further, the meaning of assertion limits the reach of Rule 801 in significant and sometimes poorly understood ways. This article is an effort to supply some clarity about the meaning of the term "assertion" using sources outside the hearsay debate.

Those sources reveal that "assertion" refers to a specific category of intentional utterances, which operate differently than other types of utterances. The attributes of assertion not only define hearsay but also shape basic notions of relevance and dictate how trial is conducted.

I put assertion in context by first considering the function of hearsay as an exclusionary rule, the details of hearsay's definition, and hearsay's relationship to more general relevance and witness rules. I then turn to the attributes and functions of assertion, describe how assertions and non-assertions follow different paths to relevance at trial, and discuss how trial rules echo and enhance the attributes of assertion in everyday speech. I then consider Rules 801(d)(1) and (d)(2) as a set of special cases of utterances that typically have both "assertional"⁸ and

⁴ Rule 802 excludes hearsay, defined under Rule 801, unless a specified exception applies. This article focuses on the definition of hearsay, not the exceptions spelled out in Rules 803 and 804.

⁵ See, e.g., *Stoddard v. State*, 887 A.2d 564, 580 (Md. 2005); but see Lindsey N. Lanzendorfer, *Garner v. State: Maryland's Implied Retreat From Implied Assertions*, 71 Md. L. Rev. 619, 619-20 (2012) (pointing out that the Maryland Supreme Court has since retreated from *Stoddard*'s holding that "implied assertions" were covered by the hearsay rule).

⁶ See John Henry Wigmore, *A Treatise On The Anglo-American System Of Evidence In Trials At Common Law* § 1362, at 3 (4th ed. 2019 & Supp. 1985) (detailing the history of hearsay and its relation to the notion of assertion); Paul R. Rice, *Should Unintended Implications Of Speech Be Considered Nonhearsay?* 65 Temp. L. Rev. 529, 531-32 (1992) (criticizing the limitation of hearsay coverage to assertions); Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 Stan. L. Rev. 682, 684 (1962) (same); John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 Vand. L. Rev. 741, 769 (1961) (advocating a flexible definition of hearsay that would generally be limited to assertions but provides for its extension to non-assertional language and conduct when dangers of ambiguity, perception, memory, and sincerity exist); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 214-17 (1948) (critiquing the limitation of hearsay coverage to assertions); Judson F. Falknor, *Silence as Hearsay*, 89 U. Pa. L. Rev. 192, 193 (1940) (recommending a definition of hearsay that covers more than assertions); Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 Harv. L. Rev. 1138, 1143 (1935) (arguing for a broadly inclusive definition of hearsay); Charles T. McCormack, *The Borderland of Hearsay*, 39 Yale L.J. 489, 504 (1930) (advocating a relaxed rule of discretion to admit non-assertional actions or utterances); Eugene Seligman, *An Exception to the Hearsay Rule*, 26 Harv. L. Rev. 146, 153 (1912) (advocating a hearsay rule that excludes inferences drawn from utterances or actions that depend upon an evaluation of the speaker or actor's credibility).

⁷ See, e.g., Margaret A. Berger, *How Would or Should the Supreme Court Interpret the Definitions in Rule 801?* 16 Miss. C. L. Rev. 13, 19 (1995).

⁸ "Assertoric" is used among philosophers to describe assertion-like qualities, going back at least to Frege. See Michael Dummett, *Frege: Philosophy of Language* 302-03 (2d ed. 1981). The choices, if one is to use the root-word "assert," seem limited to "assertoric," "assertional," or "assertive." The last is too suggestive of well-known and different meanings, and therefore ambiguous. "Assertoric" has the benefit of being singularly identified with a philosophical meaning, and therefore less likely to confuse. Nevertheless, the word is so ugly and unfamiliar that it is a distraction. "Assertional" "is ... less ugly, more tractable, and more traditional in formation." Cf. Austin, *supra* note 1, at 6 n.3 (justifying his choice of "performative" instead of "performatory"). I will use "assertional" in the same way others have used "assertoric": to describe an assertion-like quality, as in "assertoric force." See Dummett, *supra*, at 303.

"non-assertional" (or "if uttered") relevance, and so are exempted from the general ban on hearsay. I conclude with a few remarks about how certain hearsay problems might be better handled.

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I. Hearsay's context and definition

A. Hearsay as an Exclusionary Rule

Hearsay is a species of exclusionary rule. Rule 402 makes all relevant evidence admissible, subject to exceptions derived from the Constitution, statutes, or rules.⁹ Rules 402 and 403 establish a presumption that relevant evidence should be admitted: the "iron rule of relevance."¹⁰ As with all exclusionary rules,¹¹ Rule 802, which makes hearsay inadmissible, is an exception to the general preference to admit all relevant evidence in aid of the jury's task: determining and declaring the truth.¹² Exclusionary rules, including Rule 802, withhold evidence, even if highly relevant, from a jury. This withholding is problematic, given the gravity of the jury's duties. Courts apply exclusionary rules only when the benefits outweigh the "substantial social costs" of exclusion, principally the toll on truth seeking.¹³ This bias in favor of admitting relevant evidence tends to confine the hearsay rule within narrow definitional limits and to foster exceptions to the rule.

B. Under Rule 801 Hearsay is Limited to Assertions Used as Such

The hearsay rules generally exclude assertions, as well as non-verbal conduct intended as an assertion, that are not made before the jury at trial. Rule 801 defines hearsay in three sub-sections, the first two of which lay the groundwork for the third:

(a) "Statement" means (1) a person's oral or written assertion, or (2) a person's nonverbal conduct, if the person intended it as an assertion.

(b) "Declarant" means the person who made the statement.

[*352] (c) "Hearsay" means a prior statement - one that the declarant does not make while testifying at the current trial or hearing - that a party offers in evidence to prove the truth of the matter asserted in the statement.¹⁴

There are three dimensions to this definition: (1) the type of utterance made, (2) the circumstances under which the utterance is made, and (3) the use to which the utterance is put at trial.

⁹ Fed. R. Evid. 402 advisory committee's note ("The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible ... constitute the foundation upon which the structure of admission and exclusion rests.").

¹⁰ [United States v. McRae, 593 F.2d 700, 707 \(5th Cir. 1979\)](#); see [United States v. Mateos, 623 F.3d 1350, 1364 \(11th Cir. 2010\)](#); [United States v. Messino, 181 F.3d 826, 830 \(7th Cir. 1999\)](#); [United States v. Sussman, 709 F.3d 155, 173 \(3d Cir. 2013\)](#) (citing [United States v. Cross, 308 F.3d 308, 323 \(3d Cir. 2002\)](#)).

¹¹ See [Chambers v. Mississippi, 410 U.S. 284, 302 \(1973\)](#) ("perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay..."); [Crawford v. Washington, 541 U.S. 36, 69 n.1 \(2004\)](#) (Rehnquist, C.J., concurring) (hearsay exclusion is the general rule, to which there have always been exceptions).

¹² Cf. [Herring v. United States, 555 U.S. 135, 140 \(2009\)](#) (quoting [Hudson v. Michigan, 547 U.S. 586, 591 \(2006\)](#)) (even in the context of Constitutional violations, exclusion "has always been our last resort, not our first impulse").

¹³ [Id. at 141](#) (internal quotation and citation omitted).

¹⁴ Fed. R. Evid. 801(a)-(c).

The first dimension requires that, to be hearsay, an utterance must have been a "statement." A "statement" boils down to words, writings, or actions intended as an "assertion."¹⁵ The second dimension of the definition of hearsay is focused on the physical circumstances of how and when a "statement" is made. This dimension manifests itself in two definitional components of Rule 801. First, a "declarant" is defined as a person who makes a statement. Second, the hearsay rule applies only to statements that a "declarant does not make while testifying at the current trial or hearing."¹⁶

The third dimension of hearsay concerns the use to which a statement is put at trial. It is not enough that a speaker intends to utter an assertion¹⁷ when the utterance is made. The use to which the statement is put at trial must be assertional, as well: the utterance must be introduced "to prove the truth of the matter asserted."¹⁸ To paraphrase the language of Rule 401, the truth of the assertion must be a necessary link in the relevance of the utterance to some fact of consequence in the litigation.¹⁹ I will call this "assertional relevance." An utterance having assertional relevance at trial means that its relevance depends upon its character as an assertion, **[*353]** not on some collateral inference derived from other circumstances connected with the utterance.

If an utterance fails to meet any of the three definitional requirements, the utterance is not "hearsay" within the meaning of the rule, and the general ban contained in Rule 802 does not apply. Such an utterance is still subject to other evidence rules, such as the more generalized relevance and witness rules.²⁰

C. Hearsay is Both a Relevance and a Witness Rule

The relevance rules limit the range of evidence that may be considered by a jury, measured by the reasonableness and reliability of the inferences connecting the evidence to issues in dispute.²¹ The witness rules impose broad limits on who may and may not be a witness²² and provide a detailed set of rules on how a witness may be questioned.²³ The witness rules test a witness's reliability along two axes (1) the witness's

¹⁵ A "statement," under Rule 801(a), includes both written and oral assertions, as well as non-verbal acts if they are made with the intent to communicate an assertion. Some non-verbal conduct may be intended as an assertion, for instance, an emphatic up-and-down nod of the head ("yes") when asked the question "did you shoot him?" "Some nonverbal conduct ... is clearly the equivalent of words, assertive in nature, and to be regarded as a statement." Fed. R. Evid. 801 advisory committee's note. While there is no doubt that certain non-verbal conduct can function as an assertion, I will not be concerned with non-verbal assertions during the course of this article.

¹⁶ Fed. R. Evid. 801(b), (c)(1).

¹⁷ Notably left out of the definition of hearsay are utterances in which a state of facts is presumed but not asserted, which are often identified - misleadingly - as "implied assertions." See, e.g., [United States v. Lewis, 902 F.2d 1176, 1179 \(5th Cir. 1990\)](#); [United States v. Long, 905 F.2d 1572, 1579-80 \(D.C. Cir. 1990\)](#). More about indirect, implied, and veiled assertions later. See *infra* Section 5(C).

¹⁸ Fed. R. Evid. 801(c).

¹⁹ Fed. R. Evid. 401.

²⁰ See, e.g., Fed. R. Evid. 402, 403, 602.

²¹ See Fed. R. Evid. 401-15.

²² See Fed. R. Evid. 601-06.

²³ Rules 607-13 detail the manner of direct examination, cross-examination and impeachment.

mechanical reliability - her capacity to perceive, remember, and communicate events accurately - and (2) the witness's epistemic reliability.²⁴

The hearsay rules mark a confluence of the rules of relevance²⁵ and the witness rules.²⁶ Hearsay is a type of witness rule because it limits who may testify to a "statement" introduced for its truth: the speaker alone.²⁷ Hearsay is also a relevance rule because its exclusionary sanction is based on a judgment about when it is reasonable to accept an assertion as making a fact of consequence more likely. The judgment underlying the hearsay rules is that generally an inference that an assertion is true is insufficiently reliable unless the [354] assertion is made by the declarant herself before the jury, subject to observation and challenge. An implicit premise of this judgment is that an assertion, as a form of utterance, has a strong tendency to persuade human beings of the truth of its embedded proposition of fact. Because an assertion carries this strong tendency, courts cannot depend upon a jury to divine and resist unwarranted assertions, unless the assertions are made under the special conditions of trial.²⁸ The special conditions of trial provide a series of measures designed to ensure that the jury receives straightforward and truthful assertions from witnesses having personal knowledge of the facts asserted and to guard against or remedy false and unwarranted assertions.²⁹

D.

"Transport" Problems with Evidence

All evidence presents two fundamental issues that trial rules try to cope with: first, the substance of the evidence, that is, what the evidence reveals about past events; and second, the way in which the evidence arrives at the factfinder's doorstep. Evidence is a device by which information is transported from the past - of the disputed events - to the present - of the trial. Each piece of evidence carries potential "transportation" issues in addition to its packet of substantive information. The transportation process can corrupt or degrade the substantive information conveyed.

If at trial one plays a video recording of a defendant selling heroin, the jury must consider whether the visual recording accurately reflects what happened at the time of the sale. Various issues, such as the lighting, the angle, the editing, or what happened off-screen, may affect the informational value of the video.

²⁴ By a "witness's epistemic reliability" I mean how reliably a witness knows a fact to which she is testifying. See Fed. R. Evid. 602 (requiring evidence that a witness have "personal knowledge of the matter" to which she testifies). This rule requires direct sensory perception by the testifying witness, if the event is capable of sensory perception. See [United States v. Cuti](#), [720 F.3d 453, 458 \(2d Cir. 2013\)](#) (citing to the Advisory Committee Notes). See also Fed. R. Evid. 603 (requiring an oath); 607 (permitting impeachment); 608 (permitting evidence of a character for untruthfulness to impeach a witness); 609 (permitting evidence of a prior conviction to impeach a witness); 611 (controlling the order and manner of interrogation, and permitting leading questions on cross-examination); 613 (permitting evidence of the witness's prior inconsistent statement to impeach); 615 (permitting the exclusion of witnesses to ensure they testify from their own knowledge).

²⁵ The 400 series (Fed. R. Evid. 401-15).

²⁶ The 600 series (Fed. R. Evid. 601-15).

²⁷ There are exemptions and exceptions, but this is the general rule.

²⁸ There are many exceptions to this general rule. The exceptions purport to account for circumstances in which lying or lacking knowledge is less likely, or to put it affirmatively, truth-telling and well-groundedness seem more likely. See Fed. R. Evid. 803-04.

²⁹ At least six correctives spring to mind: 1) the oath and penalty of perjury, 2) a compulsory question and answer format, 3) adversarial cross-examination, 4) the social and psychological pressure exerted on a witness through being observed by strangers as she speaks in a foreign and intimidating environment, 5) the factfinder's evaluation of the witness as the witness testifies, and 6) the right to rebut false evidence with correct information.

Most evidence at trial is preserved and communicated through witnesses. Witnesses present two different kinds of "transportation" issues. They bring to court any perception, memory, and communication problems they may have.³⁰ These problems are [*355] similar to the concerns that attend mechanical evidence, such as a video recording.³¹ A video may have a better or worse point of view (perception), better or worse visual quality (memory), and better or worse courtroom playback capability (communication).

Human perception and memory serve the needs of the human who perceives and remembers. Humans do not exist to record; they record to exist. Memory is a complex and demanding process, quite unlike taking a photograph and throwing it in a shoe-box.³² The mind catalogs perceptions in memory, but that process does not necessarily preserve a memory "as is" on a sterile mental shelf. The mind routinely evaluates, codes, indexes, and uses memories for various intellectual and emotional purposes. Memories are connected and combined in many different ways with other memories and thoughts.³³ The internal processes of the mind that control and use memory are quite imperious about what is remembered and what is discarded.³⁴ To these relatively unconscious distortions of memory, which we might compare to mechanical or programming limits or imperfections in a video recording device, one must add the less benign and more conscious practices of deception and lying.³⁵ False assertions are the most straightforward and common way that humans deceive and lie.

II. Attributes and explanations of assertion

How one defines assertion will have a decisive effect on what will be excluded under the federal *hearsay* rules. Among philosophers of language there are several current accounts of assertion³⁶ [*356] that I will use to evaluate the understanding of assertion within the context of the *hearsay* rules and trial. Legal discussions of assertion tend to be dominated by concerns about the policies underlying the *hearsay* rule. As a result, these discussions tend to treat "assertion" as a relatively indefinite concept to be expanded or contracted depending upon one's notion of how broad or narrow the *hearsay* ban should extend.³⁷ I examine philosophic understandings

³⁰ See Lawrence H. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958 (1974) (citing Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 178 (1948) (listing the qualities upon which a trier of fact must rely in making any inference from testimony: proper communication between the witness and trier of fact, and "the sincerity, memory, and perception of [the] Witness")) (the *hearsay* rule addresses four dangers: "ambiguity, insincerity, faulty perception, and erroneous memory").

³¹ For this reason, I refer to these type of witness problems as "mechanical," to distinguish them from the more peculiarly human problem of lying.

³² Alan D. Baddeley, *Your Memory: A User's Guide* 6 (Anne Cope ed., 1982).

³³ See *id.* at 11-17 (types of memory); 75-91 (semantic memory).

³⁴ See *id.* at 47-63 (forgetting).

³⁵ I reserve the term "lying" for a willfully false assertion. Other types of deception and intentional distortion exist, but if they do not involve willfully false assertion they do not qualify as lies. Deception is a broader term; one can deceive by various means short of lying. Hence, for instance, the use of a "scheme to defraud" as the prohibited act, in [18 U.S.C. § 1341](#), rather than "lying" or "false statement." Lying is just one particularly efficient, effective, and pernicious means of deception.

³⁶ See Sanford C. Goldberg, *Assertion: On the Philosophical Significance of Assertoric Speech* 9-12 (1st ed. 2015). Goldberg identifies four categories of assertion theory, following John MacFarlane, *What is Assertion?*, in *Assertion: New Philosophical Essays* 79, 80-96 (Jessica Brown & Herman Cappelen eds., 2011). The classification into four categories is a useful way to compress the discussion about assertion but necessarily omits details of interest about differing views of assertion. Goldberg explains that the four-fold list is not exhaustive but covers the main proposals. *Id.* at 12. For my purposes the compression and omission are helpful because they allow me to make my point without inordinate time spent tracking the details of the many ingenious accounts of assertion.

³⁷ See Goldberg, *supra* note 36, at 3, and notes 6 and 7.

of assertion, which tend to assign the concept of assertion a more robust role, unencumbered by a historic association with, and subordination to, hearsay and its policy concerns.

These philosophic accounts of assertion all seek to explain the attributes of assertions in ordinary speech.³⁸ It makes sense to talk about these attributes first and then to talk about theories that try to explain them.

A. *Eight Attributes of Assertion* ³⁹

1) Perhaps the most obvious attribute of an assertion is that it is particularly apt for the communication of knowledge.⁴⁰ In fact, while all other speech acts may contribute knowledge of some type or another,⁴¹ assertion alone seems fitted to communicate knowledge as its direct function.

2) Speakers and hearers usually treat an assertion as belief-worthy. Under ordinary circumstances, a speaker expects a hearer to believe her when she makes an assertion.⁴² Why and to what extent this is so are the subject of debate, but it seems clear that this is an attribute of assertion. By the same token, under ordinary circumstances, **[*357]** when a speaker makes an assertion a hearer understands the speaker to be communicating a fact that the speaker wants the hearer to accept as true.

3) An assertion is liable to be challenged on epistemic grounds. A routine and appropriate question to a person making an assertion is "how do you know that?"⁴³ If there were no expectation of epistemic warrant⁴⁴ for an assertion, the question would be nonsensical.

4) A speaker making an assertion is ordinarily understood to be representing herself as knowing, or having evidence for, what she has asserted.⁴⁵ Someone who makes an assertion without knowing⁴⁶ the fact asserted is subject to censure, and the censure is more severe the more profound the knowledge deficit and the higher the stakes involved in the communication.

5) An assertion creates a "reassertion" entitlement in a hearer: the hearer is entitled to rely on the truth of an assertion when reasserting it and may refer questions about the truth of the "reassertion" to the original speaker.

³⁸ I follow Goldberg, *supra* note 36, at 6-8, who lists eight attributes. Different authors focus on different attributes. Goldberg's treatment is overtly an analysis and synthesis of a number of different ways of thinking about assertion, and so quite useful to the task of summarizing the variety of thought.

³⁹ I assign a number to each attribute for ease of reference.

⁴⁰ Goldberg, *supra* note 36, at 6.

⁴¹ For instance, a command "do your homework!" indirectly communicates to the hearer that the speaker wants the homework done. One may also infer from the command that the speaker presupposes that the homework has not been done. In neither instance does the speaker invoke the special properties of assertion to directly share knowledge, *i.e.*, "You have not done your homework. I want you to do your homework."

⁴² Goldberg, *supra* note 36, at 7.

⁴³ *Id.*

⁴⁴ By "epistemic warrant" I mean the knowledge possessed by the speaker justifying an utterance.

⁴⁵ Goldberg, *supra* note 36, at 7.

⁴⁶ The required level of epistemic certainty is much debated. See Jennifer Lackey, *Learning From Words* 103-39 (2008) (describing various epistemic norms and defending her own "reasonable to believe" norm of assertion).

⁴⁷The original speaker has a correlative responsibility to give an account of the basis of the assertion, not just to the direct recipient but also to those hearers at several layers of remove. ⁴⁸

6) An assertion ordinarily manifests the speaker's belief in the truth of the proposition asserted, and is so understood by the hearer. ⁴⁹To assert that "Plato was a Greek philosopher" carries with it the implication that the speaker believes that Plato was a Greek philosopher. This is illustrated by the thought experiment of conjoining a negation of belief to the assertion: The sentence "Plato was a Greek philosopher, and I don't believe it" strikes the hearer as at worst nonsense, and at best a paradox.

7) A speaker may retract an assertion and even may have an obligation to retract an assertion when she comes to doubt or question the basis for the assertion. ⁵⁰

[*358] 8) Finally, assertions seem to be indispensable to the interpretation of any language that is entirely unknown to the speaker. The consequence is that a premise of all new language acquisition - and by implication all mutually comprehensible language - seems to be the presumptive truth of assertions. ⁵¹Without such a presumption, it does not seem possible for human beings to acquire language from one another. While skepticism about the truth of any specific assertion is possible, systemic skepticism or agnosticism about the truth of assertions as a fundamental state would stymie communication. ⁵²

B. Explanatory Accounts of Assertion

Different accounts of assertion attempt to explain the attributes of assertion in various ways. "Attitudinal" ⁵³accounts of assertion contend that "to assert a proposition is to utter a sentence expressing that proposition, with the intention that the utterance be regarded by one's audience as a reason both to think that one believes the proposition and that one intends the audience to believe it as well." ⁵⁴"Common ground" accounts explain an assertion as "a proposal to add its content to a 'common ground' of propositions taken for granted for purposes of a conversation." ⁵⁵A distinctive feature of "common ground" accounts is that they do not focus on what is

⁴⁷ Goldberg, *supra* note 36, at 7-8.

⁴⁸ *Id.*

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* A more general way of putting it is that retraction is in order when the speaker does not wish to be required to give an account of the epistemic basis of the assertion. At what level of doubt or question a duty of retraction comes into play is subject to debate.

⁵¹ See *id.* at 95-122, relying on Donald Davidson's account of "radical interpretation." See, e.g., Donald Davidson, *Radical Interpretation*, 27 *Dialectica* 313, 324 (1973) ("Disagreement and agreement alike are intelligible only against a background of massive agreement ... If we cannot find a way to interpret the utterances and other behaviour of a creature as revealing a set of beliefs largely consistent and true by our own standards, we have no reason to count that creature as rational, as having beliefs, or as saying anything."); 3 Donald Davidson, *A Coherence Theory of Truth and Knowledge*, in *Subjective, Intersubjective, Objective: Philosophical Essays* 137, 150 ("It is impossible for an interpreter to understand a speaker and at the same time discover the speaker to be largely wrong about the world. For the interpreter interprets sentences held true (which is not to be distinguished from attributing beliefs) according to the events and objects in the outside world that cause the sentence to be held true.").

⁵² This idea has philosophical implications which are beyond the scope of this article. See Goldberg, *supra* note 36, at 95-122.

⁵³ See *id.* at 9.

⁵⁴ See Kent Bach & Robert M. Harnish, *Linguistic Communication and Speech Acts* 15 (1979) (cited in Goldberg, *supra* note 36, at 10).

expressed by an assertion, nor on the norms for making an **[*359]** assertion but on the "essential effect" of an assertion - its function in a conversation. ⁵⁶

"Commitment" accounts of assertion contend that to assert is to undertake a particular type of commitment to the truth of the matter asserted. ⁵⁷John Searle, following J.L. Austin, argues that "an assertion is a (very special kind of) commitment to the truth of a proposition" and that a proposition is the informational content of an assertion, stripped of the claim that the declarant believes it to be so. ⁵⁸In Searle's account, assertion consists of (1) the utterance of a proposition of fact (2) by a speaker who has evidence for the truth of the proposition (3) and believes the proposition to be true, (4) which "counts as an undertaking [by the speaker] to the effect that [the proposition] represents an actual state of affairs," and (5) it is not obvious to the speaker and hearer that the hearer already knows the proposition of fact. ⁵⁹Another description of the "commitment" account is that "one who asserts that p undertakes a commitment to the truth of [p], which involves inheriting the obligation to vindicate one's entitlement to [p] if queried." ⁶⁰

"Commitment" accounts, like the "common ground" account, focus on the social effects of an assertion. Unlike "common ground" accounts, which define assertions as a proposal to add to the conversational "common ground," "commitment" accounts hold that an assertion changes the duties between the parties: the speaker takes on additional duties by making an assertion, while the hearer acquires additional entitlements. ⁶¹

[*360] According to normative ⁶²accounts of assertion, to assert means to make a verbal "move defined by its constitutive rules." ⁶³Normative accounts of assertion differ on the content of the norms that govern the making of an assertion. Depending on the author, the rule might be that one must only assert a proposition 1) if it is true; 2) if one knows it to be true; 3) if one is certain it is true; 4) if one believes it to be true; 5) if one is justified in

⁵⁵ See Robert Stalnaker, Context and Content 10-11 (1999) (cited in MacFarlane, *supra* note 36, at 88); Goldberg, *supra* note 36, at 15.

⁵⁶ MacFarlane, *supra* note 36, at 89.

⁵⁷ Goldberg, *supra* note 36, at 11.

⁵⁸ See Searle, *supra* note 1, at 64-67 for an extended (and early) taxonomy of "assertion," and at 29 for a discussion of why a proposition and an assertion must be two different things. Lawyers tend to take far less trouble with the definition of assertion. See Kenneth S. Broun et al., 2 McCormick on Evidence § 246 (7th ed. 2013) ("The word simply means to say *that something is so*, e.g., that an event happened or that a condition existed.")

⁵⁹ Searle, *supra* note 1, at 66.

⁶⁰ Goldberg, *supra* note 36, at 11. Goldberg adopts the convention of "referring to a proposition by putting square brackets around a sentence that expresses it: [p] = the proposition that p."

⁶¹ For instance, commitment accounts can explain the sense in which a hearer feels entitled to a retraction from the speaker if the speaker learns, after making an assertion, that the proposition asserted is untrue. *Id.* at 18.

⁶² It may be that a commitment account can be derived from a constitutive rule. See *id.* at 19. However, it does not seem clear that a commitment to provide an epistemic basis if challenged is a necessary entailment of a constitutive rule such as "you may only assert if you know the proposition of fact to be true." One could conceive a norm that requires an epistemic basis for an assertion but a social convention under which epistemic challenge is considered insulting and blameworthy. It seems simpler to elaborate the commitment to epistemic challenge as a separate attribute of an assertion.

⁶³ *Id.* at 11.

believing it to be true; 6) if it is rational to believe it is true; 7) if it is reasonable to regard oneself as knowing that it is true.⁶⁴

In addition to the four categories suggested above, other scholars "reject[] the assumption that it is theoretically useful to single out a subset of sayings as assertions," contending instead that utterances come with varying norms, commitments, causes, and effects.⁶⁵ Still others argue for a more complex account of assertion than any of the four categories mentioned by Goldberg and MacFarlane.⁶⁶

C. Common Features of Explanatory Theories

Explanatory theories of assertion have several common features. All take ordinary human speech as their starting point. All [*361] seek to explain how assertions function in the context of ordinary human speech. All examine assertions through the lens of particular cases: describing a set of utterances in their conversational context, identifying features of the utterances that make them assertions - or exclude them from being assertions - and formulating a theory to account for the various cases. Some theories are satisfied with a description of what assertions do, without speculating much about why assertions operate as they do. Other explanatory theories posit underlying structures or motivations to explain why assertions function as they do. These posited structures or motivations range from communicative intentions to social conventions to constitutive rules.

All of the explanatory theories⁶⁷ take as given at least the following: that an assertion describes 1) an intentional act of communication - typically an utterance - 2) designed to convey that a proposition of fact, [p], is true, 3) designed to be understood by the listener as conveying that [p] is true, and 4) directed to the acceptance of

⁶⁴ *Id.* at 11-12. The point of the normative accounts is to explain when one is warranted in making an assertion. *Id.* Goldberg prefers the constitutive rule account because one can derive the commitment account from the normative account. *Id.* at 19. Goldberg argues that a normative account, such as that one must only make an assertion if one knows the proposition to be true, satisfactorily explains why one is "committed" to an assertion's truth, while also doing a better job of explaining other features of an assertion. *Id.*

⁶⁵ Herman Cappelen, *Against Assertion*, in *Assertion: New Philosophical Essays*, *supra* note 36, at 21, 21.

⁶⁶ See, e.g., Peter Pagin, *Assertoric Force*, in *Assertion: New Philosophical Essays*, *supra* note 36, at 97, 98-99. Pagin describes three (not four) types of accounts, "communicative intentions," "institutional," and "norms." *Id.* at 98. His category of "communicative intentions" seems to correspond with the MacFarlane/Goldberg "attitudinal" category. Compare *id.*, with MacFarlane, *supra* note 36, at 80. Pagin's "institutional" category describes accounts that focus on the social function of assertion and includes both the "commitment" and "common ground" accounts, as described by MacFarlane and Goldberg. Compare Pagin, *supra*, at 98, with MacFarlane, *supra* note 36, at 88-95. Pagin's normative category corresponds with MacFarlane's "constitutive rule" category of accounts. Compare Pagin, *supra*, at 98, with MacFarlane, *supra* note 36, at 84-88.

⁶⁷ Cappelen's account denies that "assertion" labels a philosophically useful category of speech acts. Cappelen, *supra* note 65, at 21. Cappelen's point is that categorization of the wide variety of speech acts that function along this continuum is not fruitful: "we do not need the distinct category of assertion in addition to the act of saying. The act of saying (that is, the act of expressing a proposition), combined with contextually variable norms, causes, effects and commitments can do all the explanatory work." *Id.* at 22. Cappelen argues that all sayings, not just assertions, "are governed by variable norms, come with variable commitments, and have variable causes and effects." *Id.* at 21. Whether Cappelen's agnosticism is warranted as a general matter, it does not seem reasonable to deny that humans make utterances that function along the lines of assertion. In the special context of trial, Cappelen's objections have far less force. The variability, in ordinary language, of commitments, norms, and contexts that is at the heart of Cappelen's objection is largely eliminated by elaborate trial rules and practices.

[p] as true by a listener. ⁶⁸Different accounts focus on the various ways in which assertions manifest these basic characteristics. ⁶⁹

D. Assertion as a "Bond"

One can think of assertion as a type of bond ⁷⁰that attaches to a particular type of utterance. The bond links the hearer's estimation [*362] of the truth of the proposition to the speaker's grounds for and belief in the truth of his assertion. The existence of the bond adds force to the utterance. A hearer not only knows that the bond requires the speaker to have an appropriate epistemic basis for his assertion but also that the hearer may insist on an account of the epistemic grounding for the assertion. These grounds, as well as the speaker's own belief, are subject to being "surrendered," upon request, by any hearer confronted with the assertion. If the speaker refuses the request to explain his grounds, the listener may discount the assertion, or find the speaker not credible. The existence of the bond bolsters the credibility of the assertion, even if the hearer's rights under the bond are not actually exercised.

This "bond" may explain the curious capacity of an assertion to convince, even without elaboration of its grounds. An assertion is not a proposition of fact contemplated internally. It has been "shared" voluntarily by the speaker, typically through reduction to a particular verbal format. Having been uttered, its meaning and consequence are no longer entirely within the control of the speaker. ⁷¹An assertion is a proposition of fact backed by a bond of the speaker's integrity and intellectual substance. Thus, an assertion is backed both by a constitutive rule, e.g., one must not assert a proposition unless one knows the proposition to be true, ⁷²and also by a commitment of the speaker's integrity and intellectual substance. The commitment is usually part of the speaker's intention when making an assertion. Whether it is actually part of the speaker's intention or not, the commitment is understood by the hearer. Furthermore, the commitment is enforceable as part of the social bond created when a speaker makes an utterance in the form [*363] of an assertion, within a context in which an assertion would be appropriate. ⁷³

This process is a mechanism by which lying is made culpable. The fact that the speaker did not internally intend to commit to the truth of his assertion does not remove his speech act from the class of assertion; it merely identifies the utterance as a false assertion deserving of sanction.

⁶⁸ By speaker, listener, or hearer, I mean to include those who communicate using language, whether by speaking, writing, or signing.

⁶⁹ Whether knowledge of the proposition of fact, or some other epistemic state, is required as part of a norm or commitment is the subject of much debate. See Goldberg, *supra* note 36, at 11-12.

⁷⁰ See *Bond*, Black's Law Dictionary (10th ed. 2014): 2.A written promise to pay money or do some act if certain circumstances occur or a certain time elapses; a promise that is defeasible upon a condition subsequent; esp., an instrument under seal by which (1) a public officer undertakes to pay a sum of money if he or she does not faithfully discharge the responsibilities of office, or (2) a surety undertakes that if the public officer does not do so, the surety will be liable in a penal sum.

⁷¹ I deliberately ignore instances of solitary assertion, such as writings in a secret diary or someone bellowing to the void. These types of utterances can raise difficult questions about whether there are norms or commitments underlying assertion. I question whether such utterances should be classified as assertions, given the lack of an intended listener. It may be that for want of a better word such utterances are called assertions, but that does not necessarily mean they are the same type of speech act as an assertion uttered for another's hearing.

⁷² Instead of knowing, different theorists substitute a variety of epistemic standards, e.g., belief, reasonable to believe, not without warrant, probable, likely, etc. See Goldberg, *supra* note 36; McKinnon, *infra* note 102; Lackey, *supra* note 46; Timothy Williamson, *Knowledge and its Limits*, 242-63 (2000).

⁷³ It is possible to disclaim or negate the presumption of assertion by signaling that no assertion was intended, e.g., by declaring or clearly signaling that one is joking, or otherwise engaged in some type of fictive exercise. See *infra* note 78. How and when such disclaimers are communicated is beyond the scope of the article.

Anyone in receipt of an assertion is entitled to call on the original maker of the "bond"⁷⁴ for an explanation of the assertion's epistemic basis. This availability for epistemic challenge seems to accomplish at least three things. First, it operates as a direct and efficient way for a hearer to explore and understand the belief-worthiness of the assertion. Second, the epistemic challenge serves as an efficient intermediate step between docile acceptance of the truth of an assertion and full-blown imposition of sanctions for false or mistaken assertion. The right of epistemic challenge operates as a kind of permissible fact-finding stage⁷⁵ that balances the need for truthful information against the social costs of imposing sanctions for false or baseless assertions. A social setting with no such intermediate step would offer a hearer two stark choices: either accept the assertion as true or reject the assertion as false or baseless (or both). The availability of epistemic challenge as part of the norm of assertion (and part of the commitment undertaken by a speaker) is a valuable tool for discerning which of two absolute resolutions (truth and adoption or falsehood, rejection, and sanction) is the appropriate response to an assertion.⁷⁶

[*364] Third, the obligation of the speaker to answer to epistemic challenge bolsters the credibility of an assertion, even when the opportunity to make an epistemic challenge is not used. The calculation is that a speaker would be careful not to make a false assertion because he can be called upon to state his grounds, not just by his immediate listener but by anyone to whom the proposition is re-asserted.⁷⁷

The actual imposition of social sanctions for false or mistaken assertion seems to be optional, rather than an inevitable consequence of a defective assertion. A sanction is dependent not only on whether and how the epistemic challenge is answered but upon circumstances outside the constitutive rule that defines "assertion." In certain contexts ("that dress fits perfectly!") false or baseless assertion may carry little or no social sanction. In others ("the house is on fire!") the sanctions for false or baseless assertion are more severe. In either event the speaker can be called upon to give an account of how he knows (or possesses some other preferred normative epistemic foundation) the fact asserted. This would explain the reason why an epistemic challenge is often not

⁷⁴ The bond is passed along with the proposition of fact, and a person re-asserting the original assertion can call for an explanation of grounds from any of those he or she relied on in re-uttering the assertion. Mere "re-asserters" just transmit the assertion without adding any independent reasoning or investigation.

⁷⁵ Something like discovery, under Federal Rules of Civil Procedure 26-37.

⁷⁶ Availability for epistemic challenge is a general human good, not just a characteristic of assertion. Availability for epistemic challenge is a relatively fragile social norm, dependent on the good will of both the speaker and the hearer. It takes fortitude for a speaker to open herself to epistemic challenge, and such a challenge requires tact from a listener, or the challenge will be rebuffed without being engaged. It takes mutual respect to motivate both fortitude and tact. An absence of tact can be overcome by great fortitude, and a lack of fortitude by great tact, but both are more likely to thrive in the presence of the other. The fruit of the process is the sharing of verifiably accurate information, a great human good.

⁷⁷ Reliance on the possibility of epistemic challenge, as opposed to making such a challenge, is a kind of freeloading that can be taken advantage of by the experienced and daring liar, as well as by the careless and slothful speaker. This freeloading is one reason for the formal embodiment and enforcement of the attributes of assertion in trial rules.

perceived as a pleasantry. It may be - and frequently is - a precursor to the imposition of social sanctions, however mild, for false or baseless assertion.⁷⁸

[*365] The level of sanction seems to be dependent in part on the motives underlying the false assertion and the effect of the false assertion. A "white lie," uttered in trivial circumstances out of concern for the feelings of another, may not be sanctioned. But even "white lies" are not typically celebrated as unadulterated goods. That is because even a white lie may have a corrosive effect on both the speaker's and listener's willingness to rely on future assertions, not just by the "white liar" but by any speaker. And an unwillingness or inability to rely on assertions hinders the efficient sharing of information within a group.

This "bond" analogy has the benefit of suggesting an explanation for the curious reality that repeated and reasserted assertions seem to gain assertional force, sometimes confounding or short-circuiting common sense in the process. False assertions seem to gain credence and force from repetition, even for those who are aware of the true state of facts.⁷⁹ It is sometimes the case that when finally exposed as untrue, it is difficult to explain how anyone could have believed the false assertion in the first place.⁸⁰ If each adoption and reiteration of an assertion incrementally increases its assertional force by adding the integrity and intellectual substance of additional persons as recourse under the bond, this would tend to explain accreditation through repetition.

Having described the legal context within which *hearsay* operates, and discussed the mechanics of assertion, it is time to consider the different ways that assertions and non-assertional utterances become relevant evidence at trial, as a prelude to considering the treatment of certain hybrid utterances that have both assertional and non-assertional relevance.

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III. Relevance and Assertion

A. Conditional Relevance

Assertions and non-assertions can both be relevant at trial but are relevant in fundamentally different ways. All trial evidence is subject to the rule of conditional relevance: *if it happened that way*, then it is relevant. One of the jury's

⁷⁸ In some specialized (fictive) contexts, there is no sanction at all for false assertion, e.g., plays, fictions, jokes, irony. In such a context, epistemic challenge is inappropriate. As long as the assertion is part of a larger communicative context clearly intended as fictive, assertions within the fiction are understood to have among their referents an imagined reality created by the storyteller. As a result, an assertion that obviously would be false under ordinary circumstances ("a dog walks into a bar and says 'do you have any jobs?'") is accepted as not subject to sanctions and not properly subject to epistemic challenge. One can criticize this type of specialized speech act - call it fictive assertion - but one typically does so by calling the fictive assertion inept, clumsy, or artistically false, to convey the sense that the author did not abide by the reality conventions either established within the particular genre or established by the author herself in her fiction. One does not fault an author of fiction for lying; one blames the author for being poor at her craft. It may be useful to call such speech acts "fictive assertions," to avoid having to spend significant time and effort defining assertion so as to exclude such cases. See John R. Searle, *Expressions and Meaning* 67 (1979) ("What distinguishes fiction from lies is the existence of a separate set of conventions which enables the author to go through the motions of making statements which he knows to be not true even though he has no intention to deceive.").

⁷⁹ See Lynn Hasher, David Goldstein & Thomas Toppino, *Frequency and the Conference of Referential Validity*, 16 J. Verbal Learning & Verbal Behav. 107, 107 (1977) ("Frequency of occurrence is apparently a criterion used to establish the referential validity of plausible statements."); Lisa K. Fazio, Sarah J. Barber, Suparna Rajaram, Peter A. Ornstein & Elizabeth J. Marsh, *Creating Illusions of Knowledge*, 142 J. Experimental Psych.: Gen. 1, 3 (2013) ("Reading stories containing misinformation led participants to reproduce factual inaccuracies that contradicted their previously demonstrated knowledge.").

⁸⁰ While the emperor and his tailors asserted that he had a marvelous new set of clothes, the assertions seemed to carry the day. Once the falsehood of the assertions was exposed, everyone was abashed to think they had been so easily fooled. Economic bubbles tend to rely on cumulative accreditation through repeated assertions.

primary functions at trial is to resolve the "if true" ⁸¹condition. ⁸²Authentication requirements for physical evidence are a manifestation of this rule: if the evidence is what it purports to be, then it is relevant. The jury must resolve this question, like all questions of conditional relevance. ⁸³

Utterances are subject to this rule of conditional relevance, just like all other evidence: one must demonstrate that the utterance in fact happened. A non-assertional utterance, such as a command, might be relevant for any number of other reasons, such as the effect on the listener or proof of notice by the speaker. An assertion, introduced as such, depends uniquely on the probity of the speaker for its evidentiary value because it is relevant only if true. Further, the probity of the speaker is a primary way to judge the truth of the assertion; often it is the only way. An explanation of different routes to relevance for different types of utterances illustrates the difference between assertions and other types of speech.

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B. Different Paths to Relevance

A good deal of everyday speech is non-assertional. Demands for money are "performatives," which have no "truth value." ⁸⁴Commands and demands are not assertions because the words of a command or demand are not intended to convey a proposition of fact and belief in that proposition. ⁸⁵Instead, such utterances serve a different purpose altogether: to stimulate behavior in accordance with the command or demand, just as a question is designed to provoke an answer.

In the same way, instructions and directions are not assertions. ⁸⁶A check, for instance, is an instruction to pay, not an assertion, and therefore not hearsay. ⁸⁷An offer to sell a commodity is not necessarily, or only, an

⁸¹ Pontius Pilate famously asked the question "what is truth?," *John* 18:38, and it has tantalized ever since. See Alexis G. Burgess & John C. Burgess, *Truth* 2 (2011). At least one traditionally acknowledged feature of truth is recognizably at issue during trial testimony: correspondence between speech (thought) and object. *Id.* at 2-3. While there may be legitimate resistance to accepting truth as logically or physically "primitive," for the purposes of this article I will assume that the concept of truth is self-evident. *Id.* at 21 (discussing Tarski's efforts to develop a mathematically rigorous definition of truth). Given Tarski's aims and method, his definition of truth is "utterly unlikely" to "give an account of what ordinary people have meant all along by the word." *Id.* Tarski's resistance to accepting truth as a primitive seems to have been based on the notion that truth is rooted in metaphysics and psychology, and that truth could not be so rooted and simultaneously rooted in physical or logical apprehension of reality. See *Id.* at 13-14. Why truth should be reducible to some particular subset of human perception or apprehension of reality, to the exclusion of others, is not clear. Truth's elusiveness as a subject of explanation; the lack of a current, widely accepted philosophical account of truth; the fact that human communication does not function, or functions ineffectively, without a concept and practice of truth; and the fact that human beings generally seem to treat the concept of truth as self-evident, all suggest that truth is a good candidate to be a "primitive," not subject to discussion or definition, certainly not in an article attempting to focus on assertion.

⁸² Fed. R. Evid. 104(b); [Huddleston v. United States](#), 485 U.S. 681, 689-90 (1988).

⁸³ See *United States v. Reilly*, 33 F.3d 1396, 1404 (3d Cir. 1994).

⁸⁴ [United States v. Montana](#), 199 F.3d 947, 950 (7th Cir. 1999) (demand for money is a "performative" utterance and not hearsay).

⁸⁵ See *United States v. White*, 639 F.3d 331, 337-38 (7th Cir. 2011) (bank robbery demand note is not hearsay - it is a command, not an assertion).

⁸⁶ See [United States v. DeSimone](#), 488 F.3d 561, 568-69 (1st Cir. 2007); [United States v. Murphy](#), 193 F.3d 1, 5 (1st Cir. 1999); *Reilly*, 33 F.3d at 1410.

⁸⁷ See [Williams v. United States](#), 458 U.S. 279, 284-85 (1982) (a check is not a "'false statement,' for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'"); *United*

assertion but a "verbal act" that has legal effect because it was uttered under a certain set of circumstances, rather than because it is "true."⁸⁸ Under the same logic, a solicitation or invitation to commit a crime is not an assertion.⁸⁹ The same holds for threats and advice.⁹⁰

Though non-assertional utterances cannot be evaluated as true or false, and so their truth cannot be the basis of relevance, they can become relevant through a variety of other ways. Sometimes the path of relevance is the probable effect of the utterance on the listener. Sometimes the path of relevance is through what the jury determines are the speaker's presuppositions,⁹¹ or the motives for the utterance. A presupposition serves as a logical foundation for **[*368]** an utterance. A presupposition that is taken for granted when a speaker utters a non-assertional utterance, such as a question, request, or command, is not asserted by the speaker, in any meaningful sense. There is no assertion because the speaker is not offering the presupposition as a proposition of fact that the speaker knows and believes to be true and wishes the listener to accept as true. Instead, the speaker is assuming the truth of the presupposition as a predicate for his own action, in the form of an utterance asking a question, making a command, making a promise, etc. The speaker is taking an action and exposing himself to criticism or liability, based on his own internal belief in the proposition of fact.

In the case of a non-assertional speech act, a listener becomes aware of a presupposition not because the speaker announces it as a proposition of fact worthy of belief. Instead, the listener comes to understand the presupposition by a process of inference as the listener seeks to understand the speaker's utterance, meaning, and illocutionary intent. If I make a request "please pass the salt" the listener may understand that I presuppose that [salt exists]⁹² and that [the speaker is capable of passing it]. The speaker's illocutionary intent is that the listener should understand the utterance as a request and undertake the action requested. The listener also understands the implication that the speaker wants the listener to "please pass the salt" *[to the speaker]*, not someone else. The listener can appropriately answer "yes" or "no," or even inform the speaker that there is no salt in the shaker, but responding "I disagree" or "that's right" to "please pass the salt" represents a communication failure, because it mistakes an intended request for an assertion.

Suppose the following sequence of utterances⁹³ occurred during a phone conversation involving a policeman who just recovered a phone from the pocket of a person arrested with a large amount of crack cocaine. The phone rings as the policeman holds it, and the policeman answers the phone call:

[1] Police: Hello.

States v. Davis, [596 F.3d 852, 856-57 \(D.C. Cir. 2010\)](#) (checks and money orders are not assertions and therefore not **hearsay**).

⁸⁸ See [Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Mktg. Bd., 298 F.3d 201, 218 n.20 \(3d Cir. 2002\)](#).

⁸⁹ See [United States v. Childs, 539 F.3d 552, 559 \(6th Cir. 2008\)](#).

⁹⁰ See [Tompkins v. Cyr, 202 F.3d 770, 779 n.3 \(5th Cir. 2000\)](#) (threats); [United States v. McLennan, 563 F.2d 943, 947 \(9th Cir. 1977\)](#) (advice).

⁹¹ I use the term "presupposition" to refer to facts assumed as a premise to an utterance, where the facts are logically or practically necessary for the utterance to make sense. See David I. Beaver & Bart Geurts, *Presupposition*, The Stanford Encyclopedia of Phil. (Edward N. Zalta ed., Winter ed. 2014) (Dec. 17, 2014), <https://stanford.io/2SKBXqP>. When I ask a question "where is my Scotch?" I presuppose that there exists something called "Scotch," that it is corporeal and discoverable, and that I own or possess that thing.

⁹² For ease of identification I put implicatures in italics and square brackets *implicatures*, presuppositions within braces [presupposition], and inferences within angled brackets <inferences>.

⁹³ Cf. [United States v. Jackson, 88 F.3d 845, 847-48 \(10th Cir. 1996\)](#) (the hypothetical in the text is based loosely on the facts in *Jackson*).

[2] Caller: Is Kenny there?

[3] P: Yeah, he's here.

[4] C: Tell him to bring me my rock.

[*369] The caller's first utterance [2] is a question, the second [4] is a direction or command. Neither is in the form of an assertion. Neither [2] nor [4] are utterances that are intended to be an assertion. Rather, the speaker made the utterances for non-assertional purposes. He is first seeking information by a question [2], then giving an instruction or command [4] in order to stimulate certain actions. The speaker is not putting his own guarantee of the existence of an epistemic basis or belief behind a proposition of fact.

Since they do not assert the truth of a fact, non-assertional utterances cannot be relevant for their "truth." They can only be relevant to the trier of fact if other circumstances - not the speaker's utterance of a true proposition of fact - make them so. During "Kenny's" drug trial, the question and the instruction, above, do not depend upon the speaker's credibility for their relevance or probative value. Rather, both depend on the speaker's utterance actions, coupled with a set of presuppositions or motives that may be inferred from those actions, under the general understanding that people base their actions on their self-interest and on what they believe to be a true state of affairs. Actions cost effort, create risk, and promise reward, which is why they are valued as evidence of internal belief, usually far more than words.⁹⁴

Because the caller asks for "Kenny," a jury reasonably may infer that the caller expected "Kenny" to answer the phone, since it is unlikely that a caller would have randomly dialed a number and asked for "Kenny." The jury may infer that the suspect from whom the phone was just taken goes by the name "Kenny."

A rational juror could also infer that the command "tell him to bring me my rock *crack*," makes it more likely that Kenny possessed crack for distribution than if the command never occurred. The inference is rational because the caller took the trouble to call and utter the command. People normally give commands because they believe their utterances have some likelihood of effecting their wishes. They typically do not bother giving a command if they do not believe it can be, or will be, fulfilled. This is especially so when the conversation is about illegal activity because severe consequences would likely attach if a person were to randomly ask for crack from total strangers. The speaker's familiarity with Kenny, the fact that Kenny uses this phone, and the speaker's well-founded belief⁹⁵ that Kenny can and will supply crack, all can be inferred rationally from the circumstances of the question and command.

[*370] Note that the speaker, in [2] and [4], is not signaling a conscious guarantee of the truth of the facts he is presupposing, any more than one who dives into a pool is making a conscious guarantee of the fact that the pool is filled with water. Nor is the jury asked by a party to infer the truth of a proposition of fact (Kenny possesses and deals crack) from the probity of the speaker. Instead, it is the speaker's actions, and the risks and benefits entailed by those actions, that serves as the foundation for a jury's inferences about the factual presuppositions or motives that undergird the speaker's question and command. The form of the utterances - a question and a command - signals that the speaker did not intend to propose a fact for the listener's belief.

A listener - in the context of a trial, the factfinder - is not invited by a question or a command, uttered in their ordinary forms,⁹⁶ to credit the truth of a proposition of fact uttered by the speaker, based on the speaker's

⁹⁴ Actions often do speak louder than words.

⁹⁵ It is certainly possible that the caller is just making random cold calls for crack, or that a 10-year old is making a prank call. It is even possible that the caller actually wants a rock, not crack. A reasonable juror would be entitled to find that these possibilities are remote. Remote possibilities generally do not warrant the exclusion of evidence.

⁹⁶ People can and do use questions for purposes other than soliciting information, for instance, testing credibility, making jokes, and engaging in rhetorical flourishes. That does not detract from the basic point: the primary use of a question is to solicit correct information from another.

probity. If the listener infers the existence of a relevant fact presupposed by the question or command, that is ordinarily not something for which the speaker is answerable because the speaker did not invite it. Such an inference is made on the hearer's credit, not the speaker's. The question and command had no assertional value, intent, or force when spoken.

By contrast, if a declarant said "I saw Bill smoking," and the utterance is introduced at trial to show the truth of a proposition of fact (Bill was smoking) not only must the jury assess whether the out-of-court utterance actually occurred (did the declarant actually say "I saw Bill smoking") and the circumstances under which it occurred but the jury must also assess whether the proposition of fact contained within the assertion is true or false. A speaker putting his probity at stake for the truth of the assertion - and the hearer's understanding that the speaker has done so - is in large part what gives an assertion its power to convince. An assertion is an invitation to the listener to rely on the speaker's probity, acuity, and memory as a substitute for the listener's own observation and evaluation of events. It is convenient to accept this invitation and hard work to decline it.

[*371] An assertion introduced as an assertion is relevant only if its proposition of fact is true.⁹⁷ Thus, an assertion introduced for its assertional value depends in a unique way on the credibility of the speaker for its relevance. The rule of conditional relevance⁹⁸ demands that the speaker's probity be assessed by the jury, since the jury must assess the truth of the assertion in order to assess relevance. If the speaker is not in court before the jury, the jury is left evaluating an assertion without any of the assurances that ordinarily attend an assertion and which the trial rules insist must be made available. Most importantly, the speaker is not available for direct epistemic challenge - confrontation and cross-examination.

IV. Trial Rules and Assertions

Relevance is not the only trial concept that intersects in interesting ways with assertion. The credibility testing mechanisms inherent in the trial process echo and reinforce various attributes of assertion. For instance, trials address⁹⁹ debates about the existence or content of speaker commitments that attend assertions in ordinary speech by the requirement that a witness take an oath. The oath is an explicit commitment of a specific and uniform kind: the witness commits to tell "the truth, the whole truth, and nothing but the truth, so help you God."¹⁰⁰ Nor at trial is there a debate whether assertions made before the jury are governed by normative rules: those rules are explicit, and provide criminal sanctions for false assertions.¹⁰¹

At trial there is no reason to question whether a commitment account or normative account of assertion is preferable or operative. A trial witness's testimony is subject to both an explicit personal commitment and an explicit

⁹⁷ An assertion that is introduced not for its truth but for some other purpose, such as its effect on the listener, is no longer being introduced *as an assertion*. It is introduced merely as an utterance, the relevance of which does not depend on the truth of its proposition of fact, but on some other circumstances attending the making of the utterance.

⁹⁸ See Fed. R. Evid. 104(b).

⁹⁹ The point is not that the oath ensures truth telling. The point is that the oath is an overt commitment to tell the truth. If a person tells a falsehood, there is no argument that they did not think they were obligated by commitment or normative standard to tell the truth.

¹⁰⁰ [ABF Freight System, Inc. v. N.L.R.B., 510 U.S. 317, 327 \(1994\)](#) (Scalia, J., concurring); see Fed. R. Evid. 603 (requiring testimony under oath).

¹⁰¹ See [18 U.S.C. §§ 1621](#) (perjury), 1623 (false statement under oath). While perjury prosecutions are relatively uncommon, compared with some other crimes, the point is that penalties exist and are well defined. In ordinary speech people can question whether sanctions exist at all, and if they exist, what is their content.

normative standard. While the [*372] required epistemic support for an assertion in ordinary conversation may be variable,¹⁰² the same is not true of a statement under oath at trial:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.¹⁰³

The congruence of trial rules and the attributes of assertion seems more than an interesting coincidence.¹⁰⁴ The rules of trial strive to offer a jury an unambiguous set of relevant assertions, subject to robust, explicit norms and commitments, as testimonial evidence, along with the context of and grounds for these trial assertions.

A. *The Relationship Between Questions and Assertions*

The question and answer format practiced as a matter of custom in common-law jurisdictions tends to lessen ambiguities in the making of assertions. In fact, this benefit may be one of the primary reasons for adopting this curious method of presenting testimony. Rather than permitting the witness to get on the stand and say his piece in narrative fashion, a lawyer must ask questions, one at a time, and receive assertions as answers, one at a time. The effect is striking. It isolates and permits the minute examination of each assertion the witness makes in relation to the question that precipitated it.

One argument in favor of the existence of assertions as a meaningful category of speech act is that an assertion is the default correct response to a correctly phrased question. An assertion can be made in the absence of a triggering question, but an assertion's ordinary function is to provide information in answer to a question. At trial, the judge treats a non-assertive response to a correctly phrased question as evasive and non-compliant.¹⁰⁵ Answering a [*373] properly posed question with a refusal ("I'm not answering that"), a question ("what are you getting at?"), or an offer ("I'll answer that if you'll answer my question") violates the rules of trial. Such an error of form is obvious, and it is quickly and emphatically corrected. Answering a properly posed question with an assertion that does not address the proposition included in the question is a subtler, but nevertheless discouraged, act.¹⁰⁶ The familiar trial command - "just answer the question" - is a telling piece of evidence that assertion, as the proper form of response to a question, exists and has properties that are well intuited by judges, attorneys, juries, and witnesses, even if its properties are not precisely labelled.

A question is a request for information. A genuine question seeks true information; a genuine assertion supplies a sincere answer based on the best available knowledge. In ordinary conversation people typically understand that a question is a request for *true* information, but at trial there is no doubt of that fact.¹⁰⁷ This requirement that

¹⁰² See Goldberg, *supra* note 36, at 11-12; Rachel McKinnon, *The Norms of Assertion* 51-84 (2015) (analyzing the author's "supportive reasons norm" and several other different proposals).

¹⁰³ Fed. R. Evid. 602.

¹⁰⁴ It is interesting that lawyers and jurists remarked on the distinctive features of assertion before philosophers of language. See Austin, *supra* note 1, at 13, 19.

¹⁰⁵ A frank disavowal of knowledge is an assertion, something like the null set of possible assertions. The fact that "I don't know" is ordinarily treated as a *prima facie* appropriate answer to a question supports the theory that an assertion is subject to an underlying epistemic norm. See Williamson, *supra* note 72, at 249.

¹⁰⁶ See [Bronston v. United States, 409 U.S. 352, 354 \(1973\)](#) for an example of an unresponsive question that was not literally untrue: 'Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? 'A. No, sir. 'Q. Have you ever? 'A. The company had an account there for about six months, in Zurich. 'Q. Have you any nominees who have bank accounts in Swiss banks? 'A. No, sir. 'Q. Have you ever? 'A. No, sir.' Mr. Bronston did indeed have individual accounts in Switzerland at one point. He was prosecuted for perjury, but defended successfully on the grounds that his answer "The company had an account there for about six months, in Zurich" was literally true, though deliberately unresponsive to the question "Have you *yourself* ever [*had any bank accounts in Swiss banks*]."

an answer to a question provide truthful information is a reason to think that the "common ground" explanation of assertion is inadequate. It is not plausible to contend that a witness who is asked the question "what time was it when shots were [*374] fired" ¹⁰⁸is only proposing that the parties add the answer "3 p.m." to the commonly agreed presuppositions that will undergird further conversation. ¹⁰⁹The legitimate expectation of the questioner, and hence the legitimate obligation of the witness, is that the answer be true. If the answer is not true, the witness is culpable, although if the answer is based on sincere belief and the best knowledge available to the witness the sanction may be limited only to discrediting the witness.

While it is correct that the person who answers the question is proposing that the information " *[it was] 3 p.m. [when the shots were fired]*" be added to the stock of accepted facts that will undergird the discussion going forward, that is not all he proposes. He is also affirming that the facts are true, or at least, that he knows and believes, that " *[it was] 3 p.m. [when shots were fired].*" ¹¹⁰Jabbering for the sake of jabbering, without reference to the truth of the propositions piling up at the feet of the conversationalists, is a possible type of conversation. An assertion "grounded neither in a belief that it is true nor, as a lie must be, in a belief that it is not true. It is just this lack of connection to a concern with truth ... that [is] the essence of bullshit." ¹¹¹Nevertheless, it is not plausible as a general norm for conversation, and it is certainly not the kind of conversation tolerated during trial.

In ordinary speech, assertions untethered to questions may give rise to concerns about either the commitment of the speaker to the truth of the assertion or the epistemic norms attached to the assertion. If a person is simply making an assertion into the void, or to his secret diary, without any question pending or even any audience in mind, the lack of a specific "recipient" of the information may make the speaker's commitment to truth ¹¹²seem equivocal. [*375] At trial, a judge frowns upon assertions untethered to questions, and they are kept to a minimum.

But even when an assertion is used to answer a question in ordinary conversation, the legitimacy of doubts about the speaker's commitment to the truth of the assertion, as well as the epistemic norms attaching to the assertion, are not substantial. If I ask a stranger at the train station "do you know what time the next train arrives?" there is little doubt that he owes me a true assertion if he chooses to respond at all. If he tells me "6 o'clock," I legitimately expect that his answer is true, or at least based on the best information he knows and believes. I legitimately expect that if he does not know, he will say nothing, or state that he does not know. The stranger is subject to social censure if he does not know the correct answer but still says "6 o'clock" without indicating he is guessing. He is subject to even harsher censure if he knows the correct answer is 6 o'clock but lies and says, "8 tomorrow

¹⁰⁷ This is not to say that speakers do not answer questions via other forms of utterance. They do. But assertion is the norm and other forms of utterance usually serve as a comical or emphatic way of refusing to answer with an assertion. The response draws its comedy or emphasis just from its disjunction with the more ordinary practice of refusing to answer, either by silence or by affirmative refusal. If I answer the question "where were you last night?" with the command "talk to the hand" it is a colorful way of telling the questioner I am not answering her question. Colorful, but perhaps not wise. This type of non-assertional response to a question is frowned upon at trial, and the witness is made to give an assertion, if a litigant challenges the answer as non-responsive.

¹⁰⁸ In the ordinary sense. One can usually construct a context that distorts the ordinary understanding of a form of speech. A man asking a provocatively clad woman in a known red-light district "what time is it?" may be looking for an answer other than "2 a.m.," but surely even he is not looking for a false statement of the time, such as "8 a.m." The fact that he intended to make a solicitation, by an indirect means of speech, rather than seeking the correct time, is interesting but uninformative about whether a speaker actually asking an ordinary question expects an accurate assertion as an answer.

¹⁰⁹ It is patently absurd at trial. I contend that it is implausible in a large majority of question and answer interactions during ordinary conversation.

¹¹⁰ And if he is not, he is either a reprobate or, perhaps worse, testing a new definition of assertion.

¹¹¹ Harry G. Frankfurt, *On Bullshit* 33-34 (2005) (A fascinating account of assertions made without any regard to their truth or falsity).

¹¹² Or the normative requirement that the assertion be true, be based on knowledge, be warranted, etc.

morning." The depth of his epistemic deficiency is one measure of the social censure attaching to his answer; the consequences of the deficiency is another. At trial, the censure for making assertions without an epistemic basis, or for outright lying, tend to be more immediate and overt than in ordinary conversation.

The question and answer format enforced at trial tends to isolate each assertion by the witness and permit its careful evaluation by the jury, attorneys, and judge. This isolation is not perfect, but the effect is far more pronounced than in ordinary conversation. The ebb and flow of ordinary conversation permits, and even demands, a great deal of unexplored vagueness and implicature. Both are present in trial testimony, as in all speech, but the parties at trial have the motive, the power, and the time to specify the vague and explicate the implicit.

B. Second-hand Assertions

In day-to-day circumstances, people often rely on second-hand assertions, giving them such weight as they think the circumstances deserve. People tend to waive or disregard the various entitlements that an assertion creates in the hearer. That tendency seems due to one or more of several conditions being true: 1) the existence of small stakes; 2) the existence of relatively high costs in time or effort to enforce the right of epistemic challenge; 3) the risk that rules of assertion may be invoked has some deterrent effect on a speaker, and therefore some credibility enhancing effect for the hearer, even if the hearer's entitlements under the rule are not enforced; 4) the human preference not to put more effort into evaluation of the [*376] truth of an assertion than experience teaches is necessary to function reasonably; and 5) the presumptive truth of assertion necessary for language acquisition tends to bias a listener in favor of believing any individual assertion.

Exercising one's prerogatives as the hearer of an assertion takes a lot of work. The various factors that lead people to rely on, or at least not to challenge, hearsay in ordinary life supply some insight into why the hearsay rule is applied at trial.

C. Exercising the Right to Challenge an Assertion

In ordinary life, the person making the decision whether to challenge an assertion is one and the same as the person with a stake in the truth of the assertion: the hearer. At trial, the person doing the questioning is different from the "hearer" (the jury). The questioning at trial is conducted by people with a substantial stake in the outcome, rather than by the jury, who have no stake at all. The jury's lack of any stake in the outcome is crucial to assuring that the jury is a neutral decision maker. But the lack of a stake in the outcome is a problem when it comes to assessing whether to rely on untested assertions. A person without a stake in the outcome is apt to undervalue both the stakes at issue and the benefits of epistemic challenge, and to overvalue efficiency, or "getting on with it," when confronted with untested assertions. The cost of enforcing the various entitlements created by an assertion falls on the jury, in the form of excluded information or the tedium of sitting through socially unpleasant and often unproductive cross-examination, while the benefit of getting the facts right goes to one of the parties, not to the jury.

The solution is to adopt the awkward convention of having a party's attorney do the questioning, rather than the decision-maker, the jury. The parties¹¹³ are in a better position to make an informed decision about the need for epistemic challenge of a particular assertion, hence whether to enforce the hearsay prohibition.¹¹⁴

The right of epistemic challenge is enforced by the parties at trial in at least two ways. On direct examination a witness must [*377] establish that she has personally observed an event or fact before she is allowed to testify about it.¹¹⁵ A witness has to give an explanation of how she "knows" something she is asserting. A proponent

¹¹³ Subject to limits set by the judge. See Fed. R. Evid. 611.

¹¹⁴ Two general caveats attend this rule: 1) waiver or forfeiture and 2) exemptions from and exceptions to the hearsay rule. The parties may agree to waive or forego the protections of the hearsay rule, since it is for their benefit that the hearsay rule exists. Exceptions to the hearsay rule and exemptions from the definition of hearsay represent a judgment that under the particular circumstances of the exception or exemption, the cost of insisting on exclusion of an out-of-court assertion outweighs the value.

typically takes pains to establish the witness's credibility, in part by having the witness explain how she comes by her knowledge. An opposing party may challenge the basis of the witness's knowledge by objecting to the "lack of foundation" during direct examination. Such challenges are routinely sustained, and the judge then requires the direct examiner to lay a foundation of personal observation. The opposing party may also challenge the witness's epistemic basis for assertions through cross examination. However much the jury may want to skip the enforcement of the right of epistemic challenge, the jury does not make that call.

The hearsay rule, as a variation from ordinary conversational practice, represents the outcome of several policy judgments: a) the stakes are higher at a trial than in ordinary conversation; b) people without a stake in the truth of an assertion undervalue the benefit of epistemic challenge and overvalue the reliability of untested assertions; and c) it is unfair to subject a litigant to the convincing power of an assertion without giving him the full benefit of all of the features of assertion that tend to make it convincing in the first place. In light of these policy considerations, the hearsay rule reverses the tendency in ordinary conversation to accept second-hand assertions as information.
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The trouble the Federal Rules, and more generally, American jurisdictions, take with hearsay is unusual among judicial systems. ¹¹⁷The rule is costly in time, effort, expense, and the loss of potentially relevant evidence. The hearsay rules seek to correct for the distorting effect that a jury's lack of a stake in the outcome has on their willingness to enforce the norms and commitments of assertion. The hearsay rules ensure that a jury - at the election of a party whose interests are at stake - has the best available tools to assess an assertion's likelihood of being true. The burden and expense of the hearsay rule is justified when it comes to out-of-court assertions used as assertions at trial, but not, in the scheme of the federal rules, when it comes to non-assertional utterances. This distinction is based on an estimation that epistemic challenge is a necessity **[*378]** when testing sincerity - always at stake when an assertion is introduced as such - but not as essential when dealing with ambiguity, perception, and memory. ¹¹⁸

V. Non-assertional Utterances and Indirect Assertions

Rule 801 makes it important to differentiate between assertions and non-assertional utterances. In ordinary conversation people do not intend to make representations of fact when making non-assertional utterances. Thus, non-assertional utterances do not have the capacity to be true or false. Rule 801(a)'s careful language about intended assertions accommodates the unusual circumstance where a non-assertional phrase or non-verbal conduct is intended as an assertion, subject to evaluation as true or false. ¹¹⁹

A. Differentiating Between Assertions and Non-assertions

Differentiating between assertions and non-assertions at trial requires an appreciation of how speakers and listeners identify assertions and non-assertions in ordinary speech. Questions, commands, requests, and assertions are all types of "illocutionary acts." ¹²⁰The fact that an utterance is phrased in the ordinary or conventional

¹¹⁵ See Fed. R. Evid. 602 (requirement of personal knowledge).

¹¹⁶ Jurors often seem perplexed or dubious about the reasons why hearsay evidence is excluded at trial. When hearsay matters in a trial, it would be a reasonable practice for judges to give a basic instruction about the operation of the hearsay rule, and the reasons justifying the rule.

¹¹⁷ David Alan Sklansky, Hearsay's Last Hurrah, Sup. Ct. Rev. 36-37 2009, at 1, 36-37.

¹¹⁸ See Fed. R. Evid. 801 advisory committee's note.

¹¹⁹ *Id.*

¹²⁰ Questions, assertions, and many other categories of "illocutionary" acts have been identified and categorized in the literature. See Austin, *supra* note 1, at 151; Searle, *supra* note 78, at 12-20; Bach & Harnish, *supra* note 54, at 41. Communicative acts consist of (at least) four subsidiary acts, "utterance acts," (roughly, speaking) "locutionary acts,"

form of a question is powerful, but not conclusive, evidence that the speaker intended a question. ¹²¹The fact that the utterance is not in the ordinary form of an assertion permits a strong presumption that the speaker did not intend the utterance as an assertion. Most of the time speakers do not use the linguistic forms of questions, commands, or other types of utterances to make an assertion. The reason is simple: they are likely to be misunderstood. ¹²²

[*379] One of the - if not *the* - most significant parts of the communicative force of an assertion is that the hearer is made aware that the speaker intends to make an assertion. More, the speaker makes the hearer aware that the speaker wants the hearer to understand the speaker to be making an assertion. ¹²³It is certainly possible for a person to intend to make an assertion by uttering a set of words in the form of a question, for instance. ¹²⁴People can do this for effect, in much the same way that they make obviously wrong assertions as an ironic device. But the effect, in these special cases, proves the rule. Using the form of a question to make an assertion would not be striking if the ordinary uses of the form of a question - to ask for true information - and the form of an assertion - to convey true information - were not so predominant.

The presumption that a speaker intended a certain illocutionary act when using the conventional form or pattern for expressing such an illocution - for instance, the form verb/subject/object with a distinctive uplift in tone at the end of the sentence when asking a question ("is there butter on the table?") - can be rebutted. Nevertheless, the rebuttal must be based on obvious and convincing evidence because the logical and practical necessities that drive the communicative presumption ¹²⁵are so powerful. Effective and efficient communication depend upon easily understood and interpreted illocutionary signals. That is why a "question is typically not *hearsay* because it does not assert the truth or falsity of a fact. A question merely seeks answers and usually has no factual content." ¹²⁶An utterance in the form of an exclamation, such as "good **[*380]** heavens," typically does not purport to assert

(roughly "saying" or "meaning"), "illocutionary acts" (the doing of some recognizably communicative act that hinges on the speaker's intent to secure uptake in the hearer), and "perlocutionary acts" (the effect on the listener, for instance, surprise, comprehension, sorrow). [Id. at 3](#). "Illocutionary acts" are those by which we perform some function with the uttering and saying of words, e.g., questioning, asserting, commanding, requesting. [Id. at 3-4](#).

¹²¹ Bach and Harnish explain the process of identification of illocutionary intent at some length. See Bach & Harnish, *supra*, note 54, at 12-16.

¹²² The confusion engendered by mismatching forms of speech and intention is at the core of the skit "Who's on First," by Abbott & Costello. The utterance "who's on first" was intended by Lou Costello as a question but was understood by Bud Abbott as an assertion about a player named "Who." The misunderstanding was repeated and elaborated for all the players, to Costello's immense frustration.

¹²³ One of the "most extraordinary" properties of human communication is that "in the case of illocutionary acts we succeed in doing what we are trying to do by getting our audience to recognize what we are trying to do." See Austin, *supra* note 1, at 47. In the case of assertion, part of the communication (the "illocutionary effect," in Searle's parlance) is that I am making an assertion. Absent this understanding, the communication falls short. See also Bach & Harnish, *supra* note 54, at 12-13 ("What distinguishes illocutionary intentions, we suggest, is that their fulfillment consists in their recognition."); [id. at 4](#) ("Part of the speaker's intention is that the hearer identify the very act the speaker intends to be performing, and successful communication requires fulfillment of that intention."); [id. at 15](#) ("An illocutionary act is communicatively successful if the speaker's illocutionary intent is recognized by the hearer.").

¹²⁴ A useful term for this practice is indirect assertion. See Searle, *supra* note 78, at 30.

¹²⁵ See Bach & Harnish, *supra* note 54, at 12-15 on the communicative presumption necessary for language and particularly the discernment of illocutionary intent.

¹²⁶ [United States v. Wright, 343 F.3d 849, 865 \(6th Cir. 2003\)](#); see [United States v. Love, 706 F.3d 832, 839-40 \(7th Cir. 2013\)](#) (questions are not assertions and therefore not *hearsay*, notwithstanding the fact that all questions communicate some information implicitly); [United States v. Jackson, 88 F.3d 845, 847-48 \(10th Cir. 1996\)](#) (the utterance "Is this Kenny?" was not an assertion, but a question); [United States v. Long, 905 F.2d 1572, 1579-80 \(D.C. Cir. 1990\)](#) (question is not an assertion, and its implicit assumption of facts does not make it one); *but see* [United States v. Summers, 414 F.3d 1287, 1299-301 \(10th Cir.](#)

a proposition of fact. There is no custom or habitual inclination, on the part of language users, to treat an utterance in the form of a question or exclamation as an assertion of fact.

B. Practical Identification of Assertional Utterances

The task, under Rule 801, is to identify and exclude assertions that are offered in evidence for their truth, while preserving other types of relevant utterances from categorical exclusion. It is not practical to expect a judge to assess whether an utterance satisfies the eight (or more) attributes of an assertion. A simpler test is that an utterance that can be evaluated for the truth of its embedded proposition of fact likely is an assertion. "The car is green" obviously can be evaluated for its truth: either the car is green, or it is not. The command "give me the keys to the green car" cannot be evaluated for truth or falsehood, on its face. The hearer can evaluate the utterance as effective or ineffective, understandable or gibberish, but not true or false. ¹²⁷

Another simple way of identifying an utterance as an assertion is to ask if the utterance is an appropriate, explicit answer to a straightforward question. "The car is green" is a grammatically appropriate answer to an easily constructed question such as "is the car green?" But one is unable to easily construct a simple question to which the answer "give me the keys to the green car" is the explicitly appropriate answer. ¹²⁸Another way of getting at the same [*381] point is to ask if the utterance can easily be inverted into question format, e.g., "the car is green" to "is the car green?" Yet another way to easily identify an assertion is to place the phrase "it is true that" before the words in question, to see if the modified utterance still makes sense. So, for instance, "the car is green" still makes sense when one adds "it is true that the car is green." By contrast, "give me the keys to the car" makes no sense as "it is true that give me the keys to the car."

C. Differentiating Between Indirect, Implied, and Veiled Assertions

It is relatively simple to differentiate between various forms of explicit illocutionary acts, such as questions, commands, promises, and assertions. It is more difficult to identify assertions when they are not explicitly made. The issue is important, because whether explicitly made or not, if an utterance is intended as an assertion, it is covered by the definition of *hearsay* in Rule 801.

To be precise when discussing the subject, I will use the phrase "indirect assertion" for all assertions that are not made explicitly. ¹²⁹There are at least two ways an indirect assertion can happen. First, there may be additional implicit assertional content to an utterance that on its face embodies an explicit assertion. I will use the

[2005](#)) (defendant who asked "How did you guys find us so fast?" was not interested in eliciting a response describing "modern methods of law enforcement," but was admitting guilt); [Love, 706 F.3d at 839-41](#) (In *Summers*, the court held that the utterance was not intended to elicit information, but intended to convey an admission of guilt). It is not quite right to say that non-assertional utterances have no "factual content," as stated in [Wright, 343 F.3d at 865](#). It is not the lack of "factual content," but what a speaker is *doing* with the "factual content," the speaker's illocutionary intent, that makes the difference between, say, a question "do you see the sugar?", a request "pass the sugar, please," and an assertion "the sugar is right next to you." All three sentences have "factual content," in some sense, but all three operate differently on the factual content.

¹²⁷ The command's presupposition(s) of fact, once inferred by the listener, may be evaluated for truth or falsehood, but that is a different matter.

¹²⁸ A question proposing two alternatives, tailored to elicit a choice of preference by the listener, would seem to do the trick, i.e., "would you prefer I give you the green car or the red car?" Nevertheless, the most direct and least ambiguous answer to that particular question would be "I prefer you give me the green car." Answering the question with the request "give me the keys to the green car" leaves the question about the listener's preference technically unanswered. The other party to the conversation may presume that the utterance of the request for keys is meant to serve as an implicit answer to the question about preference, but the person expressing the request for the keys may not in fact be expressing his or her preference for the green car. The expression of the request does not bind the speaker to the truth of his or her preference in the same way that an explicit assertion of his or her preference would. The question/answer test of assertion relies on close attention to what is being explicitly asked and answered.

¹²⁹ See *supra* note 124.

term "non-explicit assertion" ¹³⁰to describe assertional content that is implied but not made explicit by a conventional assertion. For instance, if I say, "the Scotch cost \$ 45" I may be making a non-explicit assertion that "the Scotch *whisky* cost *me* \$ 45 [*when I* [*382] *purchased it*]." Instances in which a speaker not only directly asserts a fact, but also intends to make an additional, related, non-explicit assertion, do not usually create trouble under the hearsay rules. If the explicit assertion is banned, so is the non-explicit assertion. ¹³¹Most examples of non-explicit assertion seem to be closely related adjuncts to explicit assertions. ¹³²These types of adjuncts may conceivably raise hearsay issues different from their associated explicit assertions, but examples are difficult to construct and do not suggest a persistent or significant problem.

It is important to explain what a "non-explicit assertion" is *not*. The notion that "implied assertions" accompany every speech act is wrong and founded on a misunderstanding of the function of presuppositions and other types of implicature. ¹³³The use of the phrase "implied assertion" to describe any utterance from which a listener may infer a speaker's presupposition of fact creates hopeless confusion. Even worse is the phrase "unintentional assertion," which is an oxymoron: assertion is by definition an intentional speech act. If one does not intend an assertion, one is not uttered. The phrase "implied assertion," used by scholars to describe and account for *Wright v. Tatham's* broad view of the proper scope of hearsay, misleadingly suggests that though a speaker does not intend an assertion, an assertion should nevertheless be "implied." ¹³⁴In the typical case of "implied assertion," used in this sense, the speaker has no intention of making the assertion inferred by the jurist or litigator arguing for the exclusion of the utterance on hearsay grounds. Rather, the phrase "implied assertion" usually refers to an inference drawn by the listener about the presuppositions underlying the speaker's utterance. If an evaluation of the hearsay dangers leads a judge or litigant to the conviction that hearsay should exclude more than assertion - and the arguments to that effect [*383] may be substantial - using the term "implied assertion" in this fashion does a disservice to productive discussion. ¹³⁵

There are instances when an assertion actually may be intended even though the utterance takes the form of a non-assertional utterance. "Where is my Scotch?" may be a question in form but be intended as an assertion "you have taken my Scotch." I will use the term "veiled" or "disguised" assertion to refer to this type of utterance. Instances when a speaker actually uses a non-assertional form of speech (e.g. a question) to make a veiled assertion are less common than conventional assertions because assertions disguised as other types of utterances are liable to fail in their purpose. Assertions disguised as other types of utterances fail exactly because they are

¹³⁰ I would use the tidier phrase "implied assertion," but it has been so widely used to describe utterances and conduct that are not at all intended to be assertions or were not used assertionally, that I would be begging to be misunderstood. See *infra* notes 133, 135. I use the phrase "non-explicit assertion" to refer to something actually intended as an assertion, though not uttered explicitly, which is different than the sense of "implied statements" used in *Wright v. Tatham* (1837) 112 Eng. Rep. 488 (Exchequer Chamber) 517, *aff'd*, (1838) 7 Eng. Rep. 559 (HL) and its cognate, "implied assertions," used by hearsay scholars since then. See, e.g., David. E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Continuing Quandary for Federal Courts*, 16 Miss. C. L. Rev. 33, 34-35 (1995).

¹³¹ Instances in which an explicit assertion is governed by a hearsay exception that would not cover the non-explicit assertion would be better dealt with under Rule 403 than by a generalized hearsay ban on "implied assertions."

¹³² See for example the various instances discussed in Paul Grice, *Studies in the Way of Words* 24-40 (1989).

¹³³ See Ted Finman, *Implied Assertions As Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 Stan. L. Rev. 682, 682-83 (1962) (arguing that various non-speech acts and utterances should be classified as "implied assertions" and excluded under the hearsay rule if the acts and utterances are used to draw inferences about the actor's beliefs).

¹³⁴ See Seidelson, *supra* note 130, at 34-35; Finman, *supra* note 133, at 682-83.

¹³⁵ See Christopher G. Miller, *Implied Assertion in Evidence Law: A Retrospective*, 33 Miss. L. Rev. 1, 10 n.2 (2014) (citing Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, [76 Minn. L. Rev. 367, 418 n.153 \(1992\)](#) (the term is "a singularly inept and arbitrary umbrella term.)) ("The term 'implied assertion' is misleading.").

disguised and not explicit. Unless the hearer sees through the "disguise," a veiled assertion does not accomplish its purpose.

For instance, my wife's utterance, in the form of a question "are you wearing that tie?" initially induces puzzlement because of course I have the tie on. It is not until I respond (to what I thought was a question) "yes [*I am wearing that tie*]" that I learn the question was meant as a veiled assertion, something like "that tie has mustard on it." I have learned to interpret my wife's disguised assertions, and my wife has become more patient about my not "getting it," but we have had almost four decades of close communication to practice. Most speakers and hearers must rely on widely accepted and easily interpreted language conventions to accurately signal their illocutionary intent. Where speakers and hearers are well known to each other - my wife and I have a long history - they can rely on more shared usage patterns or understandings that vary from the norm.

Veiled assertions are relatively rare because they are confusing and tend not to accomplish the crucial illocutionary act of self-revelation. That is one cost. Another is that the over-practice of veiled assertion tends to generate hyper-identification. If a hearer comes to believe that the speaker has a penchant for veiled assertion, the hearer can begin hearing ghosts - over-identifying veiled assertions where none were intended. Most times a question is just a question [*384] and a request is just a request. Constantly perceiving assertions where none were intended greatly hinders ordinary conversation. ¹³⁶

The idea that people are busy making veiled assertions left and right in ordinary speech is dubious, yet there is little question that that veiled assertions exist. Nevertheless, it is no simple matter to define and identify veiled assertions. ¹³⁷There are no reliably objective and easily applied standards for distinguishing between a case of veiled assertion and an ordinary use of a non-assertional linguistic form, such as a question or command. ¹³⁸As a result, there is no clear limiting principle in the hunt for veiled assertions. A judge may be motivated to find a veiled assertion whenever she is uncomfortable admitting an out of court, non-assertional utterance.

A rule that any non-assertional utterance is excludable if it presupposes or implies some fact is a rule that excludes almost all out-of-court utterances, not just assertions. This rule may be easier to administer than Rule 801 as it presently exists, ¹³⁹but such a rule ignores the reality of how assertional and non-assertional utterances are intended and used. Such a notion also ignores the choice in Rules 801 and 802, which together exclude assertions introduced as such but not other types of utterances. A rule excluding all out-of-court utterances also violates the strong bias against exclusionary rules, which is based on a policy judgment that juries, not judges, generally should make factual determinations.

A judge who excludes a facially non-assertional utterance based on a finding that it is a veiled assertion is doing so based on his or her evaluation of ordinary language use. The judge's evaluation is based upon contestable inferences about a speaker's intent drawn from circumstantial evidence. This is not a specialized legal determination. It is an evaluation of ordinary language use that the judge may be no better at making than a lay juror. It is not the type of fact-finding typically allocated to judges. ¹⁴⁰

¹³⁶ If I ask "where is my Scotch?" as a genuine question, and my friend adopts a hostile tone when responding "what do you mean by that?" I know that there has been a communicative short-circuit. It may take a lot of time and energy to straighten things out.

¹³⁷ Or implicatures generally. See Wayne Davis, *Implicature*, *The Stan. Encyclopedia of Phil.* (Edward N. Zalta ed., Fall ed. 2014) (June 24, 2014), <https://stanford.io/33QMt65>.

¹³⁸ *Id.*

¹³⁹ It would be even easier to admit all out-of-court utterances, never mind if they are assertions or not. That is what many, if not most, legal systems do. That is what ordinary conversationalists do, as well.

¹⁴⁰ See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388-89 (1996) (explaining circumstances in which a judge, rather than the jury, is allocated fact-finding).

[*385] For all these reasons, judges should presume against finding a veiled assertion. The presumption may be overcome through convincing evidence: evidence that efficiently and accurately identifies a veiled assertion during the rapid flow of trial testimony.

Three diagnostic tools seem appropriate. ¹⁴¹First, did the non-assertional utterance occur in a conversational context that would have ordinarily called for an assertion? The easiest example is that the non-assertional utterance occurred in response to a question, since an assertion is the default appropriate response to a question. So, for instance, if the question is "where is my Scotch?" and the response is "where did you put it?" we would immediately remark that the ordinary convention of responding to a question with an assertion has not been followed and suspect that the question "where is my Scotch?" has been interpreted as a veiled assertion. I will refer to this line of reasoning as "assertional fit."

We may also, with some level of confidence, conclude that the person responding ("where did you put it?") does not really care to know where I put my Scotch, since the respondent did not initiate the conversation. If the respondent does not really seek the information superficially sought by his question "where did you put it?," we may assume that some type of veiled assertion is intended. The response does not make much sense if taken at face value as a question seeking information, so a hearer may assume the response was a veiled assertion, due to assertional fit.

This leads to a second diagnostic tool for a veiled assertion: does the facially non-assertional speech act *fail* to fit? If I just asked, "where is my Scotch?" one of the ordinary presuppositions for the question is that [I do not know where my Scotch is]. A questioner's lack of the information requested is generally a presupposition for any question, a kind of presuppositional "null set." An assertion such as "I don't know" [*where your Scotch is*] would be the ordinary response to the question "where is my Scotch?" The response "where did you put it [*your Scotch*]?" flies in the face of the ordinarily inferable presupposition to "where is my Scotch?" - that the speaker does not know where the Scotch is, hence, the question. The response "where did you put it?" is a misfit by form (a question in response to a question) and by logical substance (it presupposes that the person asking "where is my Scotch?" knows where the Scotch is). I will refer to this indicator as "non-assertional misfit."

[*386] Assertional fit and non-assertional misfit may both be present, and if so, they support an argument that a veiled assertion is intended. If one of the two appears, but not the other, the case for supposing that a veiled assertion was intended is weaker. The absence of either assertional fit or non-assertional misfit suggests ambiguity about whether a veiled assertion was intended. In the presence of such ambiguity, a judge should be cautious against finding a veiled assertion. That caution may be overcome by strong evidence of a motive or reason to make a veiled assertion, which leads to a third diagnostic tool.

A judge may identify a veiled assertion when there is some readily discernible reason for making a veiled assertion. Veiled assertions typically take more effort to utter and to understand than an explicit assertion. If there is no clear motive for the extra effort, it makes the veiled assertion less likely. Which leads one to ask what potential motivations there could be for using a veiled assertion, rather than making an explicit assertion? One answer is discretion, in its many shades. An explicit assertion may require the speaker to back a proposition of fact that reflects poorly on the hearer, the speaker, or some third party because it is painful, grotesque, illegal, or impolitic, to name a few possibilities.

Another context in which veiled assertions are often used is an accusatory interrogation. Cross-examination is often conducted by veiled assertions. An attorney conducting a good ¹⁴²cross-examination does so by making

¹⁴¹ I do not suggest that these are the only possible diagnostic tools. They seem to be practical and relatively easy to explain and apply.

¹⁴² Teaching trial lawyers not to ask ordinary conversational questions on cross-examination is at the heart of the instructional process. It is difficult, in part because we confuse new trial lawyers by calling interrogation prompts "questions," when they are quite different in intent and effect from ordinary conversational questions. Once the student understands the

a series of assertions, cloaked in the form of questions. The witness being cross-examined must assent to or disagree with the assertions being made by the attorney. These thinly veiled assertions do not serve the same function as an ordinary question: they are not seeking new or additional information. They are intended as assertions that require an affirmation or negation in response. They are labelled questions for want of a more precise term. A "question" pulled from an accusatory context may well be a veiled assertion because it is customary to use such a linguistic device in that specific context.

A judge confronted with a claim of veiled assertion should ask if there is some obvious motive or reason to veil the assertion. In [*387] the absence of some clear motive or reason, it is fair to doubt that an assertion was veiled because veiling the assertion requires so much more work from the speaker and listener and risks illocutionary failure.

If clear reasons for making a veiled assertion do not overcome the presumption, then a facially non-assertional utterance should not be treated as a veiled or "implied" assertion and categorically excluded as hearsay. Excluding facially non-assertional utterances based on a misleadingly labelled and poorly explained theory of "implied assertion" does a disservice to the language and meaning of Rule 801. It is better to be explicit about the policy choices that lead a court to determine that a non-assertional utterance should nevertheless be excluded as evidence. If a judge is troubled by the ambiguity or potential for unfair prejudice of a non-assertional out-of-court utterance, she should analyze the utterance for probative value and weigh the probative value against the various dangers listed in Rule 403. A truly ambiguous utterance - one that a reasonable person cannot confidently characterize as non-assertional or assertional - may as a result of its ambiguity have low probative value. The low probative value may be outweighed by the substantial danger of unfair prejudice generated by the ambiguous utterance's tendency to suggest an inappropriate or illegal inference. ¹⁴³

The *Summers* ¹⁴⁴case provides an interesting example of the problems associated with veiled assertions. In *Summers*, a co-conspirator named Muhammed made an out-of-court utterance to police: "How did you guys find us so fast?" The trial court admitted the utterance as non-hearsay in a robbery trial against the defendant (Thomas) because the utterance was a question and therefore did not qualify under the hearsay definition as an assertion. The court of appeals disagreed, holding that Muhammed was not interested in eliciting a response describing "modern methods of law enforcement" but was making an admission of guilt that implicated his co-conspirator, Thomas. ¹⁴⁵The court held that the question was an [*388] implied assertion and therefore should have been excluded as hearsay. ¹⁴⁶

Summers' reasoning is unsatisfying. First, the notion that Muhammed was not seeking information seems, bluntly, wrong. It is not at all unusual for someone who has just been arrested to be puzzled, to want to know how he was caught, and to want to know the strength of the evidence against him. ¹⁴⁷Puzzlement or bewilderment is a

difference between an ordinary conversational "question" and a cross-examination "question," the student usually makes significant strides in becoming a better cross-examiner.

¹⁴³ Before excluding evidence under Rule 403, a judge is always well advised to consider whether the evidence's potential for prejudice can be lessened or eliminated by an instruction. See Fed. R. Evid. 105.

¹⁴⁴ [United States v. Summers, 414 F.3d 1287, 1293 \(10th Cir. 2005\)](#) ("When an officer asked Mohammed to identify suspicious items in his front pocket during a pat down, Mohammed replied: 'What do you think? It's bank money.' ... Later, while being led to a police car, Mohammed inquired of an attending officer: 'How did you guys find us so fast?'" (record citations omitted)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; see [United States v. Love, 706 F.3d 832, 839-41 \(7th Cir. 2013\)](#) (*Summers* held that the utterance was not intended to elicit information but intended to convey an admission of guilt).

¹⁴⁷ Lawyers and judges, even ones with years of experience in the criminal law, sometimes have a difficult time understanding why people do and say incriminating things when stopped or arrested. Once a judge insisted during a trial that

standard predicate for a question. The question made perfect sense as a question, in context. There was no non-assertional misfit.

Second, there was no assertional fit. A question is an ordinary way to attempt to clear up one's bewilderment or ignorance. It also is an ordinary way to start a conversation and is more apt to trigger a response than an assertion. Starting a conversation with the police officer by making an assertion "me and Thomas stole the money" would not be completely inappropriate, but it would be jarring and unexpected. There is no strong expectation of an assertion in the conversational context: there was no "assertional fit."

Third, there is no obvious motive or reason for a veiled assertion; at least, none is given by the court of appeals. If the defendant intended to admit guilt or curry favor with the police by implicating his friend, why would he veil the assertion? To be polite? To be amusing or colorful? Was he interrogating the police? Just a few minutes before, Muhammed had told a police officer "it's bank money" when asked to identify the contents of his pocket. He was not being coy. Why he would suddenly shift to making a veiled assertion is not explained, and there is no ready explanation of what his motive might have been to do such a thing. It does not appear that Muhammed intended to veil a criticism or an accusation.

Muhammed's question may have been plain dumb and against Muhammed's own interests, as well as those of his co-defendant, [*389] Thomas. But "plain dumb" is not a good reason to posit a veiled assertion. The inference that could be derived from the question's presupposition - that Thomas and Muhammed had robbed the bank - was inculpatory as to Muhammed's associate, Thomas, but that an out-of-court utterance is inculpatory does not justify morphing the definition of "assertion" to exclude it. ¹⁴⁸Nothing about the semantic context rebuts the presumption that this utterance, delivered in the form of a question, was intended as a question, rather than as an assertion.

The desire to exclude the statement is understandable, for reasons I will explain, but calling a question an "implicit assertion" is like defining a dog's tail as a leg and then insisting that dogs have five legs. Life is simple, under this thinking: if one believes the utterance should be excluded one simply renames it an "implicit assertion," or "unintentional assertion," or "quasi-assertion" - any name will do, so long as it has a qualifier and the word assertion in it - and dispenses with the need for actually analyzing why the utterance should be excluded. The problem is that the notion of "implicit" or "unintentional" assertion is impossible to limit because it means no more or less than "an utterance that ought to be excluded as hearsay." What is actually happening is an expansion of the categorical ban of the hearsay rule to cover more than correctly defined assertions, a choice that the framers of Rule 801 explicitly rejected.

The desire to exclude the utterance in *Summers* is understandable because of the evidentiary use made of the question. The prosecution introduced the question so that the jury would infer a presupposition (belief or knowledge) underlying Muhammed's question: that he and Thomas robbed the bank. From this a jury could infer that Muhammed knew or believed accurately, and that he and Thomas did in fact rob the bank. This is exactly what *Wright* teaches should be forbidden and exactly what Rule 801 permits, through Rule 801's choice to limit its definitional coverage to utterances that are intentional assertions. *Wright* and its champions seek to ban as hearsay not only assertions but any form of speech or action used at trial to reveal or infer the actor's belief or knowledge and from this belief or knowledge prove the truth of the thing believed or known. Under this rule it does

"no one would be that dumb" as he disbelieved testimony about what a defendant did when a group of police officers burst through his front door. I bit my lip and did not assure him that dumb happens *all the time*. People who have just been arrested are usually overwhelmingly anxious and want to know what is going on. Even experienced criminals have not had the evidentiary repercussions of conversation with the police drummed into their heads by repeated examples during trial. The evidentiary value of a question is not so obvious that the average person, even the average criminal, would be on guard.

¹⁴⁸ That is not to say that a reasonable argument cannot be made to exclude such types of utterance under a hearsay rule such as *Wright v. Tatham's*, but the argument should be made clearly, not by torturing the meaning of the word "assertion." The argument, made clearly, is that the hearsay rule should exclude more than assertions because the hearsay dangers of faulty perception, memory, and communication are also concerns that justify exclusion, even if sincerity is not a significant concern for non-assertive utterances.

not matter whether the [*390] speaker uttered an assertion or not. All that matters is the use made of the utterance at trial: to prove the belief or knowledge of the declarant and to infer from that belief or knowledge that the event is true. The rule of *Wright* bans this as hearsay. That is a defensible rule. It is just not Rule 801.

In *Summers*, the court of appeals seems to have injected concerns more properly addressed under the Confrontation Clause by describing *Crawford* as prohibiting "testimonial hearsay,"¹⁴⁹ which suggests that to be testimonial under *Crawford* a statement has to be hearsay. One of the points of *Crawford* was that the standards for excluding utterances under the hearsay rules and under the Confrontation Clause are different.¹⁵⁰ Mashing together hearsay and Confrontation analysis probably contributed to the holding in *Summers*. What doubtless loomed large in the Tenth Circuit's analysis was that Muhammed had been arrested, was in custody, and was saying words to the police that inculpated his co-defendant. But these issues bear directly on whether an utterance is testimonial, not on whether an utterance qualifies as hearsay under Rule 801.¹⁵¹ Rule 403, however, is a different story.

Analysis of the utterance in *Summers* under Rule 403 is more straightforward than analysis under Rule 801. Exclusion under Rule 403 does not expand the categorical ban under the hearsay rule but rather limits the exclusion's reach to a narrowly focused set [*391] of facts particular to the case. A judge might find that the double inference to be drawn from Muhammed's question had low probative value because of its multiple uncertainties: (a) one cannot be certain what Muhammed's motives were in making his utterance, (b) one cannot be certain that Muhammed actually presupposed that he and Thomas had robbed a bank or was just seeking to find out what the police knew, and (c) one cannot be certain who Muhammed was referring to when he asked about "us." Many of the considerations that lead courts and scholars to advocate for a broad hearsay rule fit well within the analysis of probative value, under Rule 403. Many of the same reasons suggest that Muhammed's utterance had a high potential for unfair prejudice to Thomas, who was asked to defend without cross-examination against uncertain inferences drawn from a cryptic question by an in-custody co-defendant with a motive to curry favor from the police. A judge might justifiably find that the danger of unfair prejudice, under the circumstances, substantially outweighed the probative value of the utterance. That judge might therefore conclude that the utterance should be excluded under Rule 403.

This methodology has several benefits. It avoids having to decide a difficult case using the virtually meaningless label "implicit assertion" to apply a categorical ban under the hearsay rule. It avoids putting at naught the language of Rule 801, which by its terms applies only to utterances that qualify as assertions. Assertions, by definition, are not unwittingly made. This methodology provides future trial courts with meaningful guidance about the circumstances that justify exclusion of non-hearsay utterances used to prove the belief or knowledge of the

¹⁴⁹ See *Summers*, 414 F.3d at 1298. In fairness, the phrase was borrowed from *Crawford* itself: "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Crawford v. Washington*, 541 U.S. 36, 53 (2004).

¹⁵⁰ See *Crawford*, 541 U.S. at 51 ("This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the ... abuses the Confrontation Clause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.").

¹⁵¹ Caution with custodial statements, because of the distorting effects of arrest on one's perception of self-interest, is not new. See, e.g., *Williamson v. United States*, 512 U.S. 594, 599-600 (1994) (self-exculpatory portion of a custodial statement did not qualify as a statement against penal interest under Rule 804(b)(3)); see also *Bruton v. United States*, 391 U.S. 123, 126 (1968) (an out-of-court custodial statement of a co-defendant is inadmissible as a violation of the Confrontation Clause at a defendant's trial). Uncertainty over the scope of *Crawford* may have motivated the resort to hearsay in *Summers*. The parties argued the case as a hearsay issue from start to finish. The court in *Summers* would have had to apply *Crawford*, then a new case with uncertain contours, on plain error review. Using "implied assertion" as a device to reverse must have seemed the lesser of two evils. For the same reason, the Rule 403 analysis suggested in the text would not have been available to the court of appeals, having not been argued below.

declarant in order to prove the truth of the thing believed or known. And this methodology permits future trial courts to make meaningful distinctions for similarly used utterances that for one reason or another are not as problematic as the one confronted in *Summers*.

VI. Out-of-court Assertions Used Non-assertionally at Trial

The flip side of a veiled assertion is an out-of-court utterance that clearly was intended as an assertion when made by the declarant but that is not used at trial for the truth of the proposition of fact asserted.¹⁵² Such a curiosity does not meet the definition of [*392] **hearsay** under Rule 801.¹⁵³ This is so because the assertional character of the statement is not the basis of its trial relevance. The utterance is relevant at trial because of inferences that can be derived simply from the fact that the statement was made, or from the circumstances under which it was made, rather than from the truth of its core proposition of fact. Just as with a non-assertional utterance, only the credibility of the person hearing and relating the statement to the jury need be evaluated by the jury. Although the utterance fits the bill as a "statement," it is not "**hearsay**."¹⁵⁴ It does not fit the third dimension of **hearsay**, which involves an examination of how the statement is used at trial.¹⁵⁵

This feature of the definition of **hearsay** inevitably poses conceptual difficulties for juries and practitioners because one is dealing with a single utterance used with two different states of intention at two different points in time: the declarant's intention when making the utterance, which is assertional, and the proponent's intention when putting the utterance into evidence, which is non-assertional.

Suppose that a witness heard a murder victim tell the defendant that the victim was having an affair with the defendant's wife. The victim may have intended to make an assertion of fact, but the prosecution might offer the statement because the utterance supplied a motive for the defendant to murder the victim, irrespective of its truth. On this basis, the jury need only evaluate whether the statement was in fact made by the victim to the defendant. The statement is not "**hearsay**" because it is not being introduced for its truth - it is relevant to the trial irrespective of its truth.

A. Examples of Assertions Used for Purposes Other Than Their Assertional Content

A reoccurring instance in which an out-of-court assertion is admitted for a non-assertional purpose at trial involves an out-of-court conversation between a party and a non-party in which the party makes damaging statements admissible under Rule 801(d)(2)(A). The party against whom the damaging statements are made may seek to exclude the other side of the conversation as [*393] inadmissible **hearsay**. Courts typically permit the introduction of the other side of the conversation not for its truth but to put the admissible statements of the party to the litigation in context and make them coherent.¹⁵⁶

A lie, offered into evidence as such, is not being used to prove the truth of the matter asserted and therefore is not **hearsay**.¹⁵⁷ Trial lawyers put lies, as such, into evidence because they can be proven false, and their falsity is

¹⁵² This is often expressed tersely at trial as "not introduced for the truth of the matter asserted."

¹⁵³ Fed. R. Evid. 801(c).

¹⁵⁴ Fed. R. Evid. 801(a) (statement), (c) (**hearsay**); see *Anderson v. United States*, [417 U.S. 211, 219-20 \(1974\)](#) (false statements not introduced for their truth are not **hearsay**); *Tennessee v. Street*, [471 U.S. 409, 417 \(1985\)](#) (an accomplice confession was not introduced for its truth but to rebut defendant's contention that the two confessions were identical and were the product of coercion).

¹⁵⁵ See *supra* notes 3-4.

¹⁵⁶ See *United States v. Hendricks*, [395 F.3d 173, 184 \(3d Cir. 2005\)](#). In *Hendricks* the government introduced a cooperating witness's side of a taped conversation in order to place the defendant's conversation in context. *Id.* The statements were not **hearsay** because they were introduced not for their truth but so that the defendant's statements would be comprehensible. *Id.*

relevant. ¹⁵⁸Proof that someone uttered a lie about something material to the case ¹⁵⁹may be circumstantial evidence of the person's consciousness of guilt.

Words of "independent legal significance" may be relevant because they were uttered, not because they were true. ¹⁶⁰Ready examples are the words "I offer," or "I accept," uttered at a specific point in contract negotiations. ¹⁶¹The utterance of the words has legal significance independent of its truth as a representation of the speaker's state of mind because the utterance creates a binding contract, regardless of the speaker's true intent. In the same way, a sexual proposition is a "verbal act," as is a solicitation to commit murder. ¹⁶²These "performative" words are akin to other physical acts that accomplish a certain task. The accomplishment of the task is not dependent on the truth or falsehood of the statement. If an out-of-court utterance is relevant as a verbal act, and not because of **[*394]** its truth, the jury need only evaluate the credibility of the witness who heard the words, not the credibility of the declarant who said the words.

B. Coping with Multiple Inferences from an Assertion Not Introduced for its Truth

If the theory of relevance under which a statement is being proffered does not depend on the assertion's truth, then the statement is not **hearsay** under Rule 801, at least, not as proffered. This does not mean that the assertional form of the utterance, or its truth value, has no impact on admissibility. The court may fear that a jury will not be able or inclined to follow the instruction on the proper use to which the statement may be put. The jury may mistakenly treat the statement as relevant if true, decide it was true without the benefit of having the declarant testify, and base a verdict on this defective inferential process. ¹⁶³

Nevertheless, judges should not evaluate competing potential inferential uses, some permitted and some forbidden, under the **hearsay** rules, because the **hearsay** rules have no mechanism for such a weighing process. Rather, judges should conduct this weighing process under Rule 403, which explicitly addresses the problem. The

¹⁵⁷ [Anderson, 417 U.S. at 221](#); see also [United States v. Nadeau, 639 F.3d 453, 55 \(8th Cir. 2011\)](#).

¹⁵⁸ If the false utterance is introduced not because it is false but for some other purpose, e.g., notice on the part of speaker or listener, then the falsity of the statement need not be proven, just the content of the statement. The falsity is not part of the inferential logic that makes the statement relevant.

¹⁵⁹ See [United States v. Berrios, 676 F.3d 118, 131 \(3d Cir. 2012\)](#) (a lie wholly unrelated to the crime does not logically tell us anything material about the defendant's intent *vis a vis* the crime).

¹⁶⁰ See [Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 \(6th Cir. 1999\)](#) (A "verbal act," such as an offer to sell, may be introduced not for their truth but because they have "independent legal significance."). See Austin, *supra* note 1, at 4-5 (using the word "performative" to describe utterances that are part of the doing of some action, not a report or description of the action).

¹⁶¹ See [Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 298 F.3d 201, 218 \(3d Cir. 2002\)](#) ("[A] statement offering to sell a product at a particular price is a 'verbal act,' not **hearsay**, because the statement itself has legal effect.").

¹⁶² [Owens v. United States, 822 F.2d 408, 410 \(3d Cir. 1987\)](#) (sexual proposition); See [United States v. Childs, 539 F.3d 552, 559 \(6th Cir. 2008\)](#) (solicitation to murder).

¹⁶³ See [United States v. Jones, 930 F.3d 366 \(5th Cir. 2019\)](#). Jones involved testimony that an agent had received a tip from an informant that the defendant was involved in drug trafficking. [Id. at 377](#). The tip was introduced to explain why the agent was investigating the defendant, *i.e.*, not for its truth. *Id.* The statement would not only have been **hearsay** but a testimonial statement that would have violated the Confrontation Clause if admitted for its truth. *Id.* The Fifth Circuit held that the trial court's instruction on the proper use of the out-of-court assertion was not enough to deter the jury from wrongly inferring guilt from the inculpatory assertion by a co-conspirator. [Id. at 380](#). The out-of-court statement happened to be testimonial, so that the instructional failure meant that it violated the Confrontation Clause. But a similar type of reasoning can be employed under Rule 403, even if the statement is non-testimonial and therefore not excludable as a Confrontation Clause violation.

rule provides that a judge can exclude evidence, even if relevant, if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, jury confusion, or other factors. ¹⁶⁴

Under Rule 403, a judge should weigh the level of danger posed by the improper inference - the out-of-court assertion introduced for its truth - and the risk that the jury will adopt the improper inference, even in the face of an instruction from the court **[*395]** explaining the proper use. Against this the judge should weigh the probative value of the proper inference derived from the out-of-court utterance and the likelihood that the jury will be able to understand and apply this proper inference. ¹⁶⁵If the danger of unfair prejudice from the improper inference substantially outweighs the probative value of the proper inference, then the judge may exclude the out-of-court utterance under Rule 403.

This methodology recognizes the reality that out-of-court assertions introduced under a theory of relevance that does not depend on their assertional character are inevitably susceptible to more than one inference. It also recognizes the reality that jurors might find it difficult to sift the wheat from the chaff. It is better to weigh these realities explicitly, under Rule 403, rather than doing so under the legal fiction that one or another inference is the only one that can be derived from the utterance. Except for the special cases of multiple inference dealt with in Rule 801(d), discussed below, analysis under Rule 403 is the proper way to handle utterances that are susceptible to multiple inferences, some appropriate and some forbidden.

VII. Hybrid Utterances Having Both Assertional and Non-assertional Relevance

Rules 801(d)(1) and (d)(2) identify and exempt ¹⁶⁶two classes of utterance that would otherwise be included within the definition of ***hearsay*** contained in Rule 801(c). These hybrid utterances typically have both assertional and non-assertional relevance. Rules 801(d)(1) and (d)(2) exempt these hybrid utterances for different reasons. Rule 801(d)(1) exempts certain out-of-court statements by a "declarant" who also happens to be a witness at trial, while Rule 801(d)(2) exempts certain statements of a party, or statements attributable to a party, offered against that party at trial.

These special cases concern situations in which an utterance normally will be relevant for reasons in addition to and apart from the utterance's assertional value. The definitional exemptions of subsection 801(d) permit the introduction of these hybrid utterances **[*396]** without a special limiting instruction differentiating between a permitted, non-assertional inference and an excluded, assertional inference. In other words, these utterances are allowed into evidence *both* for their assertional value as well as their non-assertional value. By contrast, under Rule 801(a)-(c) an out-of-court utterance that suggests or permits both assertional and non-assertional inferences may be used for its non-assertional evidentiary value, but not for its assertional inference. An explanatory instruction under Rule 105 is ordinarily required to explain the permitted inference and exclude the illicit inference. And if a judge concludes that a Rule 105 instruction does not adequately protect against the danger of a jury accepting the utterance as an assertion and considering its assertional relevance, the judge may opt to exclude the utterance under Rule 403.

The rationale behind Rule 801(d)(1) is that the circumstances identified in subsection (d)(1) adequately address the policies underlying the ***hearsay*** rule. Thus, neither wholesale exclusion nor limited admission (and instructed partial exclusion) of utterances that qualify under Rule 801(d)(1) is warranted. The rationale behind Rule 801(d)(2)

¹⁶⁴ Rule 403's weighing process is a fair summary of the categorical policy judgment that underlies Rule 801 and 802: the danger of unfair prejudice from unexamined ***hearsay*** substantially outweighs the ***hearsay***'s probative value.

¹⁶⁵ With deference to the rule that jurors are presumed to follow their instructions. See [Richardson v. Marsh, 481 U.S. 200, 206 \(1987\)](#).

¹⁶⁶ I use the term "exemptions" to emphasize the difference between the operation of Rule 801(d) and the basic definitional rules of Rules 801(a)-(c), on the one hand, and the exceptions to the definitional rules explained in Rules 803, 804, and 807, on the other. I have not used the term "exclusions" because ***hearsay*** itself is an exclusionary rule. Speaking of "definitional exclusions" would force the reader to wade through the conceptual murk of an exclusion from an exclusionary rule.

is that a special type of non-assertional relevance is at play for the utterances identified by the rule, and this non-assertional relevance preempts the concerns of the hearsay rule.

A. Declarant-witness Exemptions Under Rule 801(d)(1)

1. The Usual Irrelevance of a Witness's Prior Out-of-court Statements

Rule 801(d)(1) provides for special cases involving out-of-court statements by a person who is a declarant and who also a witness at trial. Before considering the details, some context is in order. The hearsay rules enforce a preference to have assertions made directly to the jury by the person who has personal knowledge of the proposition of fact embedded in the assertion. Rules 801(a)-(c), by their terms, do not make an exception for the statement of a declarant who later testifies as a witness. Rules 801(a)-(c) treat the declarant's out-of-court statements as excludable hearsay, even though the declarant-witness is testifying before the jury.

On first blush this is counterintuitive. The declarant-witness is under oath and can be cross-examined before the jury about the out-of-court statement. The right of epistemic challenge is fully protected. Why not dispense with the hearsay exclusion altogether ¹⁶⁷ [*397] and make any out-of-court statement non-hearsay if the declarant appears and testifies?

The answer is easier to understand if one has listened to a lot of trial testimony. The testimony of a declarant-witness about a previous, out-of-court utterance is subject to a peculiar communicative hitch that can confound clear understanding and cross-examination. The declarant can make a technically truthful statement, under oath, that conceals deception. Suppose that a declarant told a co-worker "I saw the defendant kill his boss." Suppose also that at the time the declarant made this statement, he knew that it was false. If the declarant is called to testify and is questioned at trial, "did you say you saw the defendant kill his boss?" the declarant can truthfully answer "yes, I did." This question and this answer actually avoid having the witness make the underlying assertion ("I saw the defendant kill his boss") before the jury, under the penalty of perjury, while giving the jury the impression that the declarant is making an assertion that matters, *i.e.*, that he saw the defendant kill the boss. In fact, the declarant is making an assertion that is normally irrelevant. He is asserting that he said something before the trial. Who cares?

The fact that a witness uttered something in an out-of-court statement generally is not relevant to what is going on at trial. ¹⁶⁸Relevance typically inheres in the substance of an assertion, not in the fact that it was previously said. Questioning about a declarant's former statement usually misdirects the jury. The jury is focused on the substance of the out-of-court assertion and can miss the fact that the assertion actually made before them - affirming the fact of a former statement - is not an assertion about the substance of the communication. The misdirection may be deliberate or just clumsy, but in either event it serves no good purpose. The introduction of an irrelevant and potentially misleading fact - the existence of a prior statement - at trial serves only to confuse the jury, not help it.

This misdirection is the point of including a declarant-witness's out-of-court statements under the hearsay ban. There is no good reason why an advocate or jury should have to sort the misdirection out on cross-examination. It is more efficient to have the witness make the relevant assertion cleanly during his direct testimony and be done with it: "I saw the defendant kill his boss." This rule is ¹⁶⁹ [*398] consistent with the preference to have assertions made directly to a jury.

2. Routine Cases of Mixed Assertional and Non-assertional Relevance

¹⁶⁷ This is the argument made by Professor Morgan. Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 192-193 (1948).

¹⁶⁸ If the witness's veracity or memory are challenged on cross, the fact of the prior statement can become quite significant.

¹⁶⁹ See Fed. R. Evid. 801(c).

Against this background, Rule 801(d)(1) provides for a few reoccurring instances when the fact that the prior utterance was made, or the circumstances under which the utterance was made, are relevant to the issues at trial.¹⁷⁰ In those instances, the rule exempts the prior statement from the definition of **hearsay** and the jury is allowed to consider both its assertional and non-assertional relevance.

Rule 801(d)(1)(A) exempts inconsistent prior statements under oath from the ban on **hearsay**. The rule exempts such a statement because sufficient guards against **hearsay** dangers have been put in place by the conditions for admission. First, the declarant has made a straightforward assertion under penalty of perjury before both the current jury and in connection with the past statement. The explicit commitment to the truth of the assertion, and sanctions for violating that commitment, apply. Since the two statements are inconsistent, by definition, they concern the same subject matter. The witness's motives for lying or telling the truth are closely related, if not identical, for both assertions. Whatever benefit the jury would have had by actually observing the witness making the prior statement is more than satisfied by the benefit of observing the witness confronted in the jury's presence with the prior inconsistent statement and having it introduced as substantive evidence contradicting the witness's trial assertion.¹⁷¹ The right of epistemic challenge in the presence of the jury is available for both statements.

An inconsistent statement need not be categorically inconsistent to qualify for introduction under this rule.¹⁷² A refusal to answer **[*399]** questions also is "inconsistent" with the witness's prior answers under oath, for purposes of the rule.¹⁷³ Statements under oath are by custom written and signed under a formal declaration, or documented via transcript. The precision and formality with which a statement under oath is recorded differs significantly from other, more casual out-of-court statements: there is comparatively little doubt that the declarant made the statement as recorded. Given the fluidity of "inconsistency" under Rule 801(d)(1)(A) the limitation of the exemption to statements under oath is understandable, even if the limitation is puzzling otherwise, since the witness is available for epistemic challenge under oath before the jury concerning the former statement.¹⁷⁴

Rule 801(d)(1)(B)(i) exempts from the definition of **hearsay** a statement that "is consistent with the declarant's testimony and is offered ... to rebut an express or implied charge that the declarant recently fabricated it [the testimony] or acted from a recent improper influence or motive in so testifying." The rule requires that the prior consistent statement be made before the motive to fabricate came into being.¹⁷⁵ The logic of the timing requirement has nothing to do with the attributes of assertions. The requirement derives from a consideration that the consistent prior statement does not have much power to rebut a charge of recent fabrication unless it pre-existed the motive for the fabrication.¹⁷⁶ Rule 801(d)(1)(B)(ii) exempts a prior consistent statement if admitted

¹⁷⁰ Of course, there may be other instances that crop up where the fact that the statement was previously made is relevant at trial, but the Rule deals with "frequent flyers."

¹⁷¹ The adverse party need not introduce this evidence this way, but why wouldn't she? And if she chose not to, that is a tactical decision by counsel, who is taking advantage of ample and agreeable procedural opportunities. Controlling or banning such discretion is not and should not be a concern of the **hearsay** rule, directed as it is to ensuring fundamental process safeguards are available, not to ensuring that every party takes every advantage of these safeguards.

¹⁷² "In applying Rule 801(d)(1)(A), inconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position." [United States v. Iglesias, 535 F.3d 150, 159 \(3d Cir. 2008\)](#) (citations and internal quotations omitted) (testimony of witness with "manifest reluctance to testify" who "forgets" facts he previously remembered is testifying inconsistently, and his prior statement may be admitted under Rule 801(d)(1)(A)); see [United States v. Mornan, 413 F.3d 372, 379 \(3d Cir. 2005\)](#) (lack of memory is not necessarily inconsistent, but a witness whose ostensible forgetfulness is not genuine makes an inconsistent statement); [United States v. Matlock, 109 F.3d 1313, 1319 \(8th Cir. 1997\)](#); [United States v. Williams, 737 F.2d 594, 608 \(7th Cir. 1984\)](#).

¹⁷³ See [United States v. Truman, 688 F.3d 129, 142 \(2d Cir. 2012\)](#).

¹⁷⁴ See *supra* Section 7(A)(i).

¹⁷⁵ See [Tome v. United States, 513 U.S. 150, 167 \(1995\)](#).

to rehabilitate a witness under any other type of credibility attack. Sub-section (B)(ii) does not impose a timing requirement - other than being prior to the in-court statement - on the out-of-court statement. ¹⁷⁷

[*400] An utterance covered under Rule 801(d)(1)(B) is by definition consistent with trial testimony. The subject matter of the statement is therefore logically relevant and probative, since the trial testimony was presumably relevant and probative, or it would have been excluded under Rules 401 or 403. There is no point in requiring that the former statement also be under oath before the jury because the witness has committed explicitly to the truth of a consistent assertion at trial, subject to rules enforced by sanction that the assertion must be based on personal knowledge and must be truthful. The fact that the prior consistent statement was uttered, and the circumstances under which it was made, have also become relevant because of the nature of the attack on the witness's credibility. ¹⁷⁸

Rules 801(d)(1)(B)(i) and (ii) focus on the circumstantial inferences that can be drawn from consistency between the prior statement and trial testimony. As a general matter, consistency between a witness's several statements on a given subject is relevant to the witness's reliability as a historian. ¹⁷⁹In the narrow circumstances dealt with in Rule 801(d)(1)(B)(i), the value of the consistency is so diminished if the prior statement occurred after the motive to fabricate cropped up, that the exemption from *hearsay* is withdrawn. In the more general circumstances described in Rule 801(d)(1)(B)(ii), the Rule gives the witness's historical consistency its due, whenever it occurs.

An instruction telling a jury that it may consider the statement for its rehabilitative effect, but not for its truth, would be gibberish because the former statement and trial testimony are, by definition, consistent. The Rule allows the jury to take the statement whole cloth, without having to digest an incoherent instruction that the former statement may only be used to evaluate the credibility of the trial testimony.

Rule 801(d)(1)(C) exempts a prior statement of identification from the definition of *hearsay*. Lawyers - typically prosecutors - introduce identification statements in one of two circumstances: either the witness is able and willing to make an identification before **[*401]** the jury, or the witness is not. In the instance of a witness who makes a trial identification, the identification made during the investigation arose before the witness's memory faded, or at the least, before it faded as much as it has by the time of trial. The pre-trial identification is the same information that the witness testified to at trial (e.g., "the defendant is the one who hit me with a brick"), so that the substance of the assertion is subject to the penalties of perjury. The jury has the chance to see and hear the witness and evaluate her demeanor, and the defendant has the chance to cross-examine the witness. The same rationale that underlies Rule 801(d)(1)(B) for consistent statements operates here.

The attack on credibility that is the premise for Rule 801(d)(1)(C) typically is based on the tendency of memories to fade. The fact that the prior identification was made at a point in time closer to the incident, and therefore when the witness's memory was fresher, is the additional fact of relevance supplied to the jury. As under Rule 801(d)(1)(B), instructing the jury that they may only consider the prior identification for its rehabilitative effect, and not for its truth, would be gibberish, since the substance of the prior statement and the trial statement are the same. There is no

¹⁷⁶ The rule is not a cure for every attack on credibility, only for an attack based on recent fabrication. See [United States v. Belfast, 611 F.3d 783, 816 \(11th Cir. 2010\)](#).

¹⁷⁷ The difference between "rebut," the operative verb in Rule 801(d)(1)(B)(i) and "rehabilitate," the verb used in Rule 801(d)(1)(B)(ii), is none too clear. Rebuttal of a charge of recent fabrication is just one way to rehabilitate a witness whose credibility is attacked. It seems clear enough that section (B)(i) deals with a narrow circumstance, and section (B)(ii) covers all other cases, many of which may not have a particular event, such as the creation date of a motive to fabricate, that would impose a time limit on the probative value of a prior consistent statement.

¹⁷⁸ The prior consistent statement may be introduced through a person who was not the declarant, which is understandable and consistent with the fact that the statement is not defined as *hearsay*. See [United States v. Green, 258 F.3d 683, 692 \(7th Cir. 2001\)](#).

¹⁷⁹ See Fed. R. Evid. 401.

need to adopt a process by which pre-trial identifications are ordinarily subject to exclusion, under Rule 802.
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In the instance of a witness who cannot (or will not) make a trial identification, the prior identification does not serve as corroboration but as primary evidence of identification. The statement is typically relevant not just for the truth of its assertion, but because an identification witness who does not identify the defendant at trial puts not just his own credibility but the *bona fides* of the entire prosecution, squarely into question. In that context, the prior identification is relevant just because it was made, not just if it was true.

Where the witness cannot or does not make an in-court identification, the rule functions like Rule 801(d)(1)(A) (prior inconsistent statements). The question then arises, why does Rule 801(d)(1)(C) permit all pre-trial identifications, rather than limit admission only to those under oath, as required by Rule 801(d)(1)(A)?

The question can be put more fruitfully in the reverse: why does Rule 801(d)(1)(A) require a prior statement under oath, when [*402] the declarant-witness is under oath and before the jury? After all, the various attributes of assertion are available and reinforced by the trial rules: subjective commitment to the truth of statements; objective requirements that the assertion be true and based on personal knowledge and with sanctions for failure to meet these requirements; and the availability of epistemic challenge.

One significant difference between the circumstances described under the two rules seems to account for the difference in treatment. Rule 801(d)(1)(A) deals with a wide variety of potentially complex statements and a broad spectrum of potential inconsistency.¹⁸¹ Rule 801(d)(1)(C) deals with a very narrow set of prior statements and a relatively simple set of potential inconsistencies. A jury that must evaluate a prior inconsistent statement as substantive evidence is placed in the difficult position of having to make three credibility evaluations simultaneously, (a) the credibility of the declarant-witness at trial whose version of events is being challenged, (b) the probity and accuracy of the witness called to prove the content of the prior inconsistent statement, and (c) the credibility of the declarant-witness at the time the prior inconsistent statement was made.

Where the statements, both trial and pre-trial, are complex, and the potential inconsistencies subtle, juggling the variables in this three-part evaluation of credibility, combined with the ambiguities of comparing complex statements for inconsistency, easily can become overwhelming. Rule 801(b)(1)(A) completely removes one source of complexity because the jury typically does not need to evaluate the probity and accuracy of a witness called upon to relay a prior inconsistent statement. The jury can rely on a disinterested court reporter's transcript or a piece of paper signed under penalties of perjury. Rule 801(b)(1)(A) allows the jury to focus exclusively on evaluating the credibility of the "declarant-witness," in his two roles, by eliminating debate about the accuracy of the witness who testifies about the prior statement.

By contrast, Rule 801(d)(1)(C) dispenses with this requirement of a prior statement under oath in the case of an inconsistent prior identification statement. In the vast majority of cases, witnesses make identification statements to law enforcement officers. If a statement is willfully false it is subject to criminal punishment in much the same way that a perjured statement would be. Additionally, identification statements are almost invariably simple. "He is [*403] the man who hit me with a brick," or "that's the guy." Any inconsistency between trial testimony (e.g. "I can't identify the person who hit me") and the pre-trial statement is stark and binary. In the case of prior identification testimony, concerns about subtle shades of language are rarely significant. Witnesses usually make pre-trial identifications under relatively formal circumstances, and most identifications are reduced to writing.¹⁸²

¹⁸⁰ Cf. [Perry v. New Hampshire, 565 U.S. 228, 237 \(2012\)](#) ("The Constitution ... protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.").

¹⁸¹ See, e.g., [United States v. Mayberry, 540 F.3d 506, 516 \(6th Cir. 2008\)](#) (poor recall is inconsistent with prior good recall).

¹⁸² To the extent they are not, the prosecution usually suffers.

Because of these characteristics, a lawyer opposing the introduction of the prior identification can efficiently test the credibility of the witness relating the prior identification on cross-examination. The jury's burden of making the three-part credibility determination mentioned above is quite manageable. Any benefit the jury would have gained by seeing and hearing the original identification statement is compensated for by having the jury watch the witness confronted with his inconsistency at trial. Applying the hearsay rule's exclusion of prior identification evidence would deprive the jury of valuable evidence that in one respect is of higher quality than trial testimony: it was obtained at a time when the witness's memory was fresher. None of the policies underlying the hearsay rule justify exclusion, since the various attributes of assertion, enhanced by the trial rules, are available.

To summarize, Rule 801(d)(1) exempts from the hearsay definition three carefully defined out-of-court statements by a declarant-witness because the statements ordinarily are not only assertively relevant (for their truth) but also non-assertively relevant based upon the particular circumstances defined in the rule. The special circumstances of the rule adequately serve the policies of the hearsay rule. Application of the hearsay rule would be costly and would serve little or no purpose.

B. Statements Attributable to an Opposing Party: "Declarant-party" Exemptions and Attributional Relevance

Rule 801(d)(2) exempts from the definition of hearsay statements attributable to a party and offered against that party:

A statement that meets the following conditions is not hearsay: ...

(2) The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

[*404] (B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).
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The rule deals with a "declarant-party," or with a declarant so closely aligned with a party that the utterance is imputed as the party's own. While Rule 801(d)(1) provides at a minimum the most important of the trial safeguards applied to out-of-court assertions¹⁸⁴ - the right of epistemic challenge - Rule 801(d)(2) permits introduction of qualifying statements regardless of whether the declarant testifies in court. For these statements, the distinction between assertion and non-assertion is immaterial, and the safeguards ordinarily surrounding assertions are of little or no concern because the theory of relevance does not depend on the truth of an assertion but on other circumstances for the utterance.

1. The Logic of Attributional Relevance

The truth value of a person's own utterance is not the primary or most obvious basis for the utterance's relevance. It is not *what* was said, or *how* it was said, but *who* said it that makes the statement relevant and valuable. A

¹⁸³ Fed. R. Evid. 801(d)(1)-(2).

¹⁸⁴ The most important assertive attribute enforced by the rule is that the declarant must be available for epistemic challenge in the presence of the jury.

party's own utterance is directly probative of the party's motive, intent, knowledge, purpose, and activity, whether true, false, or having no truth value at all. A different theory of relevance - "attributional relevance" ¹⁸⁵ displaces assertional relevance as the logical connection between the utterance and the issues at trial.

[*405] Hearsay protections exist to ensure that a party can test the credibility of a person who makes an assertion used against that party. The protections exist because a typical assertion, introduced as such, is only relevant if true, and a central part of determining the truth is assessing the witness's credibility. By contrast, an assertion by a party, relevant to the litigation and used against the party, is always probative, whether true or false. If it is a false statement about a relevant matter, it is likely to be highly probative of consciousness of guilt or some other state of mind of the party in relation to a relevant matter. If the utterance is introduced as a true assertion, it is especially probative because it is a statement by the party against her own interest. A statement against interest is inherently more reliable than a self-serving assertion. ¹⁸⁶What is more, a declarant-party has no need or justification to probe the epistemic basis of her own assertion. And if she did, she is fully capable of doing so without the assistance of the **hearsay** rule. She can testify.

Our adversary system tolerates the costs of the **hearsay** exclusionary rule because it is unjust to hold a person responsible for what a declarant asserted without ensuring that the various attributes of assertion are enforced through trial rules. Quite the opposite is true when a party's own assertions are used against her. It is the essence of fairness to hold a person responsible for what she intentionally does. Utterance is a species of doing, and assertion is a species of utterance. As it is fair to hold a person responsible for her intentional acts, it is fair to hold a person responsible for her intentional utterances, including assertions.

This rule of attributional relevance is a simpler and more straightforward theory of admissibility than assertional relevance. The jury has only to determine if the statement was made by the party against whom it is being used and if the statement bears on the issues in the case. The jury does not have to determine that the assertion is true in order to determine that it is relevant. If there is some unusual circumstance that suggests it would be unfair to admit a party's statement against her, Rule 403 provides a mechanism for addressing the situation. ¹⁸⁷

[*406] By contrast, all of the ordinary reasons for insisting that an assertion be made in the presence of the jury apply to a party's out-of-court statement if it is offered on her own behalf. ¹⁸⁸A party introducing her own out-of-court assertion is seeking to do so against the interest of the opposing party. The opposing party is entitled to test the grounds for the assertion, both under ordinary language conventions attaching to assertions and under the rules of trial enhancing and enforcing these conventions. ¹⁸⁹

¹⁸⁵ What I call attributional relevance is a type of "if uttered" relevance: if the person made the utterance under the circumstances defined in the rule, it is relevant without regard to its truth.

¹⁸⁶ Cf. Fed. R. Evid. 804(b)(3) (a witness's statement against his own penal or financial interests is admissible, even though **hearsay**).

¹⁸⁷ A number of Constitutional rules exclude statements of a party used against him because of the basic unfairness of admitting the statement. The exclusion of confessions induced by torture is an example. See [Brown v. Mississippi, 297 U.S. 278, 285 \(1936\)](#).

¹⁸⁸ Of course, if a party's own statement meets one of the exceptions in Rule 803 or 804, it may be admissible on the party's behalf.

¹⁸⁹ A statement of a party-declarant used for its truth and admitted on behalf of the party-declarant is self-serving. It does not carry with it the inherent authenticity of a statement against interest. As for a party's own false statement, the circumstances under which a party would find it useful to put her own lies - as lies - into evidence are difficult to imagine, and no doubt rare. It would be tempting to exclude such a statement. Yet it is a curiosity of theory, if not practice, that if a party wishes to introduce his own out-of-court statement for its falsity, rather than for its truth, the statement would not fit the definition of **hearsay**, and so should be presumptively admissible under Rule 802. Whether it would pass muster under Rule 401 or 403 depends on the particular facts.

There are good reasons for excluding as hearsay a prior assertion made by a party and used by the party for her own benefit and no good reasons for exempting such a statement from the hearsay ban. ¹⁹⁰

2. Extensions of the Logic of Attributional Relevance

The considerations that underlie attributional relevance are most obvious in the operation of Rule 801(d)(2)(A), which exempts from the definition of hearsay statements by a party used against her. Rules 801(d)(2)(B)-(E) extend these principles to statements that are identified with and attributable to a party through the operation of her own assent and through the creation of special relationships that bind the declarant and the assertion tightly to the party. A proponent must prove the special circumstances that trigger attribution of the statement to a party as part of the foundation for introducing the out-of-court statement. ¹⁹¹

A statement that a party adopts as his own is admissible for the same reason that his own original statement is admissible. ¹⁹²So is a [*407] statement by another that was specifically authorized by a party. ¹⁹³An authorized statement is relevant and admissible, whether true or not, because it is attributable to the defendant through his affirmative act in authorizing the statement. ¹⁹⁴Rules 801(d)(2)(A)-(C) all tie the out-of-court utterance directly to the party, through one act or another.

A statement by an agent, made during and in the scope of the agency, is admissible, but the foundational requirement is less direct than for an adopted or authorized statement. ¹⁹⁵A particular act of the party in immediate relation to the statement itself, such as stating, adopting, or authorizing, ¹⁹⁶does not tie the statement to the party. Instead, the statement is tied to the party indirectly, through the creation of an agency relationship with the declarant. If the declarant is an agent of the party and makes a statement within the scope of the agency, the statement is attributable to the party. Responsibility for actions that flow from agency is fairly attributed to the principal who created the agency in the first place. Utterances are a form of action and are therefore attributable to the principal if uttered within the scope of the agency.

3. The Co-conspirator Exemption

Rule 801(d)(2) makes a statement by a party's co-conspirator made during and in furtherance of the conspiracy attributable to the party. ¹⁹⁷The logic of the rule extends from agency, which is an attributional rule drawn from

¹⁹⁰ If the party-declarant's statement falls into one of the exceptions for hearsay listed in Rule 803 or 804, it would be presumptively admissible. The point is that there is no reason to exempt it from the hearsay definition.

¹⁹¹ See [Bourjaily v. United States, 483 U.S. 171, 175-76 \(1987\)](#) (proof that a statement was made during and in furtherance of a conspiracy to which defendant belonged).

¹⁹² Fed. R. Evid. 801(d)(2)(B); see [United States v. Ward, 377 F.3d 671, 676 \(7th Cir. 2004\)](#), as amended on denial of reh'g (Mar. 4, 2005) (silence in the face of the statement "that's the money they got when they robbed the bank" was an adoptive admission because the accusation "is the type of statement that a party normally would respond to if innocent" (citation omitted)).

¹⁹³ Fed. R. Evid. 801(d)(2)(C).

¹⁹⁴ See [United States v. Bonds, 608 F.3d 495, 503 \(9th Cir. 2010\)](#) ("certain relationships do imply an authority to speak on certain occasions" but an athletic trainer was not a person typically invested with authority to speak on behalf of a professional athlete).

¹⁹⁵ Fed. R. Evid. 801(d)(2)(D); see [United States v. Harris, 914 F.2d 927, 931 \(7th Cir. 1990\)](#) ("An attorney may be the agent of his client for purposes of Rule 801(d)(2)(D).") (emphasis in the original) (citation omitted).

¹⁹⁶ See Fed. R. Evid. 801(d)(2)(A)-(C).

licit behavior, to conspiracy, which is the analog of agency when the purposes are illicit or illegal.¹⁹⁸ It [*408] makes no sense to attribute to a principal the licit acts (including speech) of an agent acting within the scope of his agency while refusing to attribute to the principal illicit acts (including speech) of co-conspirators made during and in furtherance of a conspiracy.

In the context of conspiracy, the "scope of the agency" limitation found in the agency rule is transformed into "during and in furtherance of the conspiracy." This formulation substitutes two objective and more easily discoverable limitations on attributable utterances for the more expansive "scope of the agency" limitation. The scope of an agency created to further illegal purposes is unlikely to be explicitly and publicly defined, available for discovery, or even acknowledged by the conspiracy's principal actors.

As a predicate to admissibility under Rule 801(d)(2)(E), the court must find by a preponderance of the evidence¹⁹⁹ that a conspiracy existed, that the party and declarant both entered the conspiracy willingly, and that the statement was made during the course of and in furtherance of the conspiracy.²⁰⁰ To find that a conspiracy existed, the court must find that there was a "unity of purpose between the alleged conspirators, an intent to achieve a common goal, and an agreement to work together toward that goal."²⁰¹ This complex predicate binds the party both to the declarant (through the elements of conspiracy) and to the statement itself (through the "during" and "in furtherance" requirements). These foundational requirements eliminate statements by non-conspirators. In addition, the predicate eliminates statements by co-conspirators that do not contribute to the goals of the conspiracy (the "during" and "in furtherance" requirements).²⁰²

[*409] As with all other statements attributable to a party under Rule 801(d)(2), the identification of the declarant and his statement with a party supersedes the ordinary relevance analysis applicable to assertions. Utterance acts are attributed between conspirators on the same logic as any other action: if the purpose of a conspiracy is to multiply power and reap benefits through unified intent and action, then it would be perverse not to attribute responsibility for actions in furtherance of the conspiracy through the same channels of unified intent and action.

If an utterance is a command by a conspirator during and in furtherance of the conspiracy, such as "go kill Shorty," it is simple to understand why the utterance would be attributable to co-conspirators. A command is not an assertion and is not covered under Rule 801's definition. Because the utterance is not an assertion, the path to

¹⁹⁷ Fed. R. Evid. 801(d)(2)(E); see [United States v. Weaver, 507 F.3d 178, 186-88 \(3d Cir. 2007\)](#) (statement of a fellow conspirator informing another conspirator of the status of conspiracy was "in furtherance" and admissible against the defendant, who neither uttered nor heard the statement).

¹⁹⁸ A difference between Rules 803(d)(2)(E) (the co-conspirator rule) and 803(d)(2)(D) (the agency rule) is that each conspirator is both a principal and agent, so to speak: each conspirator can bind other conspirators and can in turn be bound by his conspirators. In this way Rule 803(d)(2)(E) works much like the law of partnership.

¹⁹⁹ See Fed. R. Evid. 104(a); [Bourjaily v. United States, 483 U.S. 171, 175 \(1987\)](#).

²⁰⁰ [United States v. Sinclair, 109 F.3d 1527, 1533 \(10th Cir. 1997\)](#); see [United States v. Inadi, 748 F.2d 812, 817 \(3d Cir. 1984\)](#) (the elements of the factual predicate which must be proven under Rule 801(d)(2)(E) are the same as those defining a conspiracy charge), *rev'd on other grounds*, [475 U.S. 387, 391 \(1986\)](#).

²⁰¹ [United States v. Gibbs, 190 F.3d 188, 197 \(3d Cir. 1999\)](#).

²⁰² For instance, a conspirator who tells an uninvolved person about how to cover up criminal behavior is not furthering the conspiracy. This is just "idle chatter." [United States v. Johnson, 927 F.2d 999, 1002 \(7th Cir. 1991\)](#). This does not necessarily mean that statements to uninvolved persons are inadmissible altogether. Such a statement may fit a **hearsay** exception or be introduced for a non-assertional purpose and therefore not fit the definition of **hearsay**. See [United States v. Berrios, 676 F.3d 118, 129 \(3d Cir. 2012\)](#) (admissions about carjacking and murder admissible under Rule. 804(b)(3)). By contrast, a conspirator who makes a statement to an uninvolved person seeking to conceal the conspiracy is acting in furtherance of the conspiracy. See [Weaver, 507 F.3d at 186](#) ("statements made for the purpose of concealing a conspiracy can further the conspiracy regardless of whether the addressee is a co-conspirator").

relevance is not routed through the truth of the statement, nor is there any urge or temptation to do so. By contrast, assertions uttered by a co-conspirator become confusing because a listener is always tempted to focus on the truth of an assertion, which is the ordinary way in which an assertion is relevant. For example, instead of saying "go kill Shorty," a command, a conspirator might have said to another "we killed Shorty," an assertion made to keep the co-conspirator abreast of information important to the furtherance of the conspiracy. In that case, the truth of the assertion, no matter how explosive, would be peripheral to the theory of relevance under Rule 801(d)(2)(E), which is focused on whether the utterance was made by a co-conspirator during and in furtherance of the conspiracy.

Conclusion

A few concluding thoughts:

1. A proper appreciation and application of Rule 801 requires an understanding of what an assertion is, how it operates, how it manifests itself in ordinary usage, and how assertions and non-assertional utterances become relevant to issues at trial. **Hearsay** and other trial rules echo and reinforce the attributes of assertion in interesting ways, and an overriding goal of the trial process is to present the jury with a series of clear, understandable, and well-tested assertions about facts of consequence made before the jury by witnesses who possess personal knowledge of the propositions of fact asserted.

2. The differences in treatment between assertions and non-assertional utterances under Rule 801 are rooted in a policy bias in favor of admitting relevant evidence and against judicial exclusion [*410] of relevant information, as well as in the realities of language use. Arguments in favor of a broader application of the **hearsay** rules should deal explicitly with both the policy concerns and the realities of language use. Arguments about the proper scope of **hearsay** should not rely on potentially misleading phrases like "implied assertion" and "unintended assertion." An effort should be made to identify non-assertional utterances that should be excluded as evidence through analysis of the **hearsay** dangers implicated by those types of utterances, rather than by lumping them incorrectly in the genus "assertion" and giving them an extra first name, such as "implied" or "unintended."

3. There are many circumstances in which an out-of-court utterance may have both assertional and non-assertional relevance.²⁰³ In those cases, a judge should not just pick one relevance theory, blind herself to other reasonable inferences derivable from the utterance, and follow the pick to a determination of admissibility or non-admissibility. Instead, a court should a) recognize the existence and nature of both the assertional and non-assertional relevance theories, b) analyze whether the assertional theory of relevance makes the utterance excludable under the **hearsay** rule, c) evaluate whether a Rule 105 instruction would aid the jury in navigating the permissible and impermissible inferences, and d) weigh the danger of unfair prejudice from the impermissible inference against the probative value of the permissible inference using Rule 403.

4. Finally, courts should presume against finding that a facially non-assertional utterance is a veiled assertion, absent clear evidence that the speaker meant to make an assertion without using the usual forms of assertional speech. Clear evidence may take the form of assertional fit, non-assertional misfit, or a reason to veil. Absent convincing evidence to the contrary, the presumption against finding a veiled assertion should hold. Judges generally should resist the temptation to rely on a theory of "implied" or unintended assertion as a basis for exclusion, under Rules 801 and 802, and instead analyze problematic but facially non-assertional utterances under Rules 401 and 403.

²⁰³ Often the parties point out the different inferences that can be drawn, one party claiming that the "true" inference is assertional, the other insisting that the utterance is non-**hearsay** and relevant non-assertionally. The point is that it is usually not necessary, and often ill-advised, to pick one inference as "the" inference for purpose of analyzing whether the utterance should be admitted.

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