Hearsay: The Threshold Question*

The hearsay rule, according to Wigmore's famous phrase, is the "most characteristic rule of the Anglo-American law of evidence ... [and] next to the jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure."[1] Although the value of the hearsay rule may not be as obvious to some authorities today[2] as it was to Wigmore, much of the study of evidence law is still the study of hearsay. The exceptions to the rule have become so numerous that dealing with hearsay statements often seems to be a matter of finding the right exception in which to pigeonhole such evidence. Yet, the proponent of evidence of an out-of-court statement need not always look for a hearsay exception. Instead, he[3] may be able to convince a court that the statement is not hearsay at all. The definition of hearsay is the first battleground in the determination of admissability.

This comment will focus on the definition of hearsay and on ways to use it when introducing or opposing an item of evidence. Section I will offer a definition of hearsay, discuss the rationale of the rule, examine the California[4] and federal statutes,[5] and note some aspects of early California case law. The balance of the comment will focus on problems in dealing with hearsay evidence: statements that are not offered for the truth of the matter asserted, statements as part of the *res gestae*, and nonassertive conduct.

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[1] 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 28 (Chadbourn rev. 1974) [hereinafter cited as 5 WIGMORE].

[2] *See, e.g.*, Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 342-46 (1961).

[3] In accord with standard usage, the male pronoun will be used generically. The authors make this concession to avoid distracting the reader, but do not wish to indicate approval of the use of the male pronoun when referring to a party who could be either male or female.

[4] CAL. EVID. CODE § § 1200-01 (West 1968).

[5] FED. R. EVID. 801 *et seq.* The FEDERAL RULES OF EVIDENCE are set forth in 28 *U.S.C. Fed. R. Evid.* 101 *et seq.* (1975).

I. HEARSAY: DEFINITION AND RATIONALE

A. DEFINITION OF HEARSAY AT COMMON LAW

The traditional definition of hearsay has three elements: hearsay is (1) a statement (2) made out of court and (3) offered to prove the truth of the matter asserted.[6]

The statement may be an oral or written verbal expression. It may also be conduct which substitutes for a verbal expression, for example, igniting a flare to show others the location of a traffic accident.

To be considered hearsay, a statement must be made out of court. In this context, "made out of court" means that the declarant[7] did not make the statement while a witness on the stand in the particular proceeding in which the statement is offered as evidence. For instance, the testimony of a witness at a preliminary hearing is an out-of-court statement when offered at the later trial of the same case.

Finally, to be considered hearsay, the statement must be offered to prove the truth of the matter it asserts. In *Oppenheimer v. Clunie*,[8] defendant leased an opera house to plaintiff for a five-year term. Plaintiff sought to cancel the lease on the ground that defendant misrepresented the physical condition of the building. To prove that the building was dangerous, plaintiff offered a grand jury report finding that the building was unsafe. The California Supreme Court found this item to be hearsay: it was a verbal expression made by the declarant (the grand jury) in another proceeding and offered to prove the truth of the matter it asserted (that the building was unsafe).[9]

In this case, suppose that defendant, contending that plaintiff knew of the building's condition, offered the grand jury report and showed that plaintiff had read it before entering the lease. The defendant would then not be using the report to prove that the building was unsafe. Rather, its existence, coupled with evidence that plaintiff had read it, would tend to prove that plaintiff knew the building's condition, and therefore did not rely on defendant's representations when he leased the building. Although the report would be an out-of-court statement, it would not be used to prove the truth of the matters it asserted,[10] and thus would not be hearsay.[11]

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[6] E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, § 246, at 584 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

[7] In this comment, the term "declarant" will be used to identify the maker of the out-of-court statement, and the term "witness" to denote the person who repeats the statement in court or the document which contains the declarant's statement. Sometimes the same person is both the witness and the declarant.

[8] 142 Cal. 313, 75 P. 899 (1904).

[9] *Id.* at 322, 75 P. at 902.

[10] *See* Section II, *infra*, for further discussion of statements which are not offered for the truth of the matter asserted.

[11] Hearsay problems are often complicated when several declarants are involved.

B. RATIONALE

Traditionally, hearsay has been considered potentially unreliable for three reasons.[12] First, the declarant has not sworn under oath to speak the truth. Second, the trier of fact cannot observe the declarant's demeanor as he makes the statement. Finally, and most important, the declarant cannot be tested by immediate cross-examination.

The importance of the oath as a guarantee of reliability has diminished in modern times.[13] Therefore, this section will focus on the value of the opportunity to observe and cross-examine the declarant in evaluating the trustworthiness of his statements.

The need to cross-examine and observe the declarant became apparent as our present-day jury system developed. The early juries of the Norman period decided issues or supplied the king with informa-

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or example, one declarant tells another declarant who tells the witness the facts ow being offered in court. This footnote offers a technique for analyzing this "multiple hearsay."

CAL. EVID. CODE § 1201 (West 1968) provides:

> A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

FED. R. EVID. 805 states:

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

As an example of multiple hearsay, suppose the defendant in a personal injury case offers a medical record as evidence. It shows that the doctor who examined the plaintiff wrote down what plaintiff told him about the events which caused his injury. The following is a diagram of the problem:

> Evidence: Medical record (written by doctor) says that
> Declarant *A*: (the doctor) says that
> Declarant *B*: (the plaintiff) said that
> "I was injured when I hit defendant from behind in my car."

Each declarant's statement must be covered by an exception to the hearsay rule. Declarant *A*'s statement is admissible under the business records exception. Declarant *B*'s statement is admissible as an admission of a party opponent. If any one declarant's statement were not covered by an exception, then the final statement, "I was injured when I hit defendant from behind," would be inadmissible.

[12] For a general discussion of the rationale behind the hearsay rule see MCCORMICK (2d ed.), *supra* note 6, § 245.

[13] Certainly some modern witnesses feel an obligation to tell the truth because of religious considerations. They are likely, however, to feel morally obligated to speak truthfully whether under oath or not.

In the medieval view, a lie under oath was far more sinful than an ordinary lie. So powerful was the guarantee of the oath that the trial itself was sometimes little more than a swearing contest in which a party could win simply by obtaining the required number of persons to swear he should win. For further discussion of this "trial by compurgation," see P. DEVLIN, TRIAL BY JURY 6-7 (1966); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 305-08 (7th rev. ed. 1956).

tion on the basis of personal knowledge or personal investigations.[14] They did not hear formal testimony from witnesses. Neither the trial as we know it nor the hearsay rule existed.[15] Gradually, however, juries were barred from having personal knowledge of the facts of the cases before them and were required to base their decisions solely on evidence formally presented to them. Since jurors could no longer investigate fact issues independently, courts needed to insure that only reliable evidence was presented at trial. By the eighteenth century, courts generally excluded hearsay evidence because it foreclosed the opportunity to examine or observe the declarant.[16] Courts and commentators felt that cross-examination and observation of the declarant's demeanor were the best ways to evaluate the declarant's credibility and the trustworthiness of his statement.[17]

Cross-examination and observation of demeanor are valuable because they help answer two questions for the trier of fact. First, does the witness himself believe what he is saying? In other words, is he *sincere* in making his statement? Second, is the witness' statement *trustworthy*?[18] That is, are his memory and perception of the event he recounts accurate, and is his meaning clear?[19] In observing the witness' demeanor, the trier of fact gathers impressions which suggest answers to these two questions. Cross-examination of the witness may confirm or alter these impressions.

1. DEMEANOR

Suppose a witness is testifying for the prosecution in a burglary case. To show that the witness is biased against defendant, defense attorney asks the witness if he was angered by a certain act of de-

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[14] For information on how the Norman kings used early juries as investigatory or decision-making bodies, see 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 312 *et seq.* (7th rev. ed. 1966); G. WORTHINGTON, AN INQUIRY INTO THE POWER OF JURIES TO DECIDE INCIDENTALLY ON QUESTIONS OF LAW 16-23 (1840).

[15] *See* 5 WIGMORE, *supra* note 1, § 1364 and authorities cited in note 14 *supra.*

[16] *See* 5 WIGMORE, *supra* note 1, § 1364 at 15-20.

[17] *See, e.g., id.*, § 1367 at 32. There are, of course, other ways to test the credibility of the declarant and the trustworthiness of his statement. For example, the adversary may produce contradictory testimony by other witnesses, point out the logical inconsistencies in the declarant's statement, or introduce evidence of the declarant's reputation for lying.

[18] The term "trustworthy" here refers to the witness' meaning and the accuracy of his memory and perception. The term "reliable" is used in a more general sense to refer to the witness' sincerity as well as the trustworthiness of the evidence.

[19] Wigmore suggests that the witness on the stand discloses, during his direct examination, only some of the facts the trier needs to hear. Cross-examination should develop the rest. According to Wigmore, the undeveloped facts may fall into one of two categories. They may be facts which explain or qualify the evidence itself or which establish or undermine the witness' sincerity and believability. *Id.*, § 1368, at 36-37.

fendant. The witness replies, "No, that didn't bother me at all." However, as he utters these words, his face reddens, and the tone of his voice changes noticeably. The jurors seeing this reaction may receive the impression that the witness does not believe what he is saying. Had the witness been an out-of-court declarant, this opportunity would have been lost. Demeanor evidence thus enables the trier of fact to gauge a witness' sincerity.

Observation of demeanor may also indicate to the fact finder the trustworthiness of the witness' perceptions. Suppose a plaintiff in an action for infliction of emotional distress contends that defendant has deliberately terrorized him. The jury, seeing him tremble uncontrollably whenever he looks at defendant, believes his terror is real and that he is sincere. However, he reacts similarly whenever any person of defendant's race walks into the courtroom. From their observation of the witness' demeanor, the jury could conclude that his perception of defendant's conduct is inaccurate. They could then evaluate the reasonableness of his fear in a way they could not have if they had not seen him.

2. CROSS-EXAMINATION

Cross-examination can both test the impressions created by observation of demeanor and elicit further information. It allows specific exploration of the witness' credibility and the trustworthiness of his belief.

Cross-examination may be used to show that the witness himself does not believe what he is saying. In one case, defendant was on trial for murder. A principal prosecution witness testified that she was an expert medical technician detailed to the police chemical laboratory. At the preliminary hearing, the witness, in response to cross-examination, hesitated when asked the year in which she had completed university training. The uncertainty in her voice gave the defense attorney the impression that she was untruthful, and he accordingly investigated her background before trial. Later, cross-examining the witness at trial, the attorney forced her to admit that she was not even a high school graduate. If a written report rather than the testimony of the witness had been introduced, defense counsel would have missed the opportunity to guess from her demeanor that she was lying, and then to impeach her credibility so effectively by cross-examination.[20]

Cross-examination can also elicit further information that clarifies the witness' meaning. Wigmore tells a story about a plaintiff who sued defendant for breach of express warranty on the sale of a

[20] Example taken from L. HELLER, DO YOU SOLEMNLY SWEAR? 306-18 (1968).

horse.[21] The horse, guaranteed to be of good disposition, proved so unmanageable when taken to a blacksmith's shop that he could not be properly shod. At trial, defendant's blacksmith, in response to a question on direct examination about whether he had had any difficulty with the horse testified, "Not the least. He stood perfectly quiet. Never had a horse stand quieter."[22] Plaintiff's attorney did not cross-examine, and defendant prevailed. Later, the smith remarked to a third person:

> "You heard that horse case tried yesterday, didn't you? Well, that fellow who tried the case for the plaintiff didn't know how to cross-examine worth a cent. I told him that the horse stood perfectly quiet while I shod him; and so he did. I didn't tell him that I had to hold him by the nose with a pair of pincers to make him stand."[23]

In this case, the opportunity to cross-examine was missed. Had the statement been offered in hearsay form, the opportunity would not even have existed.

Cross-examination also tests the witness' ability to perceive and remember accurately. A cross-examiner can test the witness' perception by asking about (1) the external physical conditions under which the observation was made, (2) the witness' own physical condition at the time of the observation, and (3) the witness' mental condition at the time. For example, suppose a robbery victim has identified the defendant as the robber. The cross-examiner might be able to establish that the holdup took place at night on a poorly lit street, that although the victim normally wore glasses, he had just broken them in a fight, and that he was still angry as a result of the fight. His perception would probably be poor, and his identification of the defendant doubtful.[24]

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[21] 5 WIGMORE, *supra* note 1, § 1368 at 40.
[22] *Id.*
[23] *Id.*
[24] A striking example of the use of cross-examination to show difficulties with perception is recounted in 3 GOLDSTEIN AND LANE, TRIAL TECHNIQUE Ch. 19, § 19.36, at 57-58 (2d ed. 1969):

> The defendant was tried for the sexual murder of a young girl. A state's witness testified that he had heard two shots fired about one minute apart, at the time and place of the crime. Leibowitz in his cross-examination dramatized the faulty observation of the witness to show that he was unable to calculate the passing of time with any degree of certainty . . . .
> Q. You say the shots were how far apart?
> A. About a minute.
> Q. A minute is a long time. Suppose I clap my hands together to indicate the interval. (The lawyer, here, clapped his hands together, waited and then clapped them again.)
> Q. That fast?
> A. Faster.
> Q. Like that? . . .
> A. No, more like this. (The witness entered into the spirit of the

The cross-examiner can similarly test the witness' memory by asking him about (1) the length of time that has lapsed since the perceived event and (2) the significance of the event in the witness' mind. For example, suppose that a delivery man testifies that he delivered a particular package to one of the parties in a lawsuit on a certain day two years in the past. The cross-examiner might be able to establish that the delivery man makes 14,500 such deliveries a year.[25] Because he makes so many deliveries each year, this particular delivery probably had no significance for him; after two years he would not be likely to remember it.

The rationale of the hearsay rule at common law applies to the California and federal codifications of that rule, which are discussed in the following subsection.

C. CALIFORNIA AND FEDERAL DEFINITIONS OF HEARSAY

The California Evidence Code[26] and the Federal Rules of Evidence[27] both retain the common law definition of hearsay as out-of-

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thing and clapped his own hands together.)
The lawyer then asked the witness to repeat his clapping. The first time he looked at his watch, and observed the interval that elapsed. When this was repeated, the state's attorney, almost unthinkingly, examined his watch. The third time, the court and practically all of the jurymen, took out their watches. The examiner went a step further. He asked the court to be a timekeeper and the witness to clap his hands once more. At the second handclap, when the witness had judged that a minute had elapsed, the court announced that, according to his watch, only three seconds had gone by.

[25] This example appears in 3 GOLDSTEIN AND LANE, TRIAL TECHNIQUE Ch. 19, § 19.30, at 37-38 (Supp. 1975).

[26] CAL. EVID. CODE § 1200 (West 1968) provides:
(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
(b) Except as provided by law, hearsay evidence is inadmissible.
(c) This section shall be known and may be cited as the hearsay rule.
CAL. EVID. CODE § 225 (West 1968) provides:
"Statement" means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.

[27] FED. R. EVID. 801 provides:
The following definitions apply under this article
(a) Statement. — A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
(b) Declarant. — A "declarant" is a person who makes a statement.
(c) Hearsay. — "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
(d) Statements which are not hearsay. — A statement is not hear-

court statements offered to prove the truth of the matter asserted. However, they reject the traditional view that nonassertive conduct is hearsay.[28] The federal rules, moreover, are unorthodox in their classification of admissions and some prior statements of a witness as nonhearsay. Admissions and prior statements are considered hearsay in California[29] but are admissible as an exception to the hearsay

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say if —

(1) Prior statement by witness. — The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. — The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 801(1)(c) was added by amendment by Pub. L. No. 94-113 (Oct. 16, 1975).

FED. R. EVID. 802 provides:

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

This comment does not deal with hearsay exceptions. In order to understand the federal approach to hearsay evidence, however, one must remember that FED. R. EVID. 803(24) and 804(b)(5) allow for an "open-ended" hearsay exception. Rule 803(24) applies when the declarant is available, rule 804(b)(5) when the declarant is unavailable. Both subsections permit the admission of

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Both sections require a party wishing to offer evidence covered by these sections to notify his opponent before the trial or hearing at which he intends to offer it.

Thus, like the California Code, the federal rules adopt the standard scheme for exclusion and exceptions, but reduce the impact of that scheme by specifically authorizing the trial court to create new exceptions. *See* text accompanying notes 83-86 for discussion of California's less specific authorization of judge-made hearsay exceptions.

[28] When an actor does not intend to communicate by doing a certain act, his conduct is termed "nonassertive." Yet a particular belief held by the actor can sometimes be inferred from his conduct. Suppose that a doctor puts a patient in the hospital. That act can be treated as the equivalent of the doctor's statement that "My patient is ill." Evidence of the act can then be offered to prove that the inferred statement is true. Under common law, such evidence would be

rule.[30]

Both statutes generate many of the confusions and contradictions that surround the traditional hearsay definition. Under both statutes, evidence that at first glance appears to be hearsay may not be; evidence that seems not to be hearsay may present hearsay dangers, and arguably should be inadmissible. Before analyzing these problems, we will first look briefly at difficulties created by the language in some pre-code California cases.

D. PRE-CODE CALIFORNIA CASES: SOME ABERRATIONS FROM THE COMMON LAW HEARSAY DEFINITION

Before the adoption of the Evidence Code, the common law defi-

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considered hearsay. Section IV, *infra*, discusses nonassertive conduct in detail.

[29] *See* CAL. EVID. CODE § § 1220-27 (West 1968) for California law on admissions and CAL. EVID. CODE § § 1235-36 (West 1968) for California law on prior statements.

[30] Normally admissions of a party opponent are classified as hearsay and are admitted as exceptions to the hearsay rule. The federal rulemakers have adopted the view of a few commentators that admissions are not hearsay. Such commentators offer some of the following reasons for their position: (1) admissions of party opponents are admissible because of the adversary nature of our system; (2) true hearsay exceptions are created for evidence that is especially reliable or necessary; admissions may be neither especially reliable nor necessary; (3) admissions are really a form of prior inconsistent statement; (4) admissions are circumstantial evidence of a party's relevant conduct. For a discussion of the federal position, see FED. R. EVID. 801(d)(2), Advisory Comm. Notes. For articles discussing this classification problem, see Strahorn, *A Reconsideration of the Hearsay Rule and Admissions* (pts. 1-2), 85 U. PA. L. REV. 484, 564 (1937); Hetland, *Admissions in the Uniform Rules: Are They Necessary?*, 46 IOWA L. REV. 307, 308-09 (1961); Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921); and see Comment, *Admissions of a Party Opponent: An Advocate's Guide to Personal, Adoptive and Judicial Admissions in Civil Cases in California and Federal Courts*, this volume.

Both the federal rules and the California Code admit a witness' prior statements for substantive use, that is, to prove the truth of the matter asserted. The same prior statements are not necessarily admissible under both statutes; the federal rule admits fewer such statements than does the California Code. The differences between the two statutes, however, do not result from the classification of the statements, but rather from the specific wording of the code sections.

The federal rules admit for substantive use under FED. R. EVID. 801(d)(1):

1) Only those prior inconsistent statements that were made under oath, at a trial, hearing, or deposition;

2) Prior consistent statements used to rebut an express or implied charge of fabrication or improper influence; and

3) Statements of prior identification.

California admits:

1) Under CAL. EVID. CODE § § 1235 and 770 (West 1968), all prior inconsistent statements so long as the witness has an opportunity to explain or deny them; and

2) Under CAL. EVID. CODE § § 1236 and 791 (West 1968), prior consistent statements not only to refute a charge of fabrication, but also when made before a prior inconsistent statement which has

nition of hearsay was the law in California.[31] Many courts, however, when confronted with hearsay evidence, did not expressly classify it as hearsay. Rather, by applying certain labels to the evidence, they indicated that it would be inadmissible. Some of these labels originated as shorthand descriptions of situations in which hearsay evidence commonly occurred. Since these terms occasionally surface in modern litigation, California attorneys should be familiar with them.

Two such shorthand terms were (1) that the statement was inadmissible because "made outside of the presence of the party" against whom it was being offered, and (2) that the statement was inadmissible because it was "self-serving."[32] The term "outside the presence of the party"[33] is ambiguous and suggests at least two distinct ideas. First, it may mean that the evidence is hearsay because a conversation between third parties cannot bind a person who did not hear or make it;[34] therefore, it is merely a statement by a third party offered to prove the truth of the matter asserted. Second, the phrase may indicate that the party against whom the statement was offered had made no adoptive admission, because he was not present to assent to the statement.

The other commonly encountered label for inadmissible hearsay

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been used to attack the witness' credibility.

California also admits, under CAL. EVID. CODE § 1238 (West 1968), statements of prior identification. For a discussion of the federal treatment of prior statements, see FED. R. EVID. 801(d)(1), Advisory Comm. Notes.

[31] A California case expressing the traditional understanding of the hearsay rationale is San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 P. 999 (1st Dist. 1909).

[32] In the early cases courts also determined admissibility of some out-of-court statements by classifying them as original or hearsay evidence. *See, e.g.*, Pfister v. Dascey, 68 Cal. 572, 10 P. 117 (1886). Courts also referred to the criminal-accused rule. This rule dealt with the admissibility of silence or other responses of defendants when accused of a crime. A complex system of psychological inferences and rules of admissibility was developed. *See, e.g.*, People v. Simmons, 28 Cal. 2d 699, 172 P.2d 18 (1946), People v. Lee, 55 Cal. App. 2d 163, 130 P.2d 168 (2d Dist. 1942); People v. Vogel, 36 Cal. App. 216, 171 P. 978 (2d Dist. 1918). The development of the Miranda-Escobedo rule [Miranda v. Arizona, 384 U.S. 436, 478-79 (1966); Escobedo v. Illinois, 378 U.S. 478, 492 (1964)] has greatly limited the usefulness of these cases.

[33] For representative cases, *see* People v. Warren, 134 Cal. 202, 66 P. 212 (1901); Estate of Emden, 87 Cal. App. 2d 115, 196 P.2d 627 (2d Dist. 1948); Siskin v. Dembroff, 121 Cal. App. 730, 734-35, 9 P.2d 908, 910 (4th Dist. 1932); Wahl v. Yori, 37 Cal. App. 773, 174 P. 692 (3d Dist. 1918). Sometimes the courts used slightly different terminology, saying the proffered statement was made "in the absence of the party," "out of his hearing and knowledge," etc.

[34] That is, the statements may be hearsay because they do not qualify as "verbal acts." The text accompanying notes 39-62, *infra* discusses verbal acts.

Similarly, the term may suggest a relevance question, such as that involved in similar transactions. That is, where there is in issue a contract between *A* and *B*, are discussions between *B* and *C* (outside of *A*'s presence) relevant to the initial contract or are they really concerned with similar transactions between *B* and *C*? For a case of this type (a *"res inter alios acta"* case), *see* Ricioli v. Lynch, 65 Cal. App. 53, 223 P. 88 (3d Dist. 1923).

evidence, that it is a "self-serving statement,"[35] is an inappropriate shorthand term for the hearsay rule. Not all hearsay evidence is self-serving, and much of the nonhearsay evidence offered in an adversary setting is self-serving. Nevertheless, the label has been a favorite with courts, which have used it to express distrust of evidence they were asked to admit. The court in *Shamp v. White*,[36] expressing typical indignation over self-serving statements, wrote:

> The writing was inadmissible for any such purposes. It was simply the declaration of a party in his own interest — mere hearsay. A litigant has never been allowed to bolster his cause by such evidence. As well as permit a man to establish an alibi by proving statements made by him to others after the event as to his whereabouts upon the date in question [*sic*].[37]

Possibly, the courts using the term were not referring to hearsay. It has been asked whether the "self-serving" objection is distinct from the hearsay objection.[38] If so, evidence that survived a hearsay challenge might still be excluded as a self-serving statement. Since the term "self-serving" implies that the evidence is unreliable, the courts may be carelessly applying it to another type of evidence they consider unreliable, that is, hearsay.

These labels, instead of illuminating the traditional hearsay definition, ignore it. They do not aid in classifying evidence as hearsay or nonhearsay, but distract from the real problems of classification. These are problems caused by misunderstanding or misapplication of the elements of the standard hearsay definition. The following sections focus on the confusions along the hearsay-nonhearsay borderline. Section II will consider whether the statement is offered to prove the truth of the matter asserted. Section III briefly digresses into the related area of *res gestae*. Section IV discusses situations in which conduct may be a "statement."

II. STATEMENTS OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED

For evidence to be hearsay, it must meet all of the requirements of

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[35] *See, e.g.*, Hotaling v. Hotaling, 187 Cal. 695, 713-14, 203 P. 745, 753 (1922); Nicholson v. Tarpey, 70 Cal. 608, 12 P. 778 (1886); Roth v. Thompson, 40 Cal. App. 208, 180 P. 656 (3d Dist. 1919); Guthrie v. Carney, 19 Cal. App. 144, 152, 124 P. 1045, 1049 (1st Dist. 1912).

[36] 106 Cal. 220, 39 P. 537 (1895). This was an unlawful detainer action. To prove he had renewed his lease, defendant introduced letters he had written after the lease had allegedly expired, in which he stated he had renewed it.

[37] *Id.* at 223, 39 P. at 537.

[38] Hardman, *Hearsay: "Self-Serving" Declarations*, 52 W. VA. L. REV. 81 (1950); Comment, *Evidence-Hearsay-Exclusion of Self-Serving Declarations*, 61 MICH. L. REV. 1306 (1963); Comment, *Admissibility of Self-Serving Declarations*, 14 ARK. L. REV. 105 (1959-1960).

the hearsay definition; not every out-of-court statement qualifies. For instance, statements are not hearsay if they are not offered to prove the truth of the matter they state. The proponent may only want to prove that the statement was made, and that it had certain consequences which did not depend on whether it was true.

When a statement is not offered for the truth of the matter asserted, the fact finder's major concern is to determine whether or not the statement was actually made. The best way to make this determination is by testing the credibility, meaning, perception, and memory of the witness claiming to have heard the statement. It is unnecessary to test the declarant's reliability, since the truth of the statement is irrelevant.

There are a number of ways to use statements without reference to their truth. For instance, statements may have a certain legal effect or may create a certain effect on the hearer. Any classification of such statements is somewhat arbitrary. The authors have chosen to divide such statements into two categories: verbal acts and statements offered as circumstantial evidence of a fact not asserted by the statement.

A. VERBAL ACTS

Sometimes the issue to be resolved is whether *X* said "*Y.*" Witness *W* testifies: "I heard *X* say '*Y.*'" In a defamation case, for example, to prove that defendant *X* called plaintiff an embezzler, plaintiff's witness says, "I heard *X* say, 'Plaintiff is an embezzler.'" If the trier of fact believes the witness, then his testimony is direct proof that the words were spoken.[39] Although the witness' testimony sounds like hearsay, it is actually an assertion that he perceived an act, the speaking of the words. Here the trier of fact is not using the statement to prove that plaintiff is in fact an embezzler.[40] Rather, the fact finder must decide (1) whether the words were spoken and (2) what legal significance they had. To decide these issues, he must know what the words were.

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[39] Direct evidence is evidence which, if believed, proves that a fact is so. Circumstantial evidence is evidence from which it is necessary to draw one or more inferences; those inferences, if believed, prove that a fact is so. Suppose the issue is whether the sun rose. A person facing east at the time testifies, "I saw the sun rise." That evidence, if believed, proves directly that the sun rose. A person facing west at the time might testify, "I saw my shadow in front of me." That evidence, if believed, is direct evidence that his shadow was in front of him. The fact that his shadow was in front of him is circumstantial evidence that the sun rose. Interview with Judge Henry Broderick of the Superior Court of Marin County, California, Mar. 10, 1976.

[40] Whether the out-of-court statement, "Plaintiff is an embezzler," is hearsay or not depends on how it is used. Suppose the defendant in a defamation case asserts truth as a defense. If he offers the out-of-court statement of plaintiff's employer, "Plaintiff is an embezzler," to prove plaintiff *is* an embezzler, he is presenting hearsay evidence.

When the very making of a statement is an event of legal significance, the words of the statement may be called a "verbal act" (sometimes also called an "operative fact"). In a defamation case, the speaking of certain words is the act of defamation: the words are a verbal act.

Words as verbal acts occur frequently in the contract setting: the words of offer and acceptance constitute the making of a contract.[41] Another example in the civil setting is *Stearns v. Fair Employment Practice Commission*,[42] a discrimination case. A black, attempting to rent an apartment, was told that he could not rent it until a credit check was made. Three hours later, a white working for a fair housing group succeeded in renting the apartment and was told that the credit application, which he could fill out at his leisure, was merely for the landlord's files.[43] The landlord at no time indicated that a credit check would have to be made on the white. The discrepancy in the landlord's statements to the black and the white constituted the discrimination in issue.

Words may also be verbal acts in criminal cases, as for example, when the defendant's words are the act which is the crime. Thus, the words of a prostitute who is charged with solicitation,[44] the words of a bookmaker who accepts a bet over the phone from a police officer,[45] the registration and claim forms filled out by a defendant who is charged with making false claims to obtain unemployment benefits[46] are admissible because the words are the act the prosecution

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[41] Sometimes verbal acts in the contracts setting occur in an unconventional way. For instance in Dolman Co., Inc. v. Rubber Corp. of America, 109 Cal. App. 353, 293 P. 129 (1st Dist. 1930), plaintiff was to serve as defendant's advertising agent. He wrote to defendant stating his terms, received no confirmation or objection, and carried out an advertising campaign for defendant. Defendant refused to pay for plaintiff's services. Because the terms of the agreement were unsettled, the court admitted correspondence between the two parties regarding defendant's nonpayment. The letters themselves were considered to constitute, not merely repeat, the contract terms, and were therefore, a verbal act. Had they been written after the contract terms were settled, the letters would only have described the contract terms and thus would have been excluded as hearsay.

Furthermore, a contract in issue may incorporate by reference the terms of another separate contract, which need not necessarily be between the same parties. *See, e.g.*, Hewes v. Germain Fruit Co., 106 Cal. 441, 39 P. 853 (1895), Chew Farng v. Keeper, 103 Cal. 46, 36 P. 1032 (1894). The terms of the second contract are then a verbal act.

[42] 6 Cal. 3d 205, 490 P.2d 1155, 98 Cal. Rptr. 467 (1971).

[43] *Id.* at 209-10, 490 P.2d at 1157-58, 98 Cal. Rptr. at 469-70.

[44] *See, e.g.*, Los Robles Motor Lodge, Inc. v. Dept. of Alcoholic Beverage Control, 246 Cal. App. 2d 198, 54 Cal. Rptr. 547 (3d Dist. 1966). This was an appeal from the revocation of a liquor license. This license had been revoked partly because acts of solicitation had been permitted in the bar. The soliciting words were admissible as verbal acts. *Id.* at 205, 54 Cal. Rptr. at 551.

[45] *See, e.g.*, People v. Decker, 155 Cal. App. 2d 165, 317 P.2d 135 (2d Dist. 1957).

[46] *See, e.g.*, People v. Koch, 4 Cal. App. 3d 270, 84 Cal. Rptr. 629 (2d Dist. 1970). In this example, the prosecutor would lose his case if he proved that the

seeks to prove.[47]

Sometimes an event of legal significance takes place only when words accompany certain conduct. Suppose, for instance, that *X* is helping *Y* to unload barrels from a truck. *X* is to receive a barrel as payment for his labor. At a certain point in the process *Y* hands a barrel to *X*, saying, "This is your barrel." The words which accompany the action give the whole act a legal significance which neither the act alone nor the words alone would have had: the barrel now belongs to *X* rather than to *Y*.

B. STATEMENTS OFFERED AS CIRCUMSTANTIAL EVIDENCE OF A FACT NOT ASSERTED BY THE STATEMENT

An out-of-court statement may also be offered as circumstantial evidence of some fact other than the fact stated, and thus be admitted as nonhearsay. From the fact that the words were spoken, an inference is drawn, which helps to prove a fact in issue.[48]

Suppose, for example, that *X* seeks to prove that *Y* is not *X*'s agent, but an independent contractor. To prove this directly, *X* might offer the contract made between *X* and *Y*. If there were no written contract, *X* might instead offer invoices submitted by *Y* which say in effect, "You owe me $100 for certain services." From the fact that this statement was made, the fact finder can infer the relationship of owner and independent contractor. The statement is not hearsay because it is not offered to prove the truth of the matter asserted, namely that *X* owes *Y* $100.[49]

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statements on the forms were true.

[47] Statements of co-conspirators may be independent evidence of their participation in the conspiracy, if those statements are the words of agreement to the conspiracy, and therefore verbal acts. They are not offered to prove the truth of what the co-conspirators said; the mere speaking of the words was the act of conspiracy. United States v. Calaway, 524 F.2d 609, 612-13 (9th Cir. 1975).

Another example comes from search and seizure law. When a criminal defendant's consent to search is in issue, his words giving a police officer permission to search him or his property are the consent. *See, e.g.*, People v. Sanchez, 191 Cal. App. 2d 783, 12 Cal. Rptr. 906 (2d Dist. 1961).

[48] In contrast, a speaker may sometimes convey his meaning by a metaphor. Suppose that *X*, looking out of a western window, sees the sunset. He says to *Y*, "Come look! The sky is on fire." His statement, rather than serving as a basis of inference, really asserts that the sun is setting. If offered to prove that the sun was setting, the statement would be hearsay.

[49] These were the facts of Rogers v. Whitson, 228 Cal. App. 2d 662, 39 Cal. Rptr. 849 (1st Dist. 1964). The court admitted the evidence. *Id.* at 675, 39 Cal. Rptr. at 856.

Conversations between third parties in the presence of the defendant were offered for a similar purpose and held to be nonhearsay in United States v. Conley, 523 F.2d 650, 654-55 (8th Cir. 1975). Defendant, a prominent politician and former legislator, was accused of distributing heroin to government agents. The government agents testified to the contents of two conversations, prior to the date of the offense, made in defendant's presence but in which he

Statements are frequently offered to explain the hearer's reaction or to show that he has certain knowledge. In *Smith v. Whittier*,[50] for example, the plaintiff sued on a negligence theory for injuries caused by the falling of an elevator. One of the defendants was asked on the stand if he had been given operating instructions by the elevator installer and if he had been warned about the consequences of ignoring those instructions. Defendant repeated the instructions and the warning. The court held that these statements were not hearsay, since they were not being used to prove how an elevator could be safely handled. Rather, they showed the defendant's knowledge of the reasonable standard of care in operating elevators.[51]

A party may also offer words spoken to him by another to explain his own actions. In *People v. Lo Cicero*,[52] for example, the defendant, charged with furnishing marijuana, testified that the declarant had threatened him with physical harm if he did not supply the marijuana. The threats were held admissible to show their effect on the defendant: the words spoken to the defendant made him fear physical harm if he did not comply with the demand.[53] They would be hearsay if offered to show that the declarant actually intended to hurt the defendant.[54]

A declarant's words are sometimes circumstantial evidence of his own state of mind.[55] In *People v. Arguello*,[56] the defendant was

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did not participate. These conversations were not offered to prove the truth of the matter asserted, but as evidence of "the emerging relationship between Conley and the government men." *Id.* at 653. Such evidence was considered necessary to show that "the government's version of the [offense] was neither improbable nor incredible . . . ." *Id.* at 653. The evidence "was offered to show that the statements were made in Conley's presence and was relevant whether or not the statements were true or accurate. This was not hearsay." *Id.* at 654-55.

[50] 95 Cal. 279, 30 P. 529 (1892).

[51] *Id.* at 290-94, 30 P. at 531-33. As another example, suppose a police officer wishes to establish that he had probable cause to conduct a search. He could testify that the victim told him, "*Y* just stole my wallet." The victim's statement would not be admissible to prove that *Y* did steal the wallet, but would be admissible to show that the police officer had reason to believe that *Y* had committed a crime, and therefore had probable cause to search *Y*.

[52] 71 Cal. 2d 1186, 459 P.2d 241, 80 Cal. Rptr. 913 (1969).

[53] *Id.* at 1189-90, 459 P.2d at 243, 80 Cal. Rptr. at 915.

[54] In another example, People v. Nichols, 3 Cal. 3d 150, 474 P.2d 673, 89 Cal. Rptr. 721 (1970), the district attorney introduced out-of-court statements made to the witness, not for their truth, but in an effort to rehabilitate her. The witness' estranged husband was charged with starting a fire in which two children were killed. When the wife testified that defendant had been seen in the area just before the fire, defense counsel charged her with fabricating the story. To rebut this contention, the prosecutor introduced evidence of the children's statements to the witness that defendant was at the door. These statements were not admitted to prove that the defendant had been at the door, but to show that the wife had a basis for her testimony. *Id.* at 157, 474 P.2d at 676-77, 89 Cal. Rptr. at 724-25.

[55] The present state of mind exception to the hearsay rule may also apply to such statements. *See* Comment, *State of Mind: The Elusive Exception*, this volume.

[56] 65 Cal. 2d 768, 423 P.2d 202, 56 Cal. Rptr. 274 (1967).

charged with the murder of an elderly widow for whom he had worked periodically as a handyman. The prosecution offered the testimony of the victim's neighbor that the victim told her she did not let strangers near the house. From this statement, the victim's state of mind, namely her fear of strangers, was inferred. The prosecution then offered this evidence of her fear to show that the murderer was someone she knew.[57]

Sometimes nonhearsay statements which are used circumstantially are confused with hearsay statements (admitted under an exception) which are used first to prove the truth of the fact asserted and then as circumstantial evidence of another fact. *People v. Whittaker*[58] demonstrates this confusion. Defendant was charged with three armed robberies. The getaway car in the first robbery was a Malibu. The getaway car in the second robbery was a Javelin. Defendant was arrested while driving a Javelin in which police found a rental receipt showing that defendant had rented it the day after the first robbery. The defendant objected to the admission of the rental receipt into evidence on the ground that it was hearsay: it was a statement by the rental agency, the declarant, saying in effect to defendant, "We rent this car to you on x day [the day after the first robbery]." Instead of analyzing the item as hearsay, the court held that the words were not offered for the truth of the matter asserted:

> Instead it established that Whittaker *had in his possession* a paper indicating that he had rented the automobile a day after the first of the charged robberies. It was relevant circumstantial evidence since it had a "tendency in reason to prove . . . any disputed fact" . . . i.e., Whittaker's guilt of the subject robberies.[59]

The court reached a correct result, but did not clarify the steps in its reasoning.

If the receipt stated that defendant rented the car one day after the first robbery, it did not lose its hearsay character simply because the fact stated was relevant circumstantial evidence of another disputed issue. Suppose the court viewed the receipt as a statement by the rental agency that defendant had paid it a deposit of a certain

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[57]The evidence was admitted. *Id.* at 773-74, 423 P.2d at 205, 56 Cal. Rptr. at 277. *See also,* Sandoval v. Southern California Enterprises, Inc., 98 Cal. App. 2d 240, 219 P.2d 928 (2d Dist. 1950). Plaintiff claimed damages for personal injury, malicious prosecution and injured reputation. Defendants had refused him admission to a music hall on the grounds that he was drunk, had beaten him when he asked for a refund, and then had had him arrested and charged with public drunkenness. Plaintiff had given a coherent description of this treatment to the doctor who attended him immediately after the beating. At trial, plaintiff introduced evidence of his statement. The court held that his statement was not hearsay, since it was not offered for the truth of the matter asserted; instead it was circumstantial evidence that plaintiff was sober enough to perceive and describe what had happened. *Id.* at 244-45, 219 P.2d at 932.

[58]41 Cal. App. 3d 303, 115 Cal. Rptr. 845 (1st Dist. 1974).

[59]*Id.* at 309, 115 Cal. Rptr. at 848-49 (original emphasis).

sum. Arguably, if the receipt was offered to prove not that defendant had paid that exact sum, but to prove that he had rented a car on the day after the robbery, it would not be offered to prove the truth of the *precise* matter asserted, and therefore would not be hearsay.

Yet in a practical sense, the agency was asserting that it had rented the car to defendant on the day after the first robbery.[60] That assertion was being offered to prove the truth of the matter asserted and was therefore hearsay. Although the receipt is hearsay, it may nevertheless be admissible as an admission of a party opponent: since defendant had the receipt in his possession (a fact the court emphasized), he arguably adopted as his own the statements it contained.[61] Such an admission might then be relevant to show that he had committed the first robbery and wanted to use a different car in committing the second.[62]

In summary, this section has emphasized one element of the hearsay definition, the requirement that the statement be offered to prove the truth of the matter asserted. Section IV will consider an-

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[60] This type of statement is analogous to those in which a fact is asserted by means of a metaphor. *See* note 48 *supra*.

[61] Wigmore says that a receipt signed by the payee may be received into evidence as an admission against the payee. *See* 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 156 (3d ed. 1940) [hereinafter cited as WIGMORE (3d ed.)] In Whittaker, the defendant was the payor who received the signed receipt. By keeping it and presumably relying on it as evidence that he had paid a deposit on the car, he could be said to have adopted the payee's admission.

[62] The court may have admitted the evidence on the following rationale: rather than focusing on the statement made by the receipt, the court emphasized its existence in the possession of the defendant as evidence that he had rented a car. A person who had not rented a car would not normally have such a receipt in his possession. Again, if defendant had rented the car, it would be some evidence of his guilt. If the court is using this reasoning, then it is an unfortunate coincidence that the "statement" the receipt makes tends to prove exactly the same fact that the existence of the receipt in defendant's possession would prove: that defendant rented the car.

The admission of the receipt on the basis of its possession by defendant might be considered analogous to the admission of "evidentiary traces" such as name tags or license plates. For example, in United States v. Snow, 517 F.2d 441 (9th Cir. 1975), defendant was charged with possession of an unregistered firearm which was found in a brief case to which tape with defendant's name was affixed. Defendant contended that the tape on the brief case was hearsay: the name tape stated that an out-of-court declarant had said, "The brief case belongs to defendant." That statement was then offered to prove the truth of the matter asserted.

In Snow, the court rejected the argument, citing 1 WIGMORE (3d ed.), *supra* note 61, § § 148-57. According to Wigmore, the name tape would be an "evidentiary trace," *id.* § 148, from which defendant's ownership could be inferred in a two-step process. First, from the presence of defendant's name, the trier of fact could infer that defendant put his name on the brief case. Second, from the fact that defendant put his name on the brief case, the trier could infer that the brief case belonged to defendant. *Id.* § § 150 at 590, 150a. If the brief case belonged to defendant, then the gun inside it could be inferred to belong to him. This analysis eliminates the hearsay problem.

other element, the requirement that the evidence be a statement. First, however, this comment will briefly discuss the concept of "*res gestae*" since courts occasionally apply this term to statements that are not hearsay because they are not offered to prove the truth of the matter asserted.

III. RES GESTAE

Sometimes statements are admitted because they are "part of the *res gestae*."[63] Courts use this Latin phrase when admitting both hearsay and some types of nonhearsay evidence. Translated, "*res gestae*" means "things done." This definition may seem simple, but it is doubtful that the law of evidence contains any term so misunderstood, yet so frequently used. Certainly no other term has been so denounced by the commentators.[64] James Bradley Thayer, the well-known nineteenth century evidence scholar, wrote:

> [L]awyers and judges seem to have caught at the term 'res gesta[e],' . . . as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one, — some things belonged there, other things might for purposes of present convenience be put there. We have seen that the singular form of the phrase soon began to give place to the plural; this made it consider-

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[63] *See, e.g.*, Menefee v. Williams, 259 Cal. App. 2d 56, 66 Cal. Rptr. 108 (4th Dist. 1968); Francis v. Suave, 222 Cal. App. 2d 102, 109-11, 34 Cal. Rptr. 754, 757-59 (1st Dist. 1963) (court's discretion to admit *res gestae*).

Res gestae is still a viable concept in many jurisdictions. *See, e.g.*, Dimond v. King, 221 N.W.2d 86 (N.D. 1974) (statements made by accident victim an hour after the event part of the *res gestae*); Marcum v. Bellomy, ____ W.Va. ____, 203 S.E.2d 367 (1974) (statements of person incompetent to testify admitted as part of *res gestae*).

[64] Authors holding the term "*res gestae*" in low esteem include Wigmore and McCormick. *See* 6 WIGMORE (3d ed.), *supra* note 61, § 1767; MCCORMICK (2d ed.), *supra* note 6, § 288.

The court in Starr v. Morsette, 236 N.W. 2d 183, 187, n.1 (N.D. 1975) commented:

> The term "res gestae" has become somewhat discredited. In 1931, Sir Frederick Pollock called it "the damnable pretended doctrine of *res gestae*," and wished that some high authority would "prick that bubble of verbiage" [*Holmes-Pollock Letters*, 2d Ed. (Cambridge: The Belknap Press of Harvard University Press, 1961), II, p. 284]. McCormick (§ 288) divides it into five categories, one of which is not hearsay at all and four of which are exceptions to the hearsay rule, and he quotes Morgan ["A Suggested Classification of Utterances Admissible as Res Gestae," 31 Yale L.J. 229 (1922)] as to "the marvelous capacity of a Latin phrase to serve as a substitute for reasoning." We note that the Federal Rules of Evidence no longer use the expression, and we agree that it should be jettisoned. The concepts properly included within it, of course, will remain, under their more accurate descriptions such as "declarations of present bodily condition," "present mental states," "excited utterances," and "declarations of present sense impressions."

> ably more convenient; whatever multiplied its ambiguity, multiplied its capacity. . . .[65]

Commentators have analyzed the contents of the "catch-all" in various ways.[66] The authors of this comment find it useful to divide *res gestae*, as the courts have applied it, into three categories:

1) Some statements are nonhearsay utterances, frequently verbal acts.

2) Some statements fall within a hearsay exception, usually the spontaneous utterance exception, but sometimes within the present state of mind or present sense impression exceptions.

3) Some statements are hearsay evidence which does not fall within a standard exception, but are so clearly relevant and so desirable that the courts strain to admit them.[67]

People v. Eppstein[68] provides an example of the first category. Defendants, husband and wife, were charged with passing bad checks, the husband writing the checks and the wife passing them. The prosecutor offered against the defendant husband statements of the wife made while passing the checks. The husband contended that the statements were inadmissible hearsay. The court admitted the statements, analyzing them as verbal acts which were part of the *res gestae:* "As the passing of these checks was of the essence of the crimes charged, Mrs. Eppstein's statements made in doing so were precisely a part of the *res gestae*. . . ."[69] Since the court recognized that her words had legal significance as the verbal part of the crime, it could have admitted them as nonhearsay without referring to "*res gestae*."

An example of the second category, *res gestae* as a synonym for a particular hearsay exception, is found in *Lane v. Pacific Greyhound Lines*,[70] a traffic accident case. Plaintiff's counsel sought to introduce evidence of a statement made at the time of the accident by defendant's employee, the bus driver. The driver had admitted that he had failed to see plaintiff's car. The court held that the statement was admissible either as an admission of a party opponent, or as a

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[65]J. Thayer, *quoted in* 6 WIGMORE (3d ed.), *supra* note 61, §1767 at 181-82. The singlar form of "*res gestae*" is "*res gesta*" which translates "the thing done."

[66]*See, e.g.*, Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922).

[67]McCormick believes *res gestae* developed before hearsay was clearly distinguished from verbal acts and before the whole array of exceptions developed. MCCORMICK (2d ed.), *supra* note 6, § 288.

[68]108 Cal. App. 72, 290 P. 1054 (4th Dist. 1930). *See also* Burris v. Rodrigues, 22 Cal. App. 645, 653, 135 P. 1105, 1108 (3d Dist. 1913) (evidence not part of *res gestae* since not a verbal act).

[69]108 Cal. App. at 76, 290 P. at 1056.

[70]26 Cal. 2d 575, 581-82, 160 P.2d 21, 24 (1945). For another discussion of spontaneous utterances as part of the *res gestae*, *see* Walsh v. Table Rock Asphalt Construction Co., 522 S.W.2d 116, 121-22 (Mo. App. 1975).

spontaneous declaration which was part of the *res gestae*. The court suggested that if the driver were not a true agent, only the *res gestae* exception would apply.[71] Under the California and federal statutes,[72] such evidence is admissible as a spontaneous declaration.[73] *Res gestae* need not be considered.

The third *res gestae* category, evidence which is not normally admissible but which the courts feel should be admitted, is the most confusing. In this area, courts resort to language about the "event speaking for itself" rather than the actor speaking, or about the relevance of the evidence in obtaining a full picture of the event.[74] Of course, when the spontaneity of the statement is emphasized, this category overlaps with the hearsay exception for spontaneous declarations.

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[71] The court quoted the dissent in Snipes v. Augusta-Aiken Ry. & Electric Corporation, 151 S.C. 391, 149 S.E. 111, 115 (1929):

> *The declarations of an agent, which are shown to have been a part of the res gestae are admitted, not because he was an agent, but because they come within the class of excepted hearsay evidence which fulfills the requirements of the res gestae rule; the declarations of one not an agent would be received under the same conditions.*

26 Cal. 2d at 582, 160 P.2d at 24 (California Supreme Court's emphasis).

[72] CAL. EVID. CODE § 1240 (West 1968) provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

FED. R. EVID. 803 provides in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> (2) Excited Utterance — A statement relating to a startling event or condition made while the declarant was under stress of excitement caused by the event or condition.

[73] According to McCormick, besides spontaneous exclamations, three other exceptions to the hearsay rule are "part of the *res gestae* exception": (1) statements of present bodily condition, (2) declarations of present mental state, and (3) declarations of present sense impressions. MCCORMICK (2d ed.), *supra* note 6, § 288. Most jurisdictions reject the exception for declarations of present sense impressions. *Id.* § 298 at 710. Thus, evidence of this type may be admissible only under the *res gestae* rubric.

[74] Typical language includes the following:

a) *"[Res gestae]* consists of those statements made rather by the event than about the event . . . ." Standard Accident Ins. Co. v. Baker, 145 Okla. 100, 291 P. 962, 963 (1930).

b) *"[Res gestae]* must be an undesigned part, or incident, of the occurrence in question, and illustrative of its character." People v. Bush, 56 Cal. App. 2d 877, 883, 133 P.2d 870, 873 (2d Dist. 1943), *quoting* 10 CAL. JUR. EVIDENCE § 340 at 1112 (1923).

In California, *res gestae* has been used to admit various kinds of pertinent evidence, such as the complaint by the child victim of a sex crime, *id.*, or relevant evidence of crimes other than the one the defendant is charged with, People v. James, 40 Cal. App. 2d 740, 105 P.2d 947 (4th Dist. 1940).

In a recent Illinois case, *Perzovsky v. Chicago Transit Authority*,[75] the victim of an accident told an ambulance attendant he had been struck by a vehicle. The victim was still in shock when placed in the ambulance. His statement was undoubtedly as free from fabrication as any spontaneous statement could be. Yet it was probably made too long after the event to qualify as a spontaneous declaration. At the subsequent trial of the action for the victim's wrongful death, the attendant was allowed to repeat the statement on the theory that it was part of the *res gestae*. The court, quoting prior case law, said:

> The term 'res gestae' refers to those circumstances which are admissible when illustrative of an act. . . . When an out-of-court statement assists in constituting the transaction, the statement is competent because it does not depend for its effect on the credit or credibility of the declarant, but derives its probative force from its close connection with the occurrence which it accompanies and tends to explain, and is admissible as original evidence and not objectionable as hearsay.[76]

Courts have also classified statements as *res gestae* of the third category to admit them when they are necessary but analytically inadmissible.[77] Today, when evidence falls within the spontaneous utterance exception or is clearly nonhearsay, the *res gestae* argument is unnecessary. When relevant evidence does not readily fit into one of these categories,[78] however, the *res gestae* argument may be useful.[79]

In federal courts, however, the *res gestae* argument should now be unnecessary. Federal rule 802[80] provides that the only hearsay exceptions are those created by the federal rules themselves; but then

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[75] 23 Ill. App. 3d 896, 320 N.E.2d 433 (1974).

[76] Grebe v. Vacek & Co., Inc., 103 Ill. App. 2d 79, 83, 243 N.E.2d 548, 440 (1968), *quoted in* Perzovsky v. Chicago Transit Auth., 23 Ill. App. 3d 896, 320 N.E2d 433, 437(1974).

[77] The imprecision of the definition of *res gestae*, so annoying to the commentators, seems a deliberate creation of courts who wished to have a flexible means of dealing with individual situations.

> It is often difficult to determine what acts or declarations are part of the *res gestae*. There is an apparent conflict in the authorities on the subject. Each case must be determined upon its own peculiar facts.

People v. Wong Ark, 96 Cal. 125, 127, 30 P. 1115 (1891).

[78] For example, a statement of an imperturbable bystander might not qualify as an excited utterance; the remark of an agent might not be closely enough related to his work to qualify as an admission; an incompetent's effort to agree to a contract might not qualify as a verbal act.

[79] In focusing on the third category, the proponent should stress (1) the explanatory value of the event, (2) the difficulty the trier of fact will have in understanding the event without this evidence, (3) the way in which the evidence arose, i.e., how closely it was connected with the event, (4) the lack of the usual hearsay dangers in the particular situation, and (5) the court's traditional role in interpreting statutes to let in evidence that it feels should be admitted.

[80] FED. R. EVID. 802, set forth in note 27, *supra.*

federal rules 803(24) and 804(b)(5)[81] authorize judges at the trial level to create new exceptions on a case-by-case basis for reliable and necessary evidence that meets certain statutory criteria.[82]

The California Code, in contrast, does not specifically authorize trial judges to create new exceptions. Section 1200 does, however, provide that hearsay evidence is admissible "as provided by law."[83] "Law" is defined by Section 160[84] and by the Comment of the Senate Judiciary Committee[85] to mean case law as well as statutory law. Some case law has approved the admission of evidence which the trial court had characterized as part of the *res gestae*.[86] Thus, California trial judges, who would ordinarily leave lawmaking to the appellate courts, may use the *res gestae* rationale as an escape device to admit hearsay evidence that is not admissible under a statutory exception.

IV. NONASSERTIVE CONDUCT: IS IT A STATEMENT?

Section II discussed one definitional question: when is a statement offered for the truth of the matter asserted? This section considers another definitional question: when can an actor's conduct be classified as a statement? When the actor intends to substitute his conduct

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[81] FED. R. EVID. 803(24), 804(b)(5) are set forth in note 27, *supra*.

[82] The term *res gestae* may, however, linger on in the case law. In United States v. Smith, 520 F.2d 1245 (8th Cir. 1975), the court rejected the government's contention that a certain statement of a co-conspirator made after the conspiracy was admissible "as an excited utterance and a part of the res gestae." *Id.* at 1248. The court notes that

> The phrase "res gestae" has been termed a convenient "catch-all" in escaping the hearsay rule of exclusion. *Regardless of terminology*, [emphasis added] " . . . the individual admissibility situations and the reasoning involved in their solution are the primary considerations." *See* LADD AND CARLSON, CASES AND MATERIALS ON EVIDENCE at 899-903 (1972).

Id., n.5.

[83] CAL. EVID. CODE § 1200(b) (West 1968), set forth in note 26, *supra*.

[84] CAL. EVID. CODE § 160 (West 1968) provides:

> "Law" includes constitutional, statutory and decisional law.

[85] CAL. EVID. CODE § 1200(b), Senate Judiciary Comm. Comment (West 1968).

[86] In California, the term *res gestae* seems to have been used most often to refer to statements that might qualify for admission as spontaneous utterances. *See, e.g.*, White v. Los Angeles Ry. Corp., 73 Cal. App. 2d 720, 167 P.2d 530 (2d Dist. 1946). The California Supreme Court has approved such a use. Showalter v. Western Pacific R.R. Co., 16 Cal. 2d 460, 465-70, 106 P.2d 895, 898-901 (1940). However, *res gestae* has sometimes been used in a broader sense. For instance, in People v. Eppstein, 108 Cal. App. 72, 76, 290 P. 1054, 1056 (4th Dist. 1930), discussed *supra* in text accompanying notes 68-69, verbal acts were called "part of the res gestae." In Gillam v. Sigman, 29 Cal. 637 (1866), *res gestae* seems to have been used to admit evidence of the third category (evidence that is neither hearsay subject to an exception nor nonhearsay). The court admitted declarations of "a third person, made to and in the presence of parties engaged in a controversy . . ." because such statements were necessary to help explain the motives and conduct of the parties. *Id.* at 642. *See also* Menefee v. Williams, 259 Cal. App. 2d 56, 62, 66 Cal. Rptr. 108, 113 (4th Dist. 1968).

for a verbal expression, the conduct is a statement.[87] For example, when a person nods his head intending to substitute conduct for the verbal expression, "Yes," he is making a statement. Likewise, a driver who places a flare on the highway may intend to make a statement to others that an accident has occurred. Conduct which the actor intends as a substitute for a verbal expression or communication is "assertive" conduct.

Suppose, however, Amelia Airborne, an expert pilot, after carefully inspecting a rented plane, boards it and takes off. An observer seeing this conduct can infer that she believes the airplane is safe. Yet she does not intend to communicate that belief to anyone else. Such conduct is "nonassertive" conduct.

Evidence of an actor's conduct can be offered as the equivalent of a statement of an actor's belief. That belief can then be used to prove that the matter believed is true. In the above example, the observer may regard the pilot's conduct as the equivalent of a statement by her, "I believe the plane is safe." This inferred statement could be used to prove that in fact the plane was safe.

The common law courts believe that such inferred statements are as potentially unreliable as express hearsay statements, and therefore require that the declarant be subjected to in-court cross-examination and observation of demeanor.[88] However, statements inferred from conduct can have other guarantees of reliability. First, an actor who does not intend to make a communication is not likely to intend to deceive. More important, a person who acts in reliance on a belief will not want to risk the adverse consequences of an incorrect belief, and is therefore more likely to have exercised care in his perception and memory.[89] Naturally, the more involuntary the conduct, the less likely it is that the actor would have intended to deceive.[90] Likewise, the more damaging the consequences of conduct in re-

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[87] CAL. EVID. CODE § 225 (West 1968), FED. R. EVID. 801(a).

[88] *See* MCCORMICK (2d ed.), *supra* note 6, § 250 at 598, especially n.42 and accompanying text.

[89] *Id.* at 599, *and see* CAL. EVID. CODE § 1200, Senate Judiciary Comm. Comment (West 1968).

[90] For example, in a murder case, People v. Clark, 6 Cal. App. 3d 658, 86 Cal. Rptr. 106 (5th Dist. 1970), the prosecutor offered the testimony of a police officer that the defendant's wife fainted when the officer asked defendant if he had a coat with a fur collar. Her fainting suggested that she knew he had such a coat; her reaction was some evidence that the murderer with the fur collared coat was her husband. It is extremely unlikely that she intended to deceive anyone by her conduct. The court admitted the evidence as nonassertive conduct. *Id.* at 660, 86 Cal. Rptr. at 112.

This particular sort of nonassertive conduct might be regarded as nonhearsay, even under the traditional approach. According to McCormick, some "instances of behavior [are] so patently involuntary that they could not by the greatest stretch of imagination be treated as the equivalent of a verbal assertion." MCCORMICK (2d ed.), *supra* note 6, § 250 at 596 and n.35.

liance on an inaccurate belief, the more careful the actor will be in his perception and memory.

These considerations underlie the California and federal codifications of the hearsay rule. Both codes reject the common law view and classify nonassertive conduct as nonhearsay by characterizing conduct as a statement only when the actor intends it as a substitute for a verbal expression.[91]

A. RECOGNIZING NONASSERTIVE CONDUCT

Surprisingly few California cases have dealt with nonassertive conduct.[92] One possible explanation is that the courts do not always recognize nonassertive conduct as such. Identifying it is easier if one remembers that conduct takes three forms: "pure conduct" (conduct consisting of neither words nor silence), words, and silence.

1. PURE CONDUCT

Nonassertive conduct is easiest to recognize when it is pure conduct. All sorts of conduct may serve as the basis for inferred statements, and may be offered to prove the truth of the inferred belief. In the airplane hypothetical above, the behavior of the pilot may be offered as evidence of the safety of the plane. Other examples, mentioned by McCormick, include:

> (1) proof that the underwriters have paid the amount of the policy, as evidence of the loss of a ship; (2) proof of payment of a wager, as evidence of the happening of the event which was the subject of the bet; (3) precautions of the family to show that the person involved was a lunatic. . . .[93]

In a 1924 California case, *People v. Mendez*,[94] defendants, farm workers on trial for the murder of a rancher and some of his family, contended that other farm workers had committed the crime. To prove this contention, they offered evidence that the other workers had left the area the day after the murder. The defendants characterized this conduct as "flight," suggesting the inference that the other workers were conscious of their own guilt. Following the traditional rule, the California Supreme Court rejected this evidence as

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[91] For definitions of the term "statement," *see* CAL. EVID. CODE § 225 (West 1968), set forth in note 26 *supra*, and FED. R. EVID. 801(a), set forth in note 27 *supra*. For comments on the rationale for classifying nonassertive conduct as nonhearsay, see CAL. EVID. CODE § 1200, Senate Judicary Comm. Comment (West 1968) and FED. R. EVID. 801(a), Advisory Comm. Notes.

[92] *See* B. WITKIN, CALIFORNIA EVIDENCE § 472 (2d ed. 1966) [hereinafter cited as WITKIN (2d ed.)].

[93] MCCORMICK (2d ed.), *supra* note 6, § 250 at 597.

[94] 193 Cal. 39, 223 P. 65 (1924), *disapproved on other grounds* in People v. McCaughan, 49 Cal. 2d 409, 317 P.2d 974 (1957).

hearsay.[95] Today, under the California and federal codes, the evidence would not be hearsay.

2. WORDS

Can words which make any kind of assertion be nonassertive conduct? Clearly words which are intended to communicate an idea make *an* assertion. However, the speaker can hold another belief which he does not intend to communicate, but which can be inferred from his assertion. His conduct, that is, his speech, might be considered nonassertive in the sense that he does not intend to assert the inferred belief.

The classic example of words as nonassertive conduct appears in the case of *Wright v. Doe d. Tatham.*[96] The proponent of John Marsden's will sought to prove that Marsden was mentally competent when he executed his will. As evidence of Marsden's competence, the proponent offered three letters addressed to Marsden in which persons who knew him wrote as if they considered him a man of normal competence. Thus their words (the letters) could be considered the equivalent of a statement that Marsden was competent, even though the writers had not intended to state that proposition directly. The proponent wished to use these inferred statements of competence as evidence that Marsden was indeed competent.[97]

When the inferred belief is offered to prove the truth of the inferred statement, one can label the words in either of two ways. The words may be called "assertive conduct" because they do make *an* assertion. Or they may be called "nonassertive conduct" because they do not assert the inferred belief which is being offered to prove that the matter believed is true. A diagrammed example may clarify these two approaches.

A = "I want you to advise me how to invest my money."
From A, infer B.
B = I believe you are competent.
Fact to be proved: you are competent

First approach:
A does not directly assert Fact B. But A does assert Fact A.
Since A makes *an* assertion, A is assertive conduct.

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[95] *Id.* at 52, 223 P. at 70. The traditional view that nonassertive conduct is hearsay was accepted in California until the enactment of the Evidence Code in 1965.

[96] 112 Eng. Rep. 488 (Ex. 1837), *aff'd* 7 Eng. Rep. 559 (H.L. 1838).

[97] The issues involved in settling John Marsden's estate troubled the English courts for eight years. Finally in 1838, the House of Lords declared all the letters inadmissible, affirming the judgment of the divided lower court. 7 Eng. Rep. 559, 597. The rationale for exclusion seems to include hearsay considerations (*id.* at 595), protection of the jury from such evidence (*id.*), lack of evidence showing that Marsden reacted to the letters in a manner showing his competence (*id.* at 596), and problems with the admissibility of opinions (*id.*).

Second approach:
A does not directly assert Fact B, the fact to be proved.
Since A does not make *the* assertion in question, A is nonassertive conduct.[98]

The drafters of the federal rules appear to have taken the first approach. The Advisory Committee on the federal rules states:

> It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement."[99]

This does not mean, however, that such statements are necessarily hearsay. After discussing the rationale for excluding nonverbal nonassertive conduct from the definition of hearsay, the Committee states that "[s]imilar considerations govern . . . [assertive verbal conduct which is offered] as a basis for inferring something other than the matter asserted . . . ."[100] These statements, according to the comment, are not hearsay because they are not offered for the truth of the matter asserted under federal rule 801(c).[101] If the words are not hearsay, it makes little difference whether one analyzes them as nonassertive conduct or as assertive conduct not offered for the truth of the matter asserted.[102] In fact, the latter analysis may be easier to understand.

It is not clear which (if either) of these two approaches California takes. The Senate Judiciary Committee comments that all non-

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[98] Sometimes the words may be a poetic expression of the fact which is to be proved. Recall the hypothetical mentioned in note 48 *supra* in which *X*, looking out of the western window, remarked, "The sky is on fire." If *X* intended to communicate the idea that the sun was setting, his remark would be hearsay when offered to prove that the sun was setting. Words used to express an idea metaphorically are assertive conduct. It is necessary to make an inference here but it involves interpreting the intended meaning rather than deducing an unintended meaning, that is, an underlying belief held by the actor.

[99] FED. R. EVID. 801(a), Advisory Comm. Notes.

[100] *Id.* The comments also say that these considerations govern "nonassertive verbal conduct." The meaning of this term is unclear. The term may refer to verbal conduct which makes no assertion at all, for example, exclamations of pain, words of imprecation, singing of meaningless phrases. However, words such as "So long, George," "Come here, Martha," and "May I borrow your book?" presumably fall within this category, too. It should be easier to classify such words as "statements" under the California definition than under the federal rules since the California Code defines statement as any "verbal expression," without specifying that it must be assertive in form. CAL. EVID. CODE § 225 (West 1968) set forth in note 26 *supra.*

[101] FED. R. EVID. 801(a), Advisory Comm. Notes.

[102] It is possible, of course, that courts will not use either of these methods. In some cases, they may simply not mention the nonassertive conduct theory at all. For example, they may analyze the words as a statement of present memory or belief, and therefore inadmissible under CAL. EVID. CODE § 1250(b)(1) (West 1968). *See* note 119 *infra.*

assertive conduct is excluded from the definition of hearsay.[103] Section 125 defines conduct to include verbal as well as nonverbal behavior.[104] While the comment does not consider words as nonassertive conduct specifically, it does cite *People v. Reifenstuhl*,[105] a case involving words, as an example of nonassertive conduct. In *Reifenstuhl*, the prosecution offered the testimony of the arresting officer that he had picked up defendant's phone and had heard the declarant say: "I want $1 to win on Nilka in the third race at Hollywood and one on Cozette to show in the fourth race. This is M.T. talking."[106] The declarant did not intend by these words to communicate his belief that the phone number was one for placing bets; rather, he intended to communicate his desire to bet on Nilka. Thus, his words could be considered nonassertive conduct rather than a statement or assertion. From this conduct, an observer could infer the declarant's belief that the phone number belonged to a bookmaking establishment. That belief could then be offered to prove the truth of the matter believed, namely, that it was a bookmaking establishment.

Although the Committee cites *People v. Reifenstuhl* as an example of nonassertive conduct, the court did not admit the declarant's words on that theory. Rather, the court admitted the words as circumstantial evidence of the use to which the public put the phone. Thus, in the court's analysis, the words were not hearsay because they were not offered to prove the truth of the matter asserted.[107] Because of the discrepancy between the court's reasoning and the Committee's use of the case, classifying words as nonassertive conduct may be troubleridden in California.

The California definition of "statement" as a "verbal expression"[108] creates another problem which is illustrated by the facts of *People v. Freeman*, a post-Code case.[109] Defendant, charged with robbery, claimed to be in a certain place on the morning of the crime. To show that he was not where claimed, but rather at her house, the witness testified that she heard her daughter greet a man who came to the house that morning with the words, "Hi, Norman" (defendant's first name).[110]

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[103] CAL. EVID. CODE § 1200, Senate Judiciary Comm. Comment (West 1968).
[104] CAL. EVID. CODE § 125 provides: " 'Conduct' includes all active and passive behavior, both verbal and nonverbal."
[105] 37 Cal. App. 2d 402, 99 P.2d 564 (2d Dist. 1940).
[106] *Id.* at 404, 99 P.2d at 565.
[107] *Id.* at 405, 99 P.2d at 566. Prior to the enactment of the 1965 Evidence Code, California courts generally excluded nonassertive conduct. The betting cases were an exception to this rule. *See, e.g.*, People v. Warner, 270 Cal. App. 2d 900, 906-07, 76 Cal. Rptr. 160, 164 (4th Dist. 1969). Public policy against illegal gambling was probably responsible for this aberration.
[108] CAL. EVID. CODE § 225 (West 1968) set forth in note 26 *supra*.
[109] 20 Cal. App. 3d 488, 97 Cal. Rptr. 717 (3d Dist. 1971).
[110] *Id.* at 492, 97 Cal. Rptr. at 720.

Under the federal analysis, the words "Hi, Norman," although they communicate a greeting, do not *assert* anything.[111] Since they do not make an assertion, they are not statements, and therefore not hearsay.[112]

In contrast, the California definition of statement as a "verbal expression" appears to be broader than the federal definition of statement as an "assertion." The words "Hi, Norman" should therefore qualify as a statement. These words might be classified as nonassertive conduct on the basis of the Senate Judiciary Committee's comment.[113] Or they might be nonhearsay on the theory that they are not offered to prove the truth of the matter asserted. However, the California definition of hearsay uses the phrase, "for the truth of the matter *stated.*"[114] If the statement "Hi, Norman" is used to prove Norman's location, those words would seem to state the fact "You are here, Norman." If so, the words "Hi, Norman" should be hearsay. But why should these words be considered hearsay when the words in *People v. Reifenstuhl*[115] were considered nonassertive conduct by the Senate Judiciary Committee?[116] When applied to words as nonassertive conduct, the California choice of the terms "statement" and "stated," rather than "assertion" and "asserted," in the definition of hearsay is unfortunate.

In *People v. Freeman*,[117] the court admitted the words "Hi, Norman" as circumstantial evidence "that one Norman had come to the house of a person associated with . . . the alleged associate of Norman Freeman in the armed robbery."[118] The court seemed to analyze the evidence as follows: the declarant intended to make a statement, "Hi, Norman." That statement was not offered to prove the truth of the matter asserted, but instead as circumstantial evidence of the declarant's belief that she was talking to a person named Norman. Her belief was offered to prove the truth of that belief. The court thus seemed to admit the evidence because it was not offered to prove the truth of the matter asserted, rather than because it was

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[111] Most unhelpfully, the federal rules do not define the term "assertion." The American Heritage Dictionary offers the following definition of "to assert": "To state or express positively; affirm." It defines "to express" as "to make known or set forth in words; state; utter." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 79, 463 (1970). Presumably, the federal rules intend to follow the usual meaning of these words, so that "assertion" is a more restrictive term than "expression."

[112] FED. R. EVID. 801(a), set forth in note 27 *supra.*

[113] CAL. EVID. CODE § 1200, Senate Judiciary Comm. Comment (West 1968).

[114] CAL. EVID. CODE § 1200 (West 1968) set forth in note 26 *supra.*

[115] People v. Reifenstuhl, 37 Cal. App. 2d 402, 99 P.2d 565 (2d Dist. 1940), discussed in text accompanying notes 105-07.

[116] CAL. EVID. CODE § 1200, Senate Judiciary Comm. Comment (West 1968), discussed in text accompanying notes 103-05.

[117] People v. Freeman, 20 Cal. App. 3d 488, 97 Cal. Rptr. 717 (3d Dist. 1971).

[118] *Id.* at 492, 97 Cal. Rptr. at 720.

nonassertive conduct. In this murky area of the law, case law will probably be more useful to the practicing lawyer than theoretical excursions into the California Evidence Code's position on words as nonassertive conduct.[119]

3. *SILENCE*

Sometimes silence is nonassertive conduct.[120] Suppose plaintiff slips and falls on a concrete walkway at defendant's golf course. She brings a personal injury suit against defendant. To prove that the accident was unforeseeable, defendant testifies that nearly 40,000 people walk over the pathway every month, and that none has ever complained of its condition. Defendant, in effect, treats their silence as the equivalent of a statement that no previous accidents have occurred, and uses that statement to prove the truth of the matter it asserts, that in fact no accidents occurred. The absence of prior accidents is then used to prove that the accident in question was unforeseeable, and that defendant was therefore not negligent.[121]

The California Evidence Code, by defining conduct[122] as both passive and active behavior, seems to recognize silence as nonassertive conduct. The courts, both before and after the enactment of the Code, have admitted such evidence without carefully explaining their

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[119] CAL. EVID. CODE § 1250 (West 1968) and FED. R. EVID. 803(3) may also affect the classification of words as nonassertive conduct. Both sections admit hearsay statements of the declarant's state of mind, except when those statements are of the declarant's memory or belief and are offered to prove the truth of that memory or belief. If the declarant in People v. Reifenstuhl, 37 Cal. App. 2d 402, 99 P.2d 565 (2d Dist. 1940), had said, "I believe that I can place bets at this number," those words would have been inadmissible hearsay, when used to prove the truth of the fact believed. But how different is the statement, "I believe I can place bets at this number," from a request to place a bet, which shows that a declarant believes he can do so? For a discussion of this problem, *see* Comment, *State of Mind: The Elusive Exception*, this volume.

[120] Silence is often not recognized as a form of nonassertive conduct. *See* MCCORMICK (2d ed.), *supra* note 6, § 250 at 600-01.

[121] These were the facts of Beauchamp v. Los Gatos Golf Course, 273 Cal. App. 2d 20, 77 Cal. Rptr. 914 (1st Dist. 1969). The court said that the lack of other accidents was admissible on the issue of foreseeability. However, it did not expressly state that it viewed the silence as nonhearsay because it was nonassertive conduct. The court simply noted the relevance of the lack of known accidents on the issue of foreseeability. *Id.* at 36, 77 Cal. Rptr. at 925. Arguably, the court could have analyzed the silence as nonhearsay, under the theory that it was a type of evidence offered to show the effect (or lack of effect) on the listener, or used as circumstantial evidence of the defendant's knowledge of the absence of reports. Thus it would not be offered to prove the truth of the matter asserted.

Possibly the "nonassertive conduct" analysis is too tortured to be of great interest to courts; at any rate they have little trouble in admitting silence where such evidence is relevant.

[122] CAL. EVID. CODE § 125 (West 1968) set forth in note 104 *supra.*

grounds for doing so.[123] Therefore, silence as one form of nonassertive conduct, whether or not recognized as such, is admissible evidence in California.

Under the federal rules,[124] silence not intended to make an assertion is not a statement, and therefore is not hearsay. Like California case law, federal cases seem to admit evidence of silence without articulating or necessarily accepting the nonassertive conduct rationale.[125]

In summary, although words as a form of nonassertive conduct may pose special problems and silence is not always recognized as nonassertive conduct, most nonassertive conduct is admissible evidence under both the California and the federal codes. The following section will consider problems raised by its admissibility and suggest ways of dealing with these problems.

B. PROBLEMS RAISED BY ADMITTING NONASSERTIVE CONDUCT AS NONHEARSAY[126]

Frequently, evidence of nonassertive conduct is reliable.[127] Sometimes, however, such evidence poses either the traditional problems of hearsay or problems peculiar to nonassertive conduct. There are three troublesome questions.

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[123] *See, e.g.*, Beauchamp v. Los Gatos Golf Course, 273 Cal. App. 2d 20, 77 Cal. Rptr. 914 (1st Dist. 1969), discussed in note 120 *supra* and People v. Layman, 117 Cal. App. 476, 4 P.2d 244 (2d Dist. 1931). In *Layman*, the defendant was on trial for perjury. He had been the plaintiff in a personal injury action. The prosecution maintained that he had fabricated the story about the accident. To prove that contention, the prosecution offered the testimony of train dispatchers that they had received no report of an accident on the day in question. When defendant complained that admission of evidence that the dispatchers had received no accident reports violated the hearsay rule, the court simply said:

> It was not hearsay, but direct proof, of course, of a fact, the fact being that no report had been turned in.

Id. at 478, 4 P.2d at 245.

[124] *See* the federal definition of "statement," FED. R. EVID. 801(a), set forth in note 27 *supra*. For a discussion of silence as nonassertive conduct under the new Federal Rules of Evidence, *see generally* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(a)[02] (1975).

[125] *See, e.g.*, Cain v. George, 411 F.2d 572 (5th Cir. 1969). Plaintiffs brought a wrongful death action against a motel owner. Plaintiff's decedent had died as a result of a fire, which plaintiffs contended was caused by a defective heater in his room. The motel owner testified that no other guests had complained about the heater. The court said that such evidence was admissible because it

> merely related the knowledge of the motel owners as to whether anyone was ever harmed by the heater. It was not hearsay as it derived its value solely from the credit to be given to the witnesses themselves and it was not dependent upon the veracity or competency of other persons.

Id. at 573.

[126] For a detailed discussion of problems in this area, *see* Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682 (1962).

[127] When an actor's life depends on the correctness of his belief, he is likely to

First, did the actor intend a communication? For example, a child who fears a barking dog sees his father approach and pat the dog. If the father pats the dog because he likes dogs, his conduct is nonassertive, and from it his belief that the dog is not dangerous may be inferred. On the other hand, he may have intended by his action to communicate that belief to the child. If so, the action is hearsay and present questions of the actor's veracity and of the accuracy of his perception and memory. When one party offers evidence that is allegedly nonassertive, the opponent will want to assure that such conduct was truly not intended to be an assertion. This is especially important when the actor may intend to mislead observers by his conduct. For example, the conduct of a person fleeing the scene of the crime might be treated as the equivalent of a statement of his guilt. But if the person seeks to shield the real criminal, he intends, by his flight, to communicate a false impression of his guilt.

Once it has been established that the conduct is truly nonassertive, the second question, one that results from the nature of nonassertive conduct, surfaces: does the inference being drawn from the actor's conduct correctly reflect his belief? More than one belief can motivate a particular course of conduct. If a doctor places a patient in isolation, for example, he may believe that the patient would be infected by outside germs, or he may believe that visitors would be infected by the patient's disease. If the issue in a case is whether the patient was the carrier of a dangerous disease, the doctor's conduct would be probative only if the trier of fact could draw the correct inference about his belief.

Third, if the correct inference has been drawn, how accurate are the actor's perception and memory of the underlying facts? The actor's reliance on the belief is considered a sufficient guarantee that he took care to perceive and remember. However, if the conduct taken in reliance on the belief is insignificant to the actor, his perception and memory of the facts underlying that belief are more likely to be inaccurate. Suppose, for example, defendant is charged with fraudulently selling sunflower seeds as pumpkin seeds. To show that

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take care how he perceives and infers. But when no serious consequences will flow from action based on a false belief, he may become careless. The Senate Judiciary Comm. Comment concedes that independent guarantees of trustworthiness are not always, but only "frequently" available. CAL. EVID. CODE § 1200, Senate Judiciary Comment (West 1968). Both the common law and the California and federal codes take an "all-or-nothing" approach to the problem. The common law labels all nonassertive conduct hearsay; the California and federal statutes label it all nonhearsay. A case-by-case determination of the admissibility of nonassertive conduct might be preferable to either approach. McCormick suggests such a case-by-case approach in his first edition. The trial court judge could admit evidence of nonassertive conduct as circumstantial evidence if he found that its probative value outweighed dangers of confusion and prejudice. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 229 at 479 (1st ed. 1954).

he truly is selling pumpkin seeds, defendant offers as evidence the conduct of a customer who, desiring pumpkin seeds, buys a pound of the suspect seeds. That conduct is evidence of the customer's belief that he is buying pumpkin rather than sunflower seeds. That evidence will be more reliable if the customer is allergic to sunflower seeds and therefore takes special care to avoid buying them, than if the customer does not know the difference between sunflower seeds and pumpkin seeds.

Cross-examination of the actor-declarant often would remedy these three problems. When the opponent of such evidence feels that cross-examination is necessary, he will want to argue that the nonassertive conduct should be excluded from evidence.

The first line of attack is to argue that the actor intended to make an assertion and to ask the judge to make a preliminary finding of fact on this issue, under California Evidence Code section 405 or federal rule 104(a).[128] Under these sections, the judge would be required to exclude the evidence before the jury hears it if he found that the actor did have such an intent.

California Evidence Code section 352 and federal rule 403[129] permit a second attack on the admissibility of evidence of nonassertive conduct. Both sections provide that relevant evidence may be excluded if the trial court finds that the usefulness of the evidence is outweighed by other considerations: admitting the evidence might

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[128] CAL. EVID. CODE § 405 (West 1968) provides:

> With respect to preliminary fact determinations not governed by Sections 403 and 404:
>
> (a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

FED. R. EVID. 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

[129] CAL. EVID. CODE § 352 (West 1968) provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

FED. R. EVID. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

consume too much time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The opponent could argue that he would have to rebut such evidence with numerous witnesses and documents, all of which would confuse the jury and consume time.[130] If the judge feels that the probative value of the proffered evidence of nonassertive conduct is outweighed by dangers of time consumption and confusion in the necessary rebuttal evidence, he may exclude the nonassertive conduct.[131] The comments of the Senate Judiciary Committee to section 1200, the California hearsay rule, support this use of section 352 to exclude evidence of nonassertive conduct.[132]

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[130] For example, suppose the defense attorney wishes to introduce evidence that certain farm workers fled the area in which a labor riot occurred to show that they, and not the defendant, incited the disturbance. The prosecutor might argue that the wrong inference was being drawn, and that he would have to put numerous witnesses on the stand to show what the correct inference was. For instance, he might have friends of the departed workers testify about the plans the workers had; he might introduce expert testimony to show the migratory patterns of farmworkers; or he might argue that they left simply to avoid being involved in the violence.

In the previously discussed sunflower seed hypothetical, the party opposing introduction of the evidence of the customer's conduct (buying the seeds) might argue that he would need to rebut it with evidence regarding the store's lighting, the customer's eyesight and knowledge of the seeds, the strength of the customer's preference, and the customer's relationship with the defendant. Should the judge anticipate that considerable time would be lost by such an effort to rebut the evidence of the nonassertive conduct, he might exclude the evidence entirely.

[131] People v. Chapman, 50 Cal. App. 3d 872, 123 Cal. Rptr. 862 (2d Dist. 1975), although not a nonassertive conduct case, offers some support for the use of CAL. EVID. CODE §§405 and 352 to exclude untrustworthy evidence. The court considered hearsay declarations of a person present at a fatal shooting that he and not the defendant had fired the shot. In light of additional facts indicating the declarant's lack of credibility, the trial court ruled that the declarations were untrustworthy and did not meet the requirements for admission as a declaration against penal interest, and cited §352 as authority for this ruling. *Id.* at 878, 123 Cal. Rptr. at 865.

The Court of Appeal said: "The resolution of this issue involves the effect and the interrelation of Evidence Code sections 352, 403, 405 and 1230." *Id.* at 878, 123 Cal. Rptr. 866. It decided that "[a] prime example of the type of preliminary factual questions to be decided under section 405 is the trustworthiness of a proffered hearsay declaration." *Id.* at 879, 123 Cal. Rptr. 866. The court held that the trial court had properly determined the untrustworthiness of the declaration under §405, and further stated that the trial court acted properly in excluding the declarations under §352. *Id.* at 881, 123 Cal. Rptr. at 868. The court also noted that "in applying Evidence Code section 352, the trial court in weighing 'probative value' necessarily considers, among other things, credibility of the witnesses who testify to the proffered evidence." *Id.* at 881, 123 Cal. Rptr. 867.

[132] CAL. EVID. CODE §1200, Senate Judiciary Comm. Comment (West 1968). The committee said:

> Of course, if the probative value of evidence of nonassertive conduct is outweighed by the probability that such evidence will be unduly prejudicial, confuse the issues, mislead the jury, or consume too much time, the judge may exclude the evidence under Section 352.

Finally, if the evidence of nonassertive conduct is admitted, the opponent can emphasize its unreliability in final argument, raising the problems suggested above: the existence of intent to communicate, the correctness of the inference drawn, and the accuracy of the actor's perception and memory.

V. CONCLUSION

This comment opened with a quotation from Wigmore suggesting that the hearsay rule is one of the happiest inventions of the Anglo-American legal system.[133] More recent commentators have not always shared Wigmore's enthusiasm: Maguire and Morgan wrote that

> a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy-quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.[134]

There are some indications that the hearsay web of prohibition and exception will eventually disappear from our law. Most striking, perhaps, is the fact that England, its birthplace, has severely limited the use of the hearsay rule in civil trials.[135] Significantly, the use of juries decreased before this limitation took effect.[136]

In America, too, the use of juries is decreasing.[137] In many trials the judge sits alone as factfinder, and in the proliferating area of administrative law,[138] juries are never used. Judges, of course, recognize that strict application of the rule would often bar consideration of "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."[139] Indeed, when they sit as factfinders, they may hear the hearsay evidence without ruling immediately on its admissibility.[140] And no doubt much hearsay evidence is admitted because lawyers waive the objection.[141] Even the Supreme Court at present has taken a less restrictive view of the impact of the

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[133] *See* text accompanying note 1 *supra*.
[134] Maguire and Morgan, *Looking Forward and Backward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).
[135] The Civil Evidence Act of 1968 Part I, set forth in 12 HALBURY'S STAT. OF ENG. 910-21 (3d ed. 1969).
[136] For a discussion of the decline of the jury in England since the turn of the century, *see* P. DEVLIN, TRIAL BY JURY 129-65 (1966).
[137] McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 502, 508-09 (1930); Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362, 1363 (1970) [hereinafter cited as Davis].
[138] In fact, hearsay evidence not within an exception is admissible in administrative hearings, although it alone may not sustain a verdict. CAL. GOVT. CODE ANN. § 11513(c) (West 1966). WITKIN (2d ed.), *supra* note 130, § 31.
[139] N.L.R.B. v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).
[140] Davis, *supra* note 137, at 1362-63.
[141] Of course, the hearsay objection may be waived if not timely made. *See,e.g.*, Continental Oil Co. v. United States, 184 F.2d 802, 813 (9th Cir. 1950), People v. Wallace, 13 Cal. App. 3d 608, 617, 91 Cal. Rptr. 643, 648 (3d Dist. 1971).

confrontation clause which limits the use of hearsay in criminal proceedings.[142]

Should the hearsay rule be abolished? Since the rule was developed to protect jurors from unreliable evidence, it may make little sense to retain it in their absence.[143] Yet, in our adversary system, the opportunity to cross-examine and observe the witness has been an important means of insuring the reliability of evidence. If we abandon the hearsay rule immediately, we may have no adequate replacement for this method of in-court testing. Perhaps we should aim for a case-by-case approach to the admission of hearsay evidence. And that is, perhaps, the direction being taken. The new federal rules, while retaining the traditional view of hearsay, emphasize the trial judge's discretion to create new exceptions for evidence that is reliable and necessary.[144] These rules are likely to become the model for state codification of hearsay law.[145]

Someday the already bulky law of hearsay exceptions may effectively demolish the rule itself. For the present, however, the practitioner must grapple with the meaning of hearsay. This comment has

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[142] For an excellent discussion of the recent Supreme Court approach toward problems of hearsay and the confrontation clause, *see* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972).

[143] In fact, the civil law system, which uses juries only infrequently and does not rely on adversarial cross-examination as an insurer of reliability of evidence, has developed no equivalent to the hearsay rule. *See* Rava, Freed & Ginsburg, *Comparative Study of Hearsay Evidence Abroad*, 4 INT'L. LAW 156 (1969).

[144] FED. R. EVID. 803(24) and 804(b)(5), set forth in note 27 *supra*. How willing will federal judges be to make use of their discretion? Little case law is available. The court in Lowery v. Maryland, 401 F. Supp. 604 (D. Md. 1975), suggested that sparing use should be made of this exception: "It was the intent of Congress that this exception be used rarely and only in exceptional circumstances." *Id.* at 608.

United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y. 1976) appears to take a more liberal approach to the exception. Here defendant was on trial for bribery and extortion. He allegedly solicited a bribe from a certain corporate official who discussed the event with two associates. The government offered the associates' testimony regarding this conversation. The court held that it was admissible under several hearsay exceptions, including Rule 803(24), and discussed the use of the open-ended exception in detail. *Id.* at 558-59.

Two other cases refer to the new rule and its policy. *See* Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975) (advisory materials published by F.A.A. are admissible as exception to the hearsay rule when relevant and trustworthy; decision not based on new federal rules open-ended exception, but in line with their policy); Stone v. State, 85 Wash. 2d 342, 534 P.2d 1022, 1025, n.2 (1975) (where witness refused, on basis of privilege against self-incrimination to answer questions in a civil suit that he had formerly answered at an inquest, his former testimony might be trustworthy enough to be admitted under Rule 803(24) even if it does not meet the requirements of a traditional exception).

[145] Some states modeling their evidence codes on the new federal rules include New Mexico (N.M. STAT. ANN. § 20-4-101 *et seq.* [Supp. 1975]) and Wisconsin (WIS. STAT. ANN. § 901 *et seq.* [1975]).

sought to point out that evidence which at first glance appears to be hearsay, when properly analyzed, is not always an out-of-court statement offered to prove the truth of the matter asserted. Furthermore, an understanding of the rationale behind the rule and the various ways the courts have confused it may be a basis on which to argue for the admission or exclusion of hearsay evidence.

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