

# The Case for a Constitutional Definition of Hearsay: Requiring Confrontation of Testimonial Nonassertive Conduct and Statements Admitted to Explain an Unchallenged Investigation

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# THE CASE FOR A CONSTITUTIONAL DEFINITION OF HEARSAY: REQUIRING CONFRONTATION OF TESTIMONIAL, NONASSERTIVE CONDUCT AND STATEMENTS ADMITTED TO EXPLAIN AN UNCHALLENGED INVESTIGATION

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## I. INTRODUCTION

In *Crawford v. Washington*,<sup>1</sup> the Supreme Court remade the Confrontation Clause of the Sixth Amendment to exclude all testimonial hearsay statements made by a declarant whom the defendant had no opportunity to confront either before or during trial.<sup>2</sup> The Court therefore rejected prior law holding that confrontation is unnecessary when a declarant's statement fits an established hearsay exception, or is otherwise shown to be reliable by

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1. 541 U.S. 36 (2004).

2. *Id.* at 51; *see also* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (“In *Crawford*, after reviewing the [Confrontation] Clause’s historical underpinnings,” the Court held that the Confrontation Clause “guarantees a Defendant’s right to confront those who bear testimony against him.”).

particularized guarantees of trustworthiness.<sup>3</sup> The Court reasoned that using the reliability of hearsay statements as a reason for dispensing with confrontation was incongruous with the Constitution's view that confrontation is required to assure the reliability of testimonial hearsay.<sup>4</sup>

Since *Crawford*, scholars have rightly paid much attention to the question of whether a hearsay statement is "testimonial" and thus requires confrontation.<sup>5</sup> However, they have paid virtually no attention to whether a statement is hearsay in the first place. Although less frequently dispositive, that question is nonetheless important because only out-of-court statements that are hearsay trigger the right to confrontation.<sup>6</sup> Statements offered for the truth of the matter asserted require a judgment about a declarant's credibility, and it is this need for a credibility determination that triggers the defendant's confrontation right.<sup>7</sup> Statements offered only for the fact that they were said, and not offered for their truth, do not require confrontation because the credibility of the speaker has no bearing on the probative value of the evidence.<sup>8</sup>

This Article argues that courts violate the Confrontation Clause by misusing the non-hearsay rubric to admit, without confrontation, two categories of testimonial statements. The first consists of nonassertive conduct, which, although exempt from the Federal Rules of Evidence's (Federal Rules) definition of hearsay, is hearsay under the common law definition that was in use when the Confrontation Clause was adopted. Under the historical approach to confrontation, required by the Court's opinion in *Crawford*, such conduct, when testimonial, requires confrontation. Nonetheless, courts routinely admit testimonial, nonassertive conduct without

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3. *Ohio v. Roberts*, 448 U.S. 56 (1980). "*Roberts* conditioned the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Crawford*, 541 U.S. at 60 (quoting *Roberts*, 448 U.S. at 66). The Supreme Court overruled *Roberts* in *Crawford* by "restoring the unavailability and cross-examination requirements." *Davis v. Washington*, 547 U.S. 813, 825 n.4 (2006); see also *Melendez-Diaz*, 129 S. Ct. at 2536 (rejecting the argument that the Confrontation Clause excludes hearsay that is the product of neutral, scientific testing as "little more than an invitation to return to our overruled decision in *Roberts*, which held that evidence with 'particularized guarantees of trustworthiness' was admissible notwithstanding the Confrontation Clause") (citation omitted).

4. *Crawford*, 541 U.S. at 61–62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

5. See, e.g., *Melendez-Diaz*, 129 S. Ct. at 2530; *Davis*, 547 U.S. at 817.

6. *Crawford*, 541 U.S. at 60 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)) ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

7. *Street*, 471 U.S. at 414 (the confrontation right depends upon the need for cross-examination to challenge credibility).

8. *Id.*

confrontation by erroneously equating it with non-hearsay evidence that does not implicate a declarant's credibility. In fact, such evidence implicates the declarant's credibility, as the common law well understood. Consequently, although nonassertive conduct is exempt from hearsay under a revised definition, nonassertive conduct is no different from evidence that was inadmissible hearsay at the Founding. Its admissibility without confrontation depends exclusively upon whether it is testimonial, not whether it is admissible under modern hearsay policy.

The second category consists of testimonial statements admitted as non-hearsay background evidence to explain the investigators' actions, even though the defendant has not questioned the investigators' behavior. Courts routinely admit those statements for their "effect on the listener" to explain the course of the investigation. They hold that such statements raise no Confrontation Clause issue because they are not admitted for their truth. Nonetheless, the statements' admission for that purpose erroneously assumes that the reasons for the investigators' actions are relevant absent the defendant's challenge. If courts admit the statements when there is no charge of investigative misconduct to rebut, the jury has to use them for their truth, in violation of the defendant's confrontation right, if it considers them at all. Regardless of whether the jury uses the statements directly as proof of what they assert or indirectly as a basis for concluding that information available to investigators supports the prosecution's claim of the defendant's guilt, the jury uses the evidence for a substantive purpose, which requires confrontation. Only when testimonial statements made to investigators are necessary to rebut an express or implied charge that the investigators acted improperly can courts justify their admission to explain the investigators' behavior as a non-hearsay purpose that does not require confrontation.

Consequently, *Crawford* requires a constitutionally mandated definition of hearsay that reflects the full scope of the confrontation right. This definition must trump the federal and state definitions that narrow the scope of hearsay to reflect modern policy and require confrontation of testimonial, nonassertive conduct. Also, this definition must trump judicial applications of the hearsay rule admitting testimonial statements as non-hearsay unless they are clearly relevant to a legitimate non-hearsay purpose. This means excluding testimonial statements as background evidence offered to justify investigators' conduct unless the defendant first questions it.

Part II explains the difference between declarant-centered and assertion-centered definitions of hearsay and shows that the Federal Rules' assertion-centered definition does not comport with the Supreme Court's view that the Constitution excuses confrontation only when admission of a declarant's statement does not implicate his credibility. It argues that courts in post-*Crawford* cases have missed this lack of parallelism because they conflate

statements offered to show the truth of what the declarant believes, although not what he intended to assert, with statements not offered to show anything that the declarant believes. Consequently, courts in many cases confuse nonassertive conduct with evidence that is not hearsay because it is not offered to show any matter whose truth depends upon the declarant's credibility. Such cases also show that nonassertive conduct under the Federal Rules' definition of hearsay is sometimes testimonial under the Court's current definition. Testimonial, nonassertive conduct requires confrontation unless there is specific historical support for the proposition that courts, at the time of the Founding, exempted nonassertive conduct from confrontation or from their understanding of hearsay evidence.

Part III argues that there is no historical evidence of a Founding-era practice by which common law courts exempted nonassertive conduct from the definition of hearsay or from the confrontation requirement. Indeed, the only explicit discussion of the issue suggests that, when the court in *Wright v. Tatham*<sup>9</sup> held in 1837 that hearsay comprised nonassertive conduct, it stated a position that it considered already implicit in the common law definition. In any event, *Wright* offers no suggestion that the court was overruling or otherwise rejecting an established, contrary position that existed at the time of the Founding. Without historical evidence of a practice exempting nonassertive conduct from confrontation—equivalent to that which the Court found sufficient to create a *sui generis* exemption of dying declarations<sup>10</sup>—the Sixth Amendment requires confrontation, despite subsequent changes in the hearsay definition that reflect evolving evidence policy.

Part IV proposes changing the basic definition of hearsay back to that of the Founding era to include nonassertive conduct. The change satisfies the constitutional command of the Confrontation Clause while providing jurisdictions with the option of creating a hearsay exception for nonassertive conduct as a matter of hearsay policy. With minimal disruption to existing practice, the proposal ensures that all testimonial hearsay, as understood at the Founding and not subject to contemporaneous exception, triggers the confrontation right, while allowing the hearsay policy of different jurisdictions to determine whether to admit nonassertive conduct that does not implicate the Confrontation Clause.

Adopting a hearsay exception for nonassertive conduct, rather than excluding it from the hearsay definition, also generates collateral benefits in cases where the confrontation right is not involved. Admitting a declarant's nonassertive conduct pursuant to a hearsay *exception* allows an opponent of that evidence to impeach the declarant's credibility pursuant to the usual rules

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9. (1837) 112 Eng. Rep. 488 (Exch. Div.).

10. *Giles v. California*, 128 S. Ct. 2678, 2684–86 (2008); *Crawford*, 541 U.S. at 56 n.6.

allowing impeachment of hearsay declarants, a result that can only enhance the accuracy of the fact-finding process.<sup>11</sup> In contrast, current law imposes a double disadvantage on the criminal defendant against whom the prosecution offers nonassertive conduct. He has no confrontation right assuring that he can cross-examine the declarant and, once the evidence is admitted, no right to impeach the declarant as if he had testified.

Part V examines cases in which courts found confrontation unnecessary because the prosecution offered testimonial statements made to investigators only for their “effect on the listener,” to explain why investigators acted as they did, and not for their truth.<sup>12</sup> This Part shows that courts routinely admit such testimonial statements for this non-hearsay purpose although the defendant did not question the investigators’ actions. While courts correctly referenced hearsay law’s distinction between using such statements for their truth and merely for the fact that they were heard to explain the investigators’ conduct, the same courts misapplied the non-hearsay rubric in a way that potentially rendered the confrontation right useless. Those courts improperly applied the “effect on listener” exception when the defendant did not challenge the investigators’ reasons for acting. Thus, the “effect on listener” exception admits testimonial hearsay for a purpose that, although permissible under the hearsay rule, is nonetheless irrelevant. As a result, juries that choose to use it will do so for its truth—its only relevant, though impermissible, purpose. To avoid that result, Part V proposes that admitting testimonial hearsay for its effect on investigators is a Confrontation Clause violation unless and until the defendant raises an issue about the investigators’ conduct. Only when used to rebut the defendant’s claim would the evidence be relevant and permissible. Part VI concludes.

## II. TESTIMONIAL, NONASSERTIVE CONDUCT

When deciding whether out-of-court statements require confrontation, courts properly consider whether prosecutors have offered such statements for the truth of the matter asserted.<sup>13</sup> If not, confrontation is unnecessary because the credibility of the declarant is irrelevant, and there is no reason to worry that the absence of cross-examination will undermine the evidence’s reliability. The exemption from confrontation of statements not offered for their truth is frequently stated as a rule holding that only hearsay statements trigger the confrontation right. Nevertheless, equating non-hearsay with statements that the prosecution has not offered for their truth is wrong when

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11. See *infra* notes 149–151 and accompanying text.

12. See *infra* Part V.

13. See, e.g., FED. R. EVID. 801(c); *Street*, 471 U.S. at 413–14 (holding that when an out-of-court statement is not offered to prove the truth of the matter, the Confrontation Clause is not implicated).

we consider the difference between the definition of hearsay most prevalent today and the original common law definition retained by a few jurisdictions.

Courts currently employ different definitions of a hearsay statement. The most common definition is inconsistent with the Court's view that the Constitution requires confrontation whenever the probative value of a testimonial statement depends upon a declarant's credibility. The first definition is "declarant-centered." Under the declarant-centered definition, hearsay statements include any out-of-court verbal or nonverbal conduct establishing the declarant's belief about a fact whose relevancy depends upon the accuracy of his belief.<sup>14</sup> This definition comports with *Crawford* because it includes any statements whose probative value depends upon a declarant's credibility.

The second definition of a hearsay statement is "assertion-centered." It *excludes* statements whose probative value depends upon the declarant's credibility if the declarant did not intend the statements "as an assertion" or the prosecution offers those statements for a reason "other than the matter asserted."<sup>15</sup> In 1975, the Federal Rules Advisory Committee adopted the assertion-centered definition, which is now used in most jurisdictions.<sup>16</sup> An assertion-centered definition establishes that verbal or nonverbal conduct is hearsay only when the actor intends by that conduct to assert the fact that its proponent is using it to prove. The rationale for adopting the assertion-based test is that the sincerity danger is reduced when a person unintentionally reveals his belief in certain facts rather than when he intentionally asserts it, and that a person acting on a belief, rather than merely asserting it, will ordinarily be more careful about what he perceived or remembers.<sup>17</sup>

Although codified in the Federal Rules and used in most states, the assertion-based definition's exclusion of nonassertive conduct<sup>18</sup> from hearsay is inconsistent with *Crawford*. Even proponents of the Federal Rules' assertion-centered definition concede that nonassertive conduct used to prove a declarant's beliefs that the proponent contends are accurate implicates the

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14. We adopt the terms "declarant-centered" and "assertion-centered" from Professor Roger Park's classic article "*I Didn't Tell Them Anything About You*": *Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783 (1990).

15. See FED. R. EVID. 801 & advisory committee's notes.

16. *Id.* The Advisory Committee makes explicit the Federal Rules' adoption of the assertion-centered definition, noting that the "effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion." *Id.*

17. *Id.* (recognizing that nonverbal conduct not intended as an assertion is "untested with respect to the perception, memory, and narration," but finding that "these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds").

18. For the sake of simplicity, this Article uses the term "nonassertive conduct" to include assertive conduct that is offered for something other than its intended inference.

declarant's testimonial capacities, and thus, his credibility. They argue, however, that hearsay dangers,<sup>19</sup> although not eliminated for nonassertive conduct, are sufficiently reduced to justify admission.<sup>20</sup> However significant to the policy debate about what the hearsay rule *should* cover, this argument is irrelevant to the application of the Confrontation Clause for the same reason that whether testimonial hearsay fits a hearsay exception, justified by reduced hearsay dangers, is irrelevant.<sup>21</sup> Under *Crawford* and its progeny, whether testimonial hearsay is reliable—as previously shown by its qualification under a firmly rooted hearsay exception<sup>22</sup>—has no bearing on its admissibility without confrontation.<sup>23</sup> The reliability argument for excluding nonassertive conduct from the definition of hearsay can have no greater significance than

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19. See Park, *supra* note 14, at 785 n.15. Park attributes the phrase “hearsay dangers” to Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948). Morgan identified sincerity, misuse of language (sometimes called ambiguity or narration), perception, and memory as the four “dangers.” *Id.* at 185–88.

20. Meanwhile, proponents of the declarant-centered definition argue that the reduction of the sincerity, memory, and perception dangers, if any, is overstated or counteracted by an increased danger of ambiguity when the jury attempts to infer the declarant's beliefs from actions not intended to communicate them. RONALD J. ALLEN ET AL., *EVIDENCE: TEXT, PROBLEMS, AND CASES* 450–51 (4th ed. 2006).

21. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539 (2009) (admissibility without confrontation turns on whether a particular statement is testimonial, not whether it fits a hearsay exception, even one that usually encompasses non-testimonial statements); *Crawford v. Washington*, 541 U.S. 36, 61–64 (2004) (admitting reliable hearsay statements “is fundamentally at odds with the right of confrontation” because the clause “is a procedural rather than a substantive guarantee . . . command[ing] . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination”).

22. The Court had previously held that the Confrontation Clause does not bar admission of a non-testifying witness's statement against a criminal defendant if the statement possessed “adequate indicia of reliability.” *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). To meet that test, evidence was required to either fall within a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.” *Id.*

23. In overruling *Roberts*, the *Crawford* Court noted the problems with the previously articulated test:

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

*Crawford*, 541 U.S. at 60 (internal citation omitted).

the reliability argument for excusing confrontation when hearsay fits a firmly rooted hearsay exception.

Federal Rule 801(a) defines “statement” for purposes of the hearsay rule as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended . . . as an assertion.” This definition rejects the declarant-centered definition.<sup>24</sup> It excludes nonassertive conduct from hearsay even if that conduct is used as a basis from which to infer a declarant’s beliefs about facts that the proponent seeks to prove with the evidence that the declarant believes them.<sup>25</sup> A classic example is evidence that a sea captain sailed with his family after subjecting the ship to a thorough inspection, as proof that the vessel was seaworthy.<sup>26</sup> The authors of the Federal Rules decided that, although such evidence implicated the captain’s credibility and was subject to the hearsay dangers of misperception, faulty memory, ambiguous narration and insincerity, the reduced dangers associated with nonassertive conduct justified its exclusion from hearsay.<sup>27</sup>

To the extent the sea captain did not intend to communicate to anyone the seaworthiness of the vessel, his actions would likely show his sincere beliefs about the condition of the ship. When intentionally communicating the condition of the ship to another, he would decide whether to report sincerely, creating the possibility that he chose to mislead. When acting upon, rather than communicating, his belief, he will be sincere, except in the unlikely event that he somehow lies to himself. Also, acting on his belief about the ship’s seaworthiness by risking the lives of himself and his family, the captain is more likely to be careful about his perception and memory of the ship’s condition than he is when he merely reports the ship’s condition to another.

Meanwhile, hearsay dangers remain. There is no certain way to determine that the captain did not intend to communicate his belief about the ship, in which case the danger of insincerity, although hidden, remains. Although his conduct is not the type ordinarily thought of as intending an assertion, the captain may have intended to dupe observers into thinking the ship was safe. Perception and memory dangers also remain. The inspection may have missed a flaw, or the captain may have misunderstood or forgotten the flaws

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24. See FED. R. EVID. 801(a).

25. See *id.*

26. Park, *supra* note 14, at 789–90 (citing *Wright v. Tatham*, (1837) 112 Eng. Rep. 488, 516 (Exch. Div.) (Parke, B.)); EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 250, at 738 (3d ed. 1984); 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 267, at 103 (rev. ed. 1979).

27. FED. R. EVID. 801(a) advisory committee’s notes (“No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct.”); *cf.* Park, *supra* note 14, at 791 (“The literature . . . lacks any compelling evidence of injustice done by receiving nonverbal conduct containing concealed assertions. The opponents of nonverbal conduct have not found their Sir Walter Raleigh.”).

that made the ship unseaworthy. Moreover, that the conduct is nonassertive may actually increase the narration danger because we infer the captain's beliefs about the seaworthiness of the ship from actions that are ambiguous precisely because the captain did not intend his actions to communicate those beliefs. Perhaps leaving with his family after the inspection showed his belief that the ship's many flaws made it an appropriate vehicle for teaching them the perils of venturing to sea on a dangerous vessel.

The Federal Rules' advisory committee's notes make it perfectly clear that the rule writers understood that they were exempting nonassertive conduct from the definition of hearsay although such conduct required a judgment about the declarant's credibility.<sup>28</sup> The committee also applied a similar argument to assertive conduct offered for some reason other than its intended assertion, using the classic example provided in *Wright v. Tatham*.<sup>29</sup> To help establish the competency of a testator (Marsden), the beneficiary of his will offered letters written to Marsden in language and about matters that suggested the writers' belief that Marsden was a person of ordinary understanding and thus competent to write his will.<sup>30</sup> The beneficiary did not offer the letters for the truth of their intended assertions about what they reported—news of mutual friends, descriptions of an author's travels, a request that Marsden settle a legal dispute, and an offer to remain in a post to which Marsden had appointed the writer—but rather as a basis for inferring the writers' beliefs that Marsden was capable of understanding and responding to their letters. Though the advisory committee acknowledged that the Court of the Exchequer Chamber excluded the letters as hearsay, the committee rejected that result to the extent that the letter writers unintentionally revealed—rather than intentionally asserted—their belief in Marsden's competency. Were the letter writers acting on their belief in the testator's mental state while having no intention to communicate that belief, the evidence would be subject to the same reduced hearsay dangers that accompany nonassertive conduct.

The *Wright* court confusingly called the letters “implied statements.”<sup>31</sup> The label elided indirect, though intended, assertions—matters the declarant left to

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28. FED. R. EVID. 801(a) advisory committee's notes.

29. *Wright*, 112 Eng. Rep. at 488–89.

30. *Id.* at 489.

31. *Wright*, 112 Eng. Rep. at 516–17. The *Wright* court wrote:

[P]roof of a particular fact, which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible.

*Id.* Before the advent of the Federal Rules, courts considered such implied assertions to be hearsay. See, e.g., *Krulwitch v. United States*, 336 U.S. 440, 442 (1949); *United States v. Pacelli*, 491 F.2d

implication, though intentionally communicated—with beliefs unintentionally revealed while the speaker intentionally asserts something else.<sup>32</sup> *Wright*'s holding addresses only the situation where the declarant's beliefs are inferred, but not intentionally asserted, because the assertion-centered definition already encompasses intentional assertions, however indirect or even cryptic.<sup>33</sup> Nonetheless, confusion about the scope of “implied statements” led some courts to read the Federal Rules' rejection of *Wright* to allow indirect, intended assertions to escape the hearsay definition; this is a result for which nobody offered justification.<sup>34</sup> In turn, this created distrust of the Federal Rules' hearsay definition deep enough to cause some courts and commentators to question whether they should not interpret the Federal Rules' assertion-centered approach as no narrower than *Wright*'s declarant-centered approach.<sup>35</sup>

Nonetheless, Professor Roger Park, in a 1990 article, set things straight. Park clearly explained the difference between the properly understood definitions and isolated several categories of evidence where the different definitions spawned different results despite some courts and commentators' contrary wishes. Park defended the Federal Rules' approach against other commentators' attempts to restore the hearsay definition to its pre-Federal Rules' condition.<sup>36</sup>

This Article's thesis does not require us to enter the debate about which approach is preferable because the occasion for revisiting the contrasting definitions is to decide the scope of the historically determined confrontation right, and not the policy-determined hearsay definition. Nonetheless, Professor Park's description of evidence for which the definitions make a difference provides a useful template for post-*Crawford* cases in which courts applying the assertion-centered definition deviated from the common law. In so doing, those courts exempt from confrontation evidence whose probative value depends upon an absent declarant's credibility.

Under the Federal Rules, perhaps the most important category of non-hearsay that raises a confrontation problem is that of false statements uttered

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1108, 1115–17 (2d Cir. 1974); *Favre v. Henderson*, 464 F.2d 359, 362 (5th Cir. 1972); *United States v. Williamson*, 450 F.2d 585, 590 (5th Cir. 1971).

32. Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 419 n.153 (1992).

33. Park, *supra* note 14, at 800 (the assertion-based definition incorporates all facts that a speaker intended to communicate, whether directly or indirectly).

34. *Id.* at 794–801 (discussing misuses of the assertion-based definition). *Stoddard v. State* illustrates almost all these misuses by arguing that questions, commands, and statements of fact requiring a “multi-step inferential process” from the fact asserted to the proposition for whose truth the statement is offered cannot be hearsay. 850 A.2d 406, 410–26 (Md. Ct. Spec. App. 2004), *rev'd*, 887 A.2d 564 (Md. 2005).

35. Park, *supra* note 14, at 787 n.20.

36. *See id.*

to investigators by a defendant's associate which the prosecution offers to show the declarant's knowledge that the defendant is guilty.<sup>37</sup> Such cases occur frequently, and because courts properly find the evidence to be non-hearsay under the assertion-centered definition, they improperly deny defendants their right to confront the declarants. In this circumstance, declarants unintentionally reveal their knowledge of the defendant's guilt while intending to communicate something exculpatory, which the government then proves is false. When persons who are aware of the defendant's criminal involvement (or lack thereof) speak falsely to mislead investigators, courts rightly conceive these statements as non-hearsay under Federal Rule 801. Occasionally, courts make the proper argument: such statements are assertive conduct offered for a purpose other than their intended assertions and therefore fall outside the Federal Rules' assertion-centered definition of hearsay.<sup>38</sup> Unfortunately, courts more frequently follow a poorly reasoned Supreme Court case, *Anderson v. United States*.<sup>39</sup> There, the Court confusedly analyzed false statement evidence revealing a declarant's unsuccessfully disguised beliefs of his and the defendant's guilt—hearsay under the declarant-centered, but not the assertion-centered definition—as if it were not hearsay under *any* definition because it was not offered to prove the truth of any matter believed by the declarant.<sup>40</sup> In

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37. *Id.* at 814–16 (citing *White v. Lewis*, 874 F.2d 599, 603–04 (9th Cir. 1989); *United States v. Candoli*, 870 F.2d 496, 507–08 (9th Cir. 1989); *United States v. Munson*, 819 F.2d 337, 339–40 (1st Cir. 1987); *United States v. Hackett*, 638 F.2d 1179, 1186–87 (9th Cir. 1980); *United States v. McPartlin*, 595 F.2d 1321, 1353–54 (7th Cir. 1979); *United States v. Weaver*, 565 F.2d 129, 135–36 (8th Cir. 1977); *United States v. Kelly*, 551 F.2d 760, 764–65 (8th Cir. 1977); *United States v. Cusumano*, 429 F.2d 378, 381 (2d Cir. 1970)). After *Crawford*, admission of the statements in each of these cases without confrontation would violate the Confrontation Clause.

38. Park, *supra* note 14, at 836–37.

[C]ourts seem to have used the concepts of nonassertive conduct, and of assertive conduct offered to prove something other than the matter asserted, in a manner consistent with the Advisory Committee's theory that sincerity dangers are lessened. The cases generally involve utterances classed as non-hearsay that raise no real insincerity dangers affecting the purpose for which they are being used. . . . It is unlikely that codefendants who made false statements exculpating their accomplices were hoping to incriminate their accomplices.

*Id.*

39. 417 U.S. 211 (1974).

40. *Id.* at 219–20. Professor Park explains that *Anderson* has little precedential value because of “the obscure way the Court stated the facts and . . . the Court's apparent belief that it was using the statement in a way that involved no reliance on credibility and hence no need for cross-examination.” Park, *supra* note 14, at 815 & n.175. Nonetheless, other courts have repeated its error. See, e.g., *Hackett*, 638 F.2d at 1186 (arguing that false statements to prove consciousness of guilt “were admitted not for their truth, but merely for the fact that the statements were made”). By contrast, that beliefs unintentionally revealed by false statements were hearsay under the declarant-centered definition was forcibly argued in *Lyle v. Koehler*, 720 F.2d 426 (6th Cir. 1983). In that case, the declarant solicited false testimony providing himself and an accomplice with a false alibi. *Id.*

*Anderson*, the Court received a declarant's false statements made to cover up the crime and used against an accomplice to show consciousness of their joint guilt.<sup>41</sup> Yet, when used to show the truth of what the declarant thought, the false statement was clearly hearsay under the declarant-centered definition because it implicated the speaker's credibility.<sup>42</sup>

When the question is whether the evidence is hearsay under the Federal Rules, the correct rubric for deciding that the false statement evidence is not hearsay does not matter, except perhaps to law professors. But when the issue is whether the Constitution requires confrontation, it makes all the difference. Applying the correct analysis shows that while the evidence is not hearsay under the assertion-based definition, it is hearsay under the common law's declarant-centered view, thereby implicating the declarant's credibility and thus triggering the defendant's confrontation right. A Massachusetts appeals court in the recent case of *Commonwealth v. Pelletier*<sup>43</sup> seemed to suspect as much. In *Pelletier*, the court cited *Anderson*, while holding that a wife's false statement that she received her injuries when she fell down the stairs, offered against her defendant-husband accused of battery, was not hearsay and raised no confrontation issue because the prosecution did not offer it for its truth.<sup>44</sup> The court qualified its ruling by noting that the defendant had not argued in his brief that the statement was "implied hearsay," so under Massachusetts appellate procedure, there was no need to address that issue or "the extent to which the principles of the hearsay rule and the confrontation clause are coextensive."<sup>45</sup> The court's disclaimer indicated that it understood that the prosecution's offer of the statements to show them false did not determine whether they were hearsay under the declarant-centered definition when the prosecution proved their falsity to show the declarant's knowledge of the defendant's guilt. It simply will not do to suggest, as did the court in *United States v. Trala*,<sup>46</sup> that *Crawford* does not apply to a declarant's false statements when offered to show his knowledge of the defendant's guilt

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Although one might argue that the defendant's guilt was intentionally asserted by the declarant's request for the false alibi (rather than by the declarant's simply providing the defendant with one), the court assumed that the request unintentionally revealed the defendant's guilt. *Id.* Nonetheless, the court found the statement hearsay and its admission a violation of the Confrontation Clause. *Id.*

41. 417 U.S. at 219–20.

42. *Id.* at 220; see also Park, *supra* note 14, at 801 & n.79 (false statements as evidence of consciousness of guilt require a judgment about the declarant's credibility).

43. 879 N.E.2d 125 (Mass. App. Ct. 2008).

44. *Id.* The court carefully noted that the "wife's statement was not being offered to prove the truth of anything asserted therein," reserving the question of whether the statement was nonetheless "implied hearsay" when offered for the truth of beliefs that she had not intended to assert. *Id.* at 130 & n.6 (emphasis added).

45. *Id.*

46. 386 F.3d 536, 544–45 (3d Cir. 2004).

“because the *reliability* of testimonial evidence is not at issue.”<sup>47</sup> That is plainly false. At the very least, the declarant’s perception, memory, and narration, and thus credibility, are squarely implicated when the prosecution uses false statement evidence in this fashion. Also, the reduction in the sincerity danger is only as good as our estimate that the declarant was not deviously intending to inculcate the defendant by falsely exculpating him.

The *Pelletier* court sensed the correct issues, while avoiding them for procedural reasons, but other courts have simply deprived defendants of their confrontation right without realizing the error of conflating the scope of the Federal Rules’ assertion-centered hearsay definition and the confrontation right. For example, in *United States v. Brown*,<sup>48</sup> the government offered the statement of Brown’s co-defendant, Giles, to airport police explaining his possession of \$23,000 in cash as the profits of his barbershop that he intended to use for the purchase of a vehicle.<sup>49</sup> The government proved the statement false, while offering it against Brown, who was traveling with Giles and was also in possession of a large amount of cash.<sup>50</sup> The court held that Giles’s statement was not hearsay, and thus did not raise any confrontation issue, because it was not “introduced for the truth of the matter asserted, but to show that he was lying.”<sup>51</sup> Still, it was not hearsay only under the assertion-centered definition because the prosecution did not offer it *for the truth of the intended assertion*, that is, that the money was barbershop profits to be used to buy a car.<sup>52</sup> The prosecution *did* prove the lie to show *the truth of the declarant’s belief* that the source and purpose of the cash that Brown and Giles were carrying needed to be hidden from the police because the cash’s source and purpose were illegal. Under the declarant-centered definition, the lie was clearly hearsay because the prosecution offered it for the truth of Giles’s belief that they needed a false explanation for the drug money, although his lie unintentionally revealed that belief, rather than intentionally asserted it.

Similarly in *United States v. Thompson*,<sup>53</sup> the court held that admission of two declarants’ false statements about paying a contractor for paving their driveway raised no hearsay or Confrontation Clause issues despite the statements having been made to (and recorded by) police and then repeated in the grand jury.<sup>54</sup> The government introduced the evidence to show that

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47. *Id.* at 544.

48. 560 F.3d 754 (8th Cir. 2009).

49. *Id.* at 765.

50. *Id.*

51. *Id.*

52. *Id.*

53. Crim. No. 07-35-GFVT, 2009 WL 331478 (E.D. Ky. Feb. 9, 2009).

54. *Id.*

“county-purchased materials were being used to improve private property,” and, ultimately, to prove that the defendants were guilty of misappropriating government property by arranging to pave the declarants’ driveway.<sup>55</sup> Although the government plainly used the declarants’ beliefs that they had no right to the materials to prove that the declarants did not own them, the court erroneously reasoned that “there is no need to assess the credibility of the declarant of a false statement” and so “the Confrontation [C]ause is not implicated.”<sup>56</sup> By now, it should be apparent why that is wrong. The statements’ probative value depended upon the accuracy of the declarants’ belief that they were not entitled to use these materials (implicating perception and memory dangers) and on the accuracy of the inference that lying about paying for the paving showed guilty knowledge of the materials’ ownership rather than something else (implicating narration dangers).

Finally, in *United States v. Blake*,<sup>57</sup> the government proved that the defendant’s wife had told police during a search that money found in the Blakes’ safe had come from the sale of electronics equipment.<sup>58</sup> The court allowed this statement to be used against the defendant because it was not “offered for the truth of the matter asserted (that the money came from electronics sales), but, rather, to show that the Blakes’ inconsistent answers to the questions about the money supported the government’s claim that the money came from the sale of illegal drugs.”<sup>59</sup> That inference required the jury to find Mrs. Blake’s explanation false, implicating Mr. Blake with her knowledge that he needed a phony explanation for the source of the drug money.<sup>60</sup> Again, the court conflated the Federal Rules hearsay and Confrontation Clause questions, finding no Confrontation Clause issue because the evidence was not hearsay under Federal Rule 801.

False statements made to police are particularly important examples of nonassertive hearsay because their status as testimonial seems clear. Indeed, if a declarant’s credibility defines the scope of the Confrontation Clause, the only way to avoid the conclusion that *Crawford* does not require courts to use a declarant-centered definition of hearsay would be to argue that, by happy coincidence, all evidence excluded from hearsay by the “intent to assert” requirement is not testimonial. That possibility is remote, though not impossible. If the Supreme Court were eventually to find that testimonial statements encompass only those in which a declarant intended to

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55. *Id.* at \*3–4.

56. *Id.* at \*4.

57. 284 F. App’x 530 (10th Cir. 2008).

58. *Id.*

59. *Id.* at 541.

60. *See id.*

communicate the facts that the prosecution offered the statements to prove, then the definition of “testimonial” would exclude the same evidence excluded from hearsay by the assertion-centered test. But the Court has not yet applied, or even suggested, such a narrow view of what is testimonial.

Thus far, to determine whether a declarant’s statements are testimonial, courts have focused upon such formulations as whether the statement was made “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” or, if made in response to police interrogation, whether circumstances “objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>61</sup> These definitions render it nearly certain that the declarants’ statements in all the false statement cases are testimonial, although meeting only the declarant-centered definition of hearsay. The declarants knew very well that they were making statements that could be used prosecutorially and would be available for use in a subsequent trial. Moreover, the primary purpose of the questioning to which they responded was to discover past events potentially relevant to criminal prosecution. The only questions are whether it matters that the declarants did not anticipate the statements would be used in the way the prosecution seeks to use them, or whether they did not intend the statements to be inculpatory at all. The Court’s recent opinion in *Melendez-Diaz v. Massachusetts*,<sup>62</sup> where it held that the Sixth Amendment requires confrontation of a police chemist who prepared a report showing that the substance possessed by the defendant was cocaine, strongly suggests that neither factor is determinative.<sup>63</sup>

First, the Court rejected the argument that statements need be “accusatory” to be testimonial.<sup>64</sup> When the prosecution offers a declarant’s statements for their truth, the declarant is a witness against the defendant, even though the substance of the statements is hardly necessary to convict.<sup>65</sup> According to the Court, the Constitution contemplates only two categories of witness: those against and those in favor of the defendant. There is no “third category of witnesses, helpful to the prosecution, but somehow immune from

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61. See *Crawford v. Washington*, 541 U.S. 36, 52 (2004); see also *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531–33 (2009); *Davis v. Washington*, 547 U.S. 813, 813 (2006); *United States v. Arnold*, 486 F.3d 177, 187–92 (6th Cir. 2007); *United States v. Ellis*, 460 F.3d 920, 923–24 (7th Cir. 2006); *United States v. Maher*, 454 F.3d 13, 21 (1st Cir. 2006); *United States v. Hinton*, 423 F.3d 355, 358–60 (3d Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 673–74 (6th Cir. 2004); *United States v. Saget*, 377 F.3d 223, 228–29 (2d Cir. 2004); *United States v. Mills*, 446 F. Supp. 2d 1115, 1121–22 (C.D. Cal. 2006).

62. 129 S. Ct. 2527, 2542 (2009).

63. See *id.*

64. *Id.* at 2533–34.

65. See *id.* at 2534.

confrontation” because the evidence the witness provides is insufficiently inculpatory or his relationship with the defendant is not adversarial.<sup>66</sup> Under *Melendez-Diaz*, if the prosecution offered a chemist’s report saying that a tested sample belonging to a person other than the defendant was negative for contraband to rebut the defendant’s suggestion that it contaminated the defendant’s sample with illegal drugs, the report would be no less hearsay than that of the original chemist’s statement that the defendant’s sample tested positive for illegal drugs.

Second, there is no suggestion that because a witness may unwittingly spill the beans, whether in response to police interrogation or when voluntarily speaking to investigators in an attempt to mislead them, the statements made during the attempt to mislead are not testimonial.<sup>67</sup> The Court said, “[C]onfrontation is designed to weed out not only the fraudulent [witness], but the incompetent one as well.”<sup>68</sup> Thus, even if nonassertive conduct raises no sincerity danger, confrontation is nonetheless required to probe the witness’s other testimonial capacities and to expose unreliable testimony of all stripes.

Finally, given the Court’s repeated description of grand jury testimony and affidavits as core instances of testimonial statements, it is hard to imagine how they become non-testimonial when offered to prove something that the declarant did not intend to assert.<sup>69</sup> It seems no more likely that the Court would find statements made to police and in the grand jury not testimonial because the speaker unwittingly revealed damaging information about the defendant, than it would hold that a witness was not testifying when he did the same thing in court. Routine instructions tell jurors to evaluate not only what witnesses say, but how they say it.<sup>70</sup> What is demeanor evidence if not a

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66. *Id.* Even if there were a requirement that the statements be sufficiently inculpatory, false statements will often meet it because, however unintentionally, they provide damning proof.

67. *Id.* at 2535 (“[N]o authority . . . hold[s] that a person who volunteers his testimony is any less a witness against the defendant than one who is responding to interrogation.”) (internal quotation marks and citation omitted).

68. *Id.* at 2537.

69. *Id.* at 2531–32 (affidavits and prior testimony are testimonial).

70. *See, e.g.*, 4 LEONARD SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CIVIL § 76.01 (2007) (Instruction 76-1).

How do you determine where the truth lies? You watched each witness testify. Everything a witness said or did on the witness stand counts in your determination. How did the witness impress you? Did he appear to be frank, forthright and candid, or evasive and edgy as if hiding something? How did the witness appear; what was his demeanor—that is, his carriage, behavior, bearing, manner and appearance while testifying? Often it is not what a person says but how he says it that moves us.

*Id.*

series of verbal and nonverbal clues that reveal, often unwittingly, what the witness actually believes? What a witness lets slip is as much a part of his live testimony as that which he intends to communicate, and seeing why it should or how it could be otherwise with out-of-court statements is exceedingly difficult.<sup>71</sup>

A second important category of nonassertive conduct is illustrated by *United States v. Zenni*.<sup>72</sup> In that classic case, the court admitted evidence that, while searching the premises of an alleged bookmaker, the police received calls in which anonymous callers attempted to place bets.<sup>73</sup> Relying on the Federal Rules' rejection of *Wright v. Tatham*, under which the calls would be declarant-centered hearsay,<sup>74</sup> the *Zenni* court determined that they were not hearsay under the assertion-based definition. Many courts have followed suit, though *Zenni* is not without its critics.<sup>75</sup>

At one point, the court treated the case as though the calls trying to place bets were pure nonassertive conduct equivalent to the ship captain's actions,

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71. The entire notion of "testimonial" hearsay is built on the idea that the Constitution requires like treatment of witnesses who testify against the defendant at trial and those who "bear testimony" against the defendant in out-of-court statements.

72. 492 F. Supp. 464 (E.D. Ky. 1980).

73. *Id.* at 465.

74. The *Zenni* court was prescient about the hearsay status of such calls under the common law. In *Regina v. Kearley*, [1992] 2 AC 228 (H.L.) (appeal taken from Eng.) (U.K.), relying on *Wright*, the House of Lords found anonymous calls ordering drugs on premises being searched by police to be hearsay. In 2003, Parliament enacted comprehensive hearsay reform whose effect was to exclude such calls from the definition of hearsay. *See infra* note 113.

75. *See, e.g.*, *State v. Kutz*, 2003 WI App 205, ¶¶ 45–46, 671 N.W.2d 660. Believing that the bettors implicitly intended to assert that bets were taken on the premises, the court wrote:

[W]e are not persuaded by the analysis in *Zenni* . . . because that analysis assumes without explanation that an assertion does not include an intended expression of a fact, opinion, or condition if it is implicit in the words used. Moreover, the court in *Zenni* acknowledged that some utterances might be intended as an assertion even though the "words [were] non-assertive in form" and such utterances would require a preliminary determination of intent: for example, an airport security inspector that says "go on through" to a passenger after using a metal detector on them might intend to assert that the passenger did not have a gun. *Zenni*, 492 F. Supp. at 469 n.21. We also observe that, even when treatises describe the rule in federal courts to be that implicit assertions are not hearsay, they often point out exceptions. *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* [note 25], § 250, at 111–12 n.29 (noting in a footnote, that when the utterance "it will stop raining in an hour" is offered to prove it is raining, that is hearsay, because "the fact to be proved is a necessary implication of the utterance").

We conclude that the preferable approach is to include within the meaning of "assertion" in Wis. Stat. § 908.01(1) an expression of a fact, opinion, or condition that is implicit in the words of an utterance as long as the speaker intended to express that fact, opinion, or condition.

*Id.*

stating that “the utterance, ‘Put \$2 to win on Paul Revere in the third at Pimlico,’ is a direction and not an assertion of any kind, and therefore can be neither true nor false.”<sup>76</sup> The analysis ignored the way in which virtually all communication has some intended assertion associated with it, which should cause us to understand the utterance above to assert, “I want to place a \$2 bet with you on Paul Revere in the third at Pimlico.”<sup>77</sup> Read that way, the caller is effectively asserting his belief that bets are taken on the premises at the same time that the act of calling and placing the bet is (perhaps) unintentionally revealing the same thing.<sup>78</sup> That does not necessarily make the evidence hearsay under the Federal Rules, but it puts it in the more problematic category of “assertive conduct not offered for its intended assertion,” like the conduct in *Wright*.<sup>79</sup>

Properly analyzed, *Zenni* is more problematic than the false statement cases where the beliefs revealed and asserted by the declarant’s words are effective opposites, offering an assurance that, when we use the words to establish inferences from their falsity, they are free of any intent to assert. In contrast, when we use the calls to show the callers’ beliefs that gambling occurs on the premises, but not their desire to place a bet, we cannot be nearly so sure that the inference is free of an intent to assert the beliefs we are using it to prove. This has moved some courts to find the calls hearsay, even under the Federal Rules, after weighing the extent to which the callers’ beliefs about the premises are unintentionally revealed versus intentionally asserted.

Nonetheless, most courts have opted to call this type of evidence non-hearsay under the Federal Rules’ assertion-centered definition, raising the possibility that confrontation is nonetheless required because the proof is hearsay under the declarant-centered view. In many cases, such evidence will not be testimonial because the callers will not know that they are speaking to authorities or, if they do, will be unlikely to place bets or ask for drugs. But in other cases, such calls can be testimonial. *Weems v. State* provides a recent example of how this can occur.<sup>80</sup> In *Weems*, several persons approached a residence where narcotics officers were executing a search warrant and asked for the defendant by his nickname. The court held that the requests to see the

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76. *Zenni*, 492 F. Supp. at 466 n.7.

77. Elsewhere, the *Zenni* court acknowledged that the callers’ unstated belief that bets were taken at that number was excluded from hearsay only if they did not intend to communicate their belief. *Id.* at 468–69 & n.21.

78. Professors Mueller and Kirkpatrick profitably discuss *Zenni* and similar borderland problems as cases of “mixed act and assertion” requiring judges to weigh the conduct’s performative and assertive aspects. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 8.22 (3d ed. 2009).

79. Park, *supra* note 14, at 800–01.

80. 673 S.E.2d 50 (Ga. Ct. App. 2009).

defendant were “verbal acts not introduced for their truth but rather to connect Weems to the residence and the cocaine seized from that location.”<sup>81</sup> The court went on to say that the verbal act designation also meant that there was no Confrontation Clause violation because “the Clause does not bar the admission of statements for purposes other than establishing the truth of the matter asserted.”<sup>82</sup>

Such evidence is hearsay under the declarant-centered view even if it is not hearsay under the assertion-centered definition because the declarants were mostly revealing, not asserting, their beliefs that the defendant could be found there. Either way, the probative value of their statements clearly depends upon their credibility. Any residual confusion about whether such evidence would be hearsay under the declarant-centered view follows from the *Weems* court’s confusing use of the term “verbal act” for assertive conduct offered for a purpose other than its intended assertion.

The term “verbal act” is better reserved for evidence that is not hearsay because its occurrence is probative *despite* the actor’s beliefs.<sup>83</sup> A classic example is a statement assenting to a contract while the speaker secretly refuses to be bound. Where the law makes the speaker’s verbalized assent probative on the issue of whether he concluded a binding contract, despite his unexpressed reservations, the assent is a verbal act. A true verbal act is relevant merely by virtue of its having been spoken and is not hearsay under either the assertion-centered *or* declarant-centered definitions. In *Weems*, however, asking for the defendant at a particular location is probative of the fact that he can be found there *because* it shows the declarant’s belief that the defendant can be found there. Unlike the classic verbal act, the probative value of the proof depends on the declarant’s credibility, implicating, at the least, his perception and memory that the defendant hangs out there. The proof is not exempted from hearsay because it is a verbal act making the truth of any matter irrelevant. It is not hearsay only under the assertion-centered view because the declarant’s beliefs about the defendant’s whereabouts are not intentionally asserted, but rather unintentionally revealed by the declarant asking for him there.

*Weems* was not entirely clear about whether the persons asking for the defendant by his nickname knew they were speaking to police. At one point, the court described steps that the officers took to disguise themselves on the

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81. *Id.* at 54.

82. *Id.* at 53 n.2.

83. Park, *supra* note 14, at 833. Professor Park notes that the term “verbal act” is unobjectionable if it is reserved for circumstances when the act of uttering words has legal consequences. The label creates problems, however, when courts use it to refer to verbal conduct that is not hearsay because it is nonassertive, but is not legally operative language. Such conduct involves hearsay dangers. *Id.*

premises, which resulted in their arresting several persons who came to the door asking for drugs and the defendant.<sup>84</sup> But when the court analyzed the statements of the persons asking for the defendant, it made no reference to the requests for drugs.<sup>85</sup> This suggests that some of the callers arriving at the door may have arrived after the police revealed themselves and simply asked for the defendant without revealing their (possibly illegal) purpose. Even if these were not the facts of *Weems*, this scenario clearly illustrates how we can expect declarants in cases besides the false statement cases to engage in nonassertive conduct that implicates defendants, even in the presence of police. Similar cases will undoubtedly include those where the speakers know that they are talking to police because the nonassertive conduct that connects a defendant to illegality need not inculcate the speaker. Asking for Weems by nickname associates him with the location at which the drugs were found, despite whether the visitors gave any reason at all for coming, or innocently identified themselves as there to, say, chat about the Yankees or take the defendant to tea.

Like the false statements, the nonassertive conduct associating the defendant with the drug location is not exempt from being testimonial because the prosecution uses it in unanticipated ways or because it is not accusatory, sufficiently inculpatory, or adversarial.<sup>86</sup> But there is a difference that may matter. The actors whose conduct connects the defendant to illegality are less likely to anticipate that they are giving evidence at all, even if their actions are knowingly undertaken in the presence of police. The declarants of false statements are fully aware that they are providing information to the authorities that they may use as evidence, making that information the functional equivalent of live testimony.

The statements associating a person with illegality that fit the nonassertive conduct rubric are harder to conceive as functional testimony. The declarant of such nonassertive conduct, like the declarant who asks the police for Weems, should not be thinking at all about providing evidence. If a person *is* aware that he is potentially providing evidence to the police, rather than just acting in their presence, his statement should probably no longer qualify as nonassertive conduct. It thus remains an open question whether the Court will want to make clear that the inquiry into whether a declarant would understand that statements made to police can be “used prosecutorially” and “would be available for use in a subsequent trial” should include an inquiry into whether

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84. *Weems*, 673 S.E.2d at 52.

85. *Id.* at 53–54.

86. *See supra* notes 61–68 and accompanying text.

the declarant likely understood that he was providing evidence at all.<sup>87</sup> Nonetheless, the central point remains that the *Weems* court never asked whether Weems's visitors' statements were testimonial because it erroneously assumed that the assertion-centered definition of hearsay determined the extent of Weems's confrontation right.

Some statements that courts find fit the mold of non-hearsay "connecting" statements will undoubtedly remain testimonial. *Washington v. McKinney* provides an example.<sup>88</sup> The defendant was charged with dealing drugs. She admitted using, but denied dealing, drugs. She instead claimed that her boyfriend, who used her cell phone, was dealing.<sup>89</sup> While detaining McKinney, the police had answered a call on her cell phone in which Crystal Donovan complained that she had been waiting for McKinney to bring her drugs in the parking lot outside a hotel.<sup>90</sup> After receiving Donovan's description, the officer who had answered the phone offered to bring the drugs.<sup>91</sup> Subsequently, a uniformed officer approached Donovan in the parking lot.<sup>92</sup> Donovan volunteered to the officer that she was there to meet McKinney, whom she described as her friend.<sup>93</sup> When the officer asked Donovan why she was meeting McKinney, she said first, that she was going to give McKinney a ride, and later, that she wanted to hang out with her.<sup>94</sup> The court held that Donovan's statements were not hearsay because they were not offered for their truth, but rather to show "that Donovan knew McKinney and that McKinney was nearby at the Sunrise Motel."<sup>95</sup> The court further held that since Donovan's statements were not offered for their truth, there was no Confrontation Clause issue.<sup>96</sup>

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87. Other circumstances raising this issue include the flight or suicide of the subject of an investigation, or his destruction of evidence, when the subject knows that the police are investigating him. Courts have admitted these actions as nonassertive conduct revealing the subject's knowledge of the unlawful nature of the activities for which he was being investigated or the incriminating nature of the materials destroyed, which knowledge may then be admissible against others connected to those activities or materials. *See, e.g., Commonwealth v. Colson*, 490 A.2d 811, 824 (Pa. 1985) (suicide of defendant's accomplice admissible against defendant). In these cases, the declarants surely know that their actions will become known to police and thus available for use in a subsequent trial, but they may have no immediate awareness that they are providing evidence when they undertake their actions.

88. Nos. 58201-1-I, 58202-0-I, 2007 WL 2297111, at \*1-3 (Wash. Ct. App. Aug. 13, 2007) (per curiam).

89. *Id.* at \*3.

90. *Id.* at \*2.

91. *Id.* at \*4.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

One can debate whether using the statements for Donovan's knowledge of McKinney and McKinney's nearby location—potentially important to determine whether McKinney was actually the source of the drugs or a foil for her boyfriend—was hearsay under the Federal Rules' definition.<sup>97</sup> But *Zenni* itself is debatable, as are many close questions at the border created by the assertion-centered view's distinction between beliefs that are unintentionally revealed and those that are indirectly, though intentionally, asserted.<sup>98</sup> However, the issue is not whether the *McKinney* court decided the hearsay question correctly under the Federal Rules. It is whether it denied the defendant her confrontation right by erroneously assuming the applicability of the assertion-based definition to the Confrontation Clause. In this case, the statements “connecting” McKinney to Donovan and the Sunrise Hotel were clearly testimonial, having been made to a uniformed officer in response to his inquiries into drug activity.<sup>99</sup> Donovan's credibility was implicated even when her statements were used only to show that Donovan knew McKinney and that she was nearby.<sup>100</sup> Like all testimonial, declarant-centered hearsay, the statement triggered McKinney's confrontation right unless there is a special reason why the Confrontation Clause exempts it.

As with false exculpatory statements, “connecting” statements often escape confrontation scrutiny because courts confuse nonassertive conduct with statements that are not offered for their truth. The primrose path to erroneously admitting testimonial, nonassertive conduct in this manner is illustrated by *United States v. Rodriguez-Lopez*.<sup>101</sup> The court admitted ten calls requesting heroin received on the defendant's seized cell phone to “support an inference that Rodriguez was . . . dealing heroin.”<sup>102</sup> It erroneously held that the calls to Rodriguez were not hearsay because the inference from their being placed to his involvement “[did] not depend on the callers' truthfulness, memory, or perception.”<sup>103</sup> It claimed that the calls were probative merely because they were made, despite the truth of the “declarants'

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97. Donovan's responses to the officer's questions went beyond the acts of requesting or buying drugs in the earlier calls and are therefore arguably not covered by *Zenni*'s rationale that the declarant was performing an act rather than intentionally communicating something.

98. For example, the court in *McKinney* admitted Donovan's call to McKinney's cell phone in which she had complained of “waiting for over 20 minutes for her shit from [McKinney],” and another call in which the caller said that McKinney “had [taken her boyfriend's] ‘stuff’ and ‘was now selling [it].’” 2007 WL 2297111, at \*2. Admitting these statements to show McKinney's involvement in selling, but not for their literal truth, stretches, if not obliterates, the limits of *Zenni*, or perhaps illustrates why *Zenni* was wrongly decided in the first instance.

99. See *Davis v. Washington*, 547 U.S. 813 (2006).

100. *McKinney*, 2007 WL 2297111, at \*2–4.

101. 565 F.3d 312 (6th Cir. 2009).

102. *Id.* at 315.

103. *Id.*

belief that the defendant could supply the desired heroin.”<sup>104</sup> On that analysis, however, the calls were admissible without confrontation even if government agents intentionally orchestrated them for the express purpose of generating evidence for use at trial. One hoped that if such a case arose, the court would immediately realize that calls of this type are probative of the defendant’s involvement only if offered to show the truth of the declarants’ beliefs that the defendant is involved. Thus, the government-generated calls are testimonial hearsay requiring confrontation, if they are admissible at all, and the independently initiated calls are admissible without confrontation only because they are non-testimonial, nonassertive conduct, and not because their probative value is independent of the callers’ credibility.

Such hope, however, was dashed in *United States v. Cesareo-Ayala*.<sup>105</sup> The court held that monitored calls made to the defendant by Mendez, a recently arrested coconspirator, were not testimonial hearsay although requested and supervised by government agents. Among other things, Mendez told Cesareo-Ayala that Mendez had his money from an earlier sale and needed to get more drugs from him to sell.<sup>106</sup> The court held that the calls were not hearsay requiring confrontation because Mendez’s testimonial capacities were not implicated when the calls were considered as proof of their business relationship rather than for any implicit assertion made for the “benefit of the officers.”<sup>107</sup> That analysis would undoubtedly be true if Mendez’s statements were adopted by Cesareo-Ayala during the call, and hence admissible pursuant to Federal Rule 801(d)(2)(B) as Cesareo-Ayala’s adopted admissions. But the court essentially disavowed this rubric when it analogized the calls to those in *Rodriguez-Lopez* where the defendant never participated.<sup>108</sup> Apparently, the *Cesareo-Ayala* jury had never been instructed to consider Mendez’s statements only insofar as Cesareo-Ayala’s responses “manifested an adoption or belief in [their] truth.”<sup>109</sup> Thus, to avoid the confrontation requirement, the court held that Mendez’s statements, like those in *Rodriguez-Lopez*, could stand alone because they were somehow probative apart from their truth.<sup>110</sup>

Nonetheless, the analysis is similarly flawed. Apart from anything that Cesareo-Ayala said in response, the probative value of Mendez’s attempts to

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104. *Id.*

105. 576 F.3d 1120 (10th Cir. 2009).

106. *Id.* at 1129–30.

107. *Id.* at 1129.

108. Officers intercepted the calls. *Id.*

109. FED. R. EVID. 801(d)(2)(B).

110. Concurring, Judge Kelly noted that the court’s faulty non-hearsay analysis invited collision with *Crawford*; he would have acknowledged constitutional error, but found it harmless. *United States v. Cesareo-Ayala*, 576 F.3d 1120, 1131–32 (Kelly, J., concurring).

pay Cesareo-Ayala for drugs already received from him, and to obtain more drugs from him to sell, depended entirely on the truth of Mendez's belief that Cesareo-Ayala was Mendez's supplier. Moreover, those statements, made at the urging of police to obtain evidence against Cesareo-Ayala, were clearly testimonial. Even assuming that they were properly admitted as non-hearsay, nonassertive conduct, their admission—like admission of the statements in *McKinney*—violated the defendant's confrontation right unless there is historical evidence showing that only assertion-based hearsay triggered the right to confront an absent declarant at the time of the Founding.

### III. CONFRONTATION OF NONASSERTIVE CONDUCT AT THE FOUNDING

Rather than defining the scope of the confrontation right by reference to the reliability concerns informing hearsay policy, *Crawford* defines the scope of the requirement by reference to common law rules governing admissibility of testimonial hearsay at the time of the Constitution's adoption.<sup>111</sup> History requires using the declarant-centered hearsay definition, however inconvenient. Before twentieth-century critiques resulted in the Federal Rules' revision of the hearsay definition to encompass only intended assertions, the common law employed the declarant-centered definition. *Wright v. Tatham*, decided in 1837 and affirmed in 1838,<sup>112</sup> pronounced the authoritative view of the common law on the subject. There, the Court of the Exchequer Chamber held that a declarant's beliefs about facts unintentionally revealed by the declarant's nonassertive conduct or by conduct not intended to assert those beliefs amounted to "implied statements," and thus, constituted hearsay.<sup>113</sup> Although the Federal Rules rejected *Wright* in 1975 when Federal Rule 801 narrowly defined "statements" to include only intended assertions, the declarant-centered view of *Wright* existed at the Founding. Under *Crawford*, therefore, the declarant-centered definition of hearsay must determine whether the Constitution requires confrontation.

Moreover, courts must require confrontation for nonassertive conduct because the Supreme Court has held that declarants' statements that the prosecution has not offered for their truth are exempt from confrontation only

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111. *Crawford v. Washington*, 541 U.S. 36, 43–56 (2004).

112. (1837) 112 Eng. Rep. 488 (Exch. Div.), *aff'd*, (1838) 7 Eng. Rep. 559 (H.L.).

113. 112 Eng. Rep. at 517. English courts continued to endorse that view, upholding *Wright* against challenge in 1992. *See R v. Kearley*, [1992] 2 AC 228 (H.L.) (appeal taken from Eng.) (U.K.). In 2003, Parliament enacted comprehensive hearsay reform whose effect, according to the court in *Regina v. Sukadeve Singh*, [2006] EWCA Crim. 660, [2006] 2 Crim. App. 12, was to reverse *Kearley* and, perhaps, entirely overrule *Wright*. Section 115 of the Criminal Justice Act of 2003 states that hearsay statements include matters stated only if "the purpose, or one of the purposes, of the person making the statement appears to the court to have been—(a) to cause another person to believe the matter, or (b) to cause another person to act or a machine to operate on the basis that the matter is as stated." Criminal Justice Act, 2003, c. 44, § 115 (Eng.).

because the declarants' credibility is irrelevant to the statements' probativity. When the prosecution uses such conduct to infer the declarant's beliefs in certain facts, which beliefs are then used to prove the existence of those facts, the declarant's credibility is clearly relevant to the statements' probative value. Simply wrong are courts that have equated statements offered for the truth of beliefs that declarants did not intend to assert with statements that are not hearsay by any definition because the prosecution has not offered them for the truth of *any* beliefs held by the declarants, as even the proponents of the assertion-centered definition embodied in Federal Rule 801 conceded.

The history contains no evidence that nonassertive conduct was considered exempt from hearsay or from the common law's requirement of confrontation. Letters similar to those at issue in *Wright* had been admitted in the Ecclesiastical and Prerogative Courts—which handled civil cases without a jury—but the Court of King's Bench, Court of Exchequer Chamber, and House of Lords in *Wright* made clear that these cases established no precedent for the common law courts in which such evidence had never been received. Similarly, there was nothing in the definition of hearsay that today includes the phrase “truth of the matter *asserted*” that made the assertion-centered approach an implicit part of Founding-era lawyers' conception of hearsay/confrontation and from which the common law subsequently departed. Similarly, there is no evidence that Founding-era lawyers entertained a definition of “statement” that excluded nonassertive conduct that the *Wright* court overturned by including nonassertive conduct within the ambit of implied statements governed by the hearsay rule and confrontation requirements.

The *Wright* case serves as a useful guide for ascertaining how hearsay would have been understood at the time of the Founding. Although decided fifty years after the Constitution's framing, *Wright* was nothing if not thoroughly litigated, and the key issue to the precedent-bound judges was whether precedent excluded nonassertive conduct.<sup>114</sup> Yet Sir Frederick Pollock, the letters' proponent, conceded the nonexistence of common law precedent for the proposition that letters sent to Marsden (the testator)—which showed the writers' belief that he was capable of understanding matters contained in the letters, and which, in turn, would show him possessed of the capacity to write a will—were admissible.<sup>115</sup> Noting precedent in the Ecclesiastical and Prerogative Courts for receiving such letters on the issue of

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114. The story of the entire litigation is well told in John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 749–60 (1961).

115. *Wright*, 112 Eng. Rep. at 498 (“No instances have been found of decisions as to this kind of evidence in the Courts of the Common Law.”); *see also id.* at 511 (Bosanquet, J.) (“No precedent has been referred to in which such evidence has been admitted upon a trial at law.”).

a testator's competency—where “[i]t is usual . . . to plead that the person whose sanity is in question was treated of a man of sound mind”—Pollock argued that “the same rule (which is grounded in good sense) should . . . prevail in both courts.”<sup>116</sup> Nonetheless, the judges unanimously rejected Pollock's argument.<sup>117</sup> Although some judges would have admitted the letters, they would have done so only because they found sufficient reason to believe that the testator had acted competently in response to those letters, whose probative value would then lie in giving context to the actions that suggested his sanity.<sup>118</sup> Thus, even those judges who would have admitted the letters did not believe they were competent evidence in common law courts of the writers' beliefs about the testator's sanity, from which one could infer that he was sane.<sup>119</sup>

The reasons for excluding the letters were exactly those one would expect. The statements were not made under oath and were not subject to cross-examination.<sup>120</sup> Moreover, the letters' potential reliability was insufficient

116. *Id.* at 498.

117. “[N]one of the judges who participated in the final hearing of the case flatly committed himself to the proposition that the three letters should have been admitted as falling outside the hearsay area.” Maguire, *supra* note 114, at 755–56 (citing Lord Chancellor Cottenham in *Wright v. Tatham*, (1838) 7 Eng. Rep. 559, 597 (H.L.)).

118. *Wright*, 112 Eng. Rep. at 508 (Gurney, B.); *id.* at 518–19 (Parke, B.) (reporting that there was no difference among the judges on the principle that the letters were inadmissible as proof of the declarants' belief in Marsden's sanity, but that some judges found sufficient basis to believe that Marsden had acted “with reference to the letters,” making them admissible to explain such acts, and candidly conceded that if admitted for that purpose “no rule of law could prevent their full effect from being produced on the minds of the jury”); *see also* Maguire, *supra* note 114, at 754–55.

119. At least one Prerogative Court Judge found that the decision of the Court of King's Bench excluding the letters in *Wright* was no precedent for excluding them in Ecclesiastical and Prerogative Courts. 112 Eng. Rep. at 498 (noting two unreported decisions by Sir Herbert Jenner, Commissary of the Prerogative Court of Canterbury, in which *Wright* was cited “without success”).

120. *Id.* at 500 (Sir Cresswell, arguing for *Tatham* against admission) (“All the letters were inadmissible, because they presented statements which could not be verified by oath, and subjected to the test of cross-examination.”); *id.* at 515 (Parke, B.) (“[T]hey are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question.”).

The administering of an oath furnishes some guarantee for the sincerity of the opinion; and the power of cross-examination gives an opportunity of testing the foundation and the value of it. Such being the general rule, it is necessary for the party who brings forward evidence not on oath to show some recognised exception to the general rule, within which it falls.

*Id.* at 506 (Coltman, J.).

If the writers of these letters were produced as witnesses and examined upon oath, their opinion would be receivable in evidence, because the grounds of their knowledge and the credibility of their testimony might be ascertained by cross-examination; but I know of no rule by which the opinion, however clearly expressed, of a person, however well informed, is receivable in evidence, unless it be given in the course of legal examination.

grounds from which to fashion a new exception, at least for judges who were not inclined to do so. Arguing for Tatham and against admission of the letters, Sir Cresswell stated the law as follows:

It is urged on the other side that such evidence ought to be received, because it would, in the ordinary course of life, have some effect on the mind; but that is a reason for excluding it, if not legitimately entitled to attention according to general rules. In a particular case the assertion, without oath, of a respectable man might influence a reasonable mind; but the rule, established for the safe administration of justice in general, is, that evidence unconfirmed by oath, and not subject to cross-examination, shall not be received.<sup>121</sup>

Responding specifically to the claim that “the expressions in [the letters] are not to be presumed ironical or insincere,”<sup>122</sup>—an argument not unlike the reduced sincerity danger made by the advisory committee for excluding such proof from hearsay—Sir Cresswell responded, “if the evidence were given in the ordinary manner by witnesses, that point might be tried by cross-examination.”<sup>123</sup>

The court also responded to the claim that nonassertive conduct was more reliable because declarants act upon their beliefs rather than merely assert them. Baron Parke rejected the distinction between merely asserting and acting upon beliefs as a reason for excluding nonassertive conduct. He reasoned that even assertive conduct, such as sending a letter claiming that the testator was competent, “affords an inference that such an act would not have been done unless the statement was true, or believed to be true.”<sup>124</sup> As a result, accepting the argument would lead to the “indiscriminate admission of hearsay evidence of all manner of facts.”<sup>125</sup> However wrongly one may think that the judges responded to Sir Pollock’s policy arguments, there was simply no doubt that they agreed that the issue was one of altering the hearsay rules with which they were familiar:

[I]t is clear that an acting to a much greater extent and degree upon such statements . . . would not make the statements admissible. . . . [I]f a wager to a large amount had been made

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*Id.* at 511 (Bosanquet, J.).

121. *Id.* at 500.

122. *Id.* Sir Pollock argued, “The test of sincerity . . . is that respectable parties openly do that which would disgrace them if they acted against their belief.” *Id.* at 506.

123. *Id.* at 500.

124. *Id.* at 516 (Parke, B.).

125. *Id.*

as to the matter . . . , the payment of that wager, however large the sum, would not be admissible to prove the truth of the matter. . . . You would not have had any right to present it to the jury as raising an inference of the truth of the fact, on the ground that otherwise the bet would not have been paid. It is . . . nothing but the mere statement of that fact, with strong evidence of the belief of it by the party making it.<sup>126</sup>

One may fault the opinion for begging the question (maybe paying a bet should be excluded too?), but one cannot deny that Baron Parke conceived the existing general rule to exclude the proof. Without authority for doing so, the court was hardly going to create an exception<sup>127</sup> or suggest that nonassertive conduct was implicitly excluded from the conception of hearsay evidence all along, considering that it believed itself asked to “establish an entirely new precedent in a Court of Common Law.”<sup>128</sup>

Similarly, all agreed that the cases in the Ecclesiastical and Prerogative Courts, where judges sat as fact-finders and often employed different evidence rules, were not precedent for common law courts sitting with a jury. The rules of evidence in the Ecclesiastical Courts were different because the judges were fact-finders “and [could] exercise a discretion, in admitting or rejecting evidence, which would be dangerous where the fact is tried by a jury.”<sup>129</sup> In cases where similar letters had been admitted in those courts, they “would have been clearly inadmissible in a Court of Common Law.”<sup>130</sup> At the end of day, the only cases that could support a precedent were those of the common law courts, and the fact that none were cited in the tortuous history of the case was not lost on the House of Lords when it affirmed the letters’ exclusion:

[I]t is a circumstance of no small weight in determining my opinion . . . , that, with all the industry and ability of the learned Counsel for the defendants below, no single instance has been adduced of evidence of this kind having been admitted in a Court of Common Law. When I reflect upon the frequent occurrence of questions of this kind, and I must add, the probable existence of such proof in favour of

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126. *Id.*

127. *See id.* at 506. Judge Colman speaks of the general rule requiring proof by the examination of witnesses upon oath subject to cross examination, which places a duty on a party seeking to do otherwise to “shew some recognised exception to the general rule.” *Id.*

128. *Id.* at 514 (Bosanquet, J.).

129. *Id.* at 501 (Sir Cresswell, arguing for Tatham); *id.* at 512 (Bosanquet, J.); *id.* at 521 (Tindall, J.).

130. *Id.* at 502 (Sir Cresswell, arguing for Tatham); *id.* at 512 (Bosanquet, J.); *id.* at 521 (Tindall, J.).

competency, I cannot account for its absence, except upon the supposition that it has been assumed and considered to be inadmissible for the purpose for which the evidence was upon the present occasion tendered.<sup>131</sup>

The *Wright* judges took pains to avoid making new law or disguising new law as part of the old. That attitude makes the case an especially good indicator of the state of the preexisting law, however poor an exemplar it is of dynamic common law evolution. The preexisting law, against which the Founders would have framed the Confrontation Clause, included nonassertive conduct within its conception of hearsay evidence. Such evidence was inadmissible without specific exception, of which none applied, leaving counsel to urge (unsuccessfully) a previously unrecognized reduction in the hearsay rule's scope.<sup>132</sup>

Consequently, suggestions that the *Wright* case made a mess of an earlier hearsay conception consistent with the assertion-based view are either anachronisms or perhaps wishful thinking among those who prefer the assertion-based view. For example, the court in *Stoddard v. State*<sup>133</sup> suggested an “earlier, and essentially indistinguishable, common law counterpart[]” to the Federal Rules’ assertion-centered definition of hearsay that created a “well-marked boundary between . . . clean-cut paradigms of hearsay and non-hearsay,” but which lasted only until the *Wright* court disrupted the heretofore “ship shape” hearsay rule with its “caveat” of implied assertions.<sup>134</sup> But the court failed to offer even the slightest historical evidence for the existence of such halcyon days before *Wright*. Instead, it relied on Professor Mueller’s observation that to use the term “implied assertion” to refer to what a declarant’s conduct suggests, rather than what it is intended to convey, “divorces ‘assertion’ from normal usage, making it mean essentially ‘evidence’ and severing it from expressive or communicative purpose.”<sup>135</sup>

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131. *Wright v. Tatham*, (1838) 7 Eng. Rep. 559, 570 (H.L.) (Williams, J.).

132. Maguire, *supra* note 114, at 752–53.

As a general exclusive principle, the hearsay rule was solidly established. The foundations of the main exceptions admitting some assertive hearsay had also been laid. Those exceptions certainly did not include anything covering the needs of the litigant offering the letters in the immediate situation, nor does there appear in the long and varied discussion much special urging to fabricate a new hearsay exception. Argument of counsel and judges can on the whole be most easily referred to as effort for and against restricting definition of the exclusionary rule's scope.

*Id.* (discussing the *Wright* case).

133. 850 A.2d 406 (Md. Ct. Spec. App. 2004), *rev'd*, 887 A.2d 564 (Md. 2005).

134. *Id.* at 412.

135. Mueller, *supra* note 32, at 419 n.153.

Although true, Professor Mueller's observation hardly provides support for the proposition that the hearsay definition existing at the Founding used the term "assertion" in the way in which we may use it today, nor is there any evidence that he intended his observation as a historical argument. Professor Mueller was simply making a point about what he—like other assertion-centered proponents—sees as the overbreadth of *Wright's* conception of hearsay and the unfortunate locution declarant-centered proponents use when trying to show their position consistent with the language of Federal Rule 801(c).<sup>136</sup> Baron Parke's *Wright* opinion refers to implied *statements*, not implied *assertions*, making no pretense that its holding was consistent with an assertion-centered view.<sup>137</sup>

Moreover, recent studies of evidence law existing at the Founding agree that the prevailing definitions of hearsay did not even include the phrase "truth of the matter," much less the phrase "truth of the matter *asserted*."<sup>138</sup> They referred more generally to all unsworn, out-of-court statements.<sup>139</sup> To this definition, the contemporary, commonly used evidence sources added the lack of cross-examination as a rationale.<sup>140</sup> It is that rationale which the Supreme Court holds limits the Confrontation Clause to out-of-court statements by persons whose cross-examination is useful because their credibility is implicated, i.e., when their statements are offered for the truth of the matter asserted.<sup>141</sup> If hearsay's contemporaneous formal Founding definition did not even limit hearsay statements to those offered for the "truth of the matter," then it surely does not follow that it further limited hearsay

136. *Id.*

137. *Wright v. Tatham*, (1837) 112 Eng. Rep. 488, 516–17 (Exch. Div.) (Parke, B.).

[P]roof of a particular fact . . . which is relevant only as implying a statement or opinion of a third person . . . [is] inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible; and, therefore, . . . the letters which are offered only to prove the competence of the testator, that is the truth of the implied statements therein contained, were properly rejected.

*Id.*

138. Stephen Aslett, Comment, *Crawford's Curious Dictum: Why Testimonial 'Non-Hearsay' Implicates the Confrontation Clause*, 82 TUL. L. REV. 297, 311–22 (2008); Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford–Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349, 351 n.9, 462 n.279 (2007).

139. Davies, *supra* note 138; Aslett, *supra* note 138, at 312 (citing Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule: A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 561–62 n.15 (2007); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 196 (2005)).

140. Aslett, *supra* note 138, at 313 n.83.

141. *Id.* at 311–22.

only to the truth of matters that a declarant had *intentionally asserted*. Finally, there was nothing about the term “statement” in that hearsay definition that showed a choice to avoid using it as the *Wright* court did, namely to include actions that effectively “make a statement” about an actor’s beliefs, even if the actor did not intend to communicate them.

In fact, one commentator has gone so far as to suggest that a historically accurate definition of hearsay requires post-*Crawford* courts to demand confrontation of all testimonial statements made out of court, even if they are not hearsay under *any* modern definition because they are not offered for their truth.<sup>142</sup> That approach would include nonassertive hearsay whose inclusion this Article urges. But it would also go further and encompass statements that do not implicate a declarant’s credibility, such as a murder victim’s report to police that the defendant was dealing drugs, when offered only to show that the defendant knew that the victim was accusing him, and thus had motive for murder, rather than to show that the defendant had been dealing drugs.<sup>143</sup> Nothing in this Article’s analysis supports that result, which demands confrontation even when the missed opportunity to cross-examine has no bearing on the statement’s probative value because its relevance depends only

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142. *Id.*

143. *Id.* at 303. Aslett argues that the defendant in such a case is prejudiced because he must disprove the allegation (and hence the strength of the motive) by evidence besides the victim’s cross-examination, and that “the jury could still be convinced that the false accusation itself was enough” to provide a motive to kill “if the false accusation caused negative consequences.” *Id.* at 302–03. The argument proves too much. It is precisely because even a false accusation can give motive for murder that hearsay theory calls the victim’s credibility not probative when the allegation is offered merely for the fact that it was known to the defendant, and not to show the defendant’s involvement in drug dealing. There is no drug dealing established by the statement to disprove by cross-examination or otherwise. If the prosecution does introduce the evidence to show the defendant’s drug dealing, and hence a more specific and powerful reason to fear the accusation and to kill to eliminate it, then confrontation is required because the evidence is being offered for the truth. If the prosecution does not offer the evidence for the truth, then it is limited to arguing whatever motive can be inferred from the victim’s accusation, whether a ridiculous lie or the gospel truth, and the defendant is limited to showing that the allegation—true *or* false—was unknown to him or unlikely to cause him harm. Aslett betrays his allegiance to the “truth of the matter asserted” conception by choosing an example of testimonial non-hearsay that he can claim implicates the declarant’s credibility only because juries will use it wrongly. His other example is that of testimonial statements on whose truth experts rely when rendering their opinions, but which juries are told to use only for the non-hearsay purpose of evaluating the basis for the expert’s opinion, and not directly for the truth of their contents. One need not reject the “truth of the matter” formulation to find that the testimony of an expert whose opinion presupposes the truth of the testimonial statements is enough to trigger the confrontation right. *See, e.g.*, *People v. Goldstein*, 843 N.E.2d 727, 732–33 (N.Y. 2005) (experts’ reliance on testimonial hearsay statements for their truth triggers defendant’s confrontation right because evaluating the expert’s opinion requires “accepting as a premise . . . that the statements were true,” so “[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert’s opinion is not meaningful in this context”).

upon whether it was spoken.<sup>144</sup> Surely more than a general definition that historically did not expressly state the “truth of the matter” limitation, but which *did* incorporate the absence of cross-examination rationale, is required before reaching that result. None of the articles showing the absence of the “truth of matter asserted” language in the hearsay definition cite cases in which courts included out-of-court statements not offered for their truth within the ambit of hearsay, and consequently excluded the statements or demanded the declarants’ confrontation. In contrast, *Wright*’s holding is an express statement of the common law’s inclusion of nonassertive conduct within the ambit of hearsay and constitutes a landmark precedent for consequently excluding it at trial. Thus, all the historical indications support extending the confrontation right at least far enough to encompass the testimonial, nonassertive conduct whose exclusion we can be certain the common law courts required.

#### IV. A PROPOSAL FOR INCORPORATING THE CONSTITUTIONAL DEFINITION OF HEARSAY

Constitutionally mandating the declarant-centered definition of hearsay for confrontation purposes need not be disruptive. Rather than provide two different definitions of hearsay, one for testimonial hearsay offered against criminal defendants and another for all other situations, courts and legislatures in all jurisdictions can simply revert to the original common law definition encompassing nonassertive conduct. Each jurisdiction can then choose whether to enact a hearsay exception for nonassertive conduct, which would not allow admission of testimonial, nonassertive conduct without confrontation. This proposal would simply require courts to do with nonassertive conduct what they are already doing with all other hearsay—that is, base the confrontation right on whether the hearsay is testimonial, without regard for whether an applicable hearsay exception applies. Recasting

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144. For example, eliminating the truth of the matter asserted requirement would demand confrontation even if the victim’s accusation were offered merely to prove that he was able to speak and thus alive when he reported the defendant’s drug activities to the police. Aslett seems to avoid this result by limiting his example to one where he assumes that a jury would use the evidence for its forbidden hearsay inference, although it is also relevant for a non-hearsay purpose. The real test of Aslett’s thesis is whether the Confrontation Clause is offended when the lack of confrontation potentially impedes the defendant’s ability to rebut evidence that is *correctly* used for its non-hearsay purpose. For example, does the Confrontation Clause prohibit using the unsworn, uncross-examined accusation to prove that the accuser was alive before the defendant allegedly killed him because he is not available to the defense to contradict the proof? Does it prohibit using the victim’s accusations against the defendant, regardless of their truth, to show the defendant’s motive to kill because the victim is not available to the defendant to deny that he ever made the threats? Although it is undoubtedly true that the definition of hearsay was less than fully developed at the Founding, it seems unlikely that the oath and cross-examination rationales were so far divorced from the concern for witness credibility.

nonassertive conduct as a hearsay exception would prevent courts from confusing its exclusion by post-Founding hearsay definitions with its constitutionally required inclusion under the Confrontation Clause. A uniform definition of hearsay would remind courts to protect defendants' right to confront testimonial, nonassertive conduct and the testimonial, intended assertions defined as hearsay by the Federal Rules.

In contrast, accomplishing that goal will be elusive in a regime in which the declarant-centered definition of hearsay applies to testimonial statements offered against criminal defendants, while the assertion-centered definition, which excludes nonassertive conduct, applies in all other circumstances. First, the belief that the hearsay definition reflects a single, correct conceptual structure rather than a historically contingent one reflecting different policy choices equivalent to those informing hearsay exceptions will undoubtedly persist. As shown by the cases in Part II, there is a persistent, though incorrect, association between non-hearsay under Federal Rule 801(c) and statements that are not offered for the truth of *any* matter and thus do not implicate the declarant's credibility.<sup>145</sup> That association has outlasted the Federal Rules by more than thirty years and will continue to encourage courts to think that the assertion-centered definition with which they are familiar applies across the board.<sup>146</sup>

More critically, nonassertive conduct can easily be overlooked as hearsay, a fact that plays no small role in some commentators' arguments for excluding it from the statutory definition.<sup>147</sup> But where there is no option to exclude it because the Confrontation Clause demands the declarant-centered definition, realizing the constitutional goal requires a doctrine that will help lawyers and judges recognize nonassertive hearsay. Doing so requires practice, and the easiest way to encourage courts and lawyers to practice is by changing the statutory definition of hearsay to track the constitutional definition. Jurisdictions that currently exclude nonassertive conduct from hearsay can then create a hearsay exception for nonassertive conduct, while those that retained the traditional declarant-centered view need not.<sup>148</sup> Instead of employing the constitutional definition in only the relatively few cases where prosecutors offer testimonial, nonassertive conduct, courts and lawyers will use it all the time, while also becoming familiar with a hearsay exception that,

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145. See *supra* notes 38–45 and accompanying text.

146. One might say that the incorrect assumption of a single definition sparked the need for this Article.

147. Park, *supra* note 14, at 791.

148. Compare FED. R. EVID. 801(c), which would require an exception, with TEX. R. EVID. 801(c), which would not.

in most jurisdictions, will allow the proof except when the Confrontation Clause applies.

The proposal uses the bias in favor of a single definition to capture all the hearsay whose identification the Constitution demands. It requires lawyers and courts routinely to exercise the “muscles” necessary to identify all hearsay requiring confrontation. It also requires them to learn the exception for nonassertive conduct, pursuant to which such conduct will be admissible in cases where the Confrontation Clause does not apply. Encountering a case when the prosecution offers potentially testimonial, nonassertive conduct, courts and defense lawyers will recognize it as hearsay and realize—as they do now for assertion-centered hearsay—that the statement’s testimonial quality, not its qualification under a hearsay exception, determines admissibility without confrontation. Courts and lawyers will be far less likely to spot testimonial, nonassertive hearsay under a regime that defines it as hearsay pursuant to a rarely used rule that applies only when the prosecution offers such evidence against criminal defendants.

Moreover, there is an important collateral benefit to changing the hearsay definition even in those cases where confrontation is not an issue. In most jurisdictions, nonassertive conduct will be admissible pursuant to a hearsay exception rather than excluded by the basic hearsay definition. Admitting nonassertive conduct under a hearsay exception recognizes that the person engaging in that conduct is a hearsay declarant whose credibility can be attacked and supported as if he were a witness.<sup>149</sup>

Admission of persons’ nonassertive conduct makes their credibility relevant, like that of any hearsay declarant under the assertion-centered definition, so there can be no argument against this result. That the Federal Rules allow impeachment of statements admitted under hearsay exceptions justified by reduced hearsay dangers, but deny impeachment of nonassertive conduct admitted pursuant to a narrowed hearsay definition that is also justified by reduced hearsay dangers, has always been an anomaly leading to arbitrary and indefensible results.<sup>150</sup> For example, in *United States v. Garcia-Villanueva*, the court held that a criminal defendant, whose out-of-court statements telling her alleged accomplices not to smuggle aliens had been admitted to show her noninvolvement, should have been declared immune from impeachment.<sup>151</sup> The court reasoned that the defendant could not be

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149. FED. R. EVID. 806.

150. See, e.g., Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 972–73 (1974). Professor Tribe argues that reduced, but not eliminated, hearsay dangers associated with nonassertive conduct justifies, at most, creating a hearsay exception that admits nonassertive conduct while allowing its impeachment pursuant to Federal Rule 806.

151. 855 F.2d 863, No. 87-5261, 1988 WL 86215, at \*1–3 (9th Cir. 1988).

impeached because her statements were “verbal conduct” providing circumstantial evidence of state of mind, which is not hearsay under Federal Rule 801, rather than hearsay statements asserting her state of mind, which is hearsay under Federal Rule 801, but admissible pursuant to Federal Rule 803(3)’s state of mind exception. Either way, however, her credibility was implicated; the probative value of the proof as evidence of her desire that she not be involved depended entirely upon whether she meant for her accomplices to refrain from smuggling (sincerity) and the accuracy with which her words reported her attitude about her own, rather than the others’, involvement (narration or ambiguity).

The proposal avoids the possibility that courts would disallow impeachment of nonassertive conduct altogether because it does not qualify as hearsay. That result unjustifiably exempts nonassertive conduct from impeachment, although its probative value depends on the declarant’s credibility. Worse, such a result would compound the injury to defendants who are denied the opportunity to impeach the persons whose nonassertive conduct they also are not able to confront. (Thus, for example, none of the defendants in the cases discussed in Part II would have been allowed to impeach the absent declarants as if they were witnesses.) Consequently, the defendants cannot introduce the declarants’ inconsistent statements unless another hearsay exception applies.<sup>152</sup> Nor can they show that the declarants were convicted of perjury, are biased against the defendant, or suffer from memory loss.<sup>153</sup> Such a result is indefensible and, with respect to the bias evidence, may even be unconstitutional.<sup>154</sup> Changing the statutory definition to include nonassertive conduct while creating a hearsay exception for such conduct will assure that courts will allow impeachment of those declarants. This result benefits fact-finding in all cases and avoids the “double whammy” under current law when defendants can neither confront *nor* impeach testimonial, nonassertive conduct.

#### V. PROTECTING THE CONFRONTATION RIGHT FROM EVISCERATION BY EVIDENCE JUSTIFYING INVESTIGATORS’ BEHAVIOR

Extending the confrontation right to testimonial, nonassertive conduct will have little or no effect unless courts protect it from routine evasion by prosecutors claiming to introduce testimonial hearsay only for its effect on the listener and not for the truth of the matter asserted to explain investigators’ actions that defendants have not questioned. By arguing that investigators

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152. FED. R. EVID. 613.

153. See FED. R. EVID. 609; see also *United States v. Abel*, 469 U.S. 45, 50 (1984).

154. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (the Sixth Amendment right to confront witnesses includes the right to show a witness’s bias against a defendant).

took the steps they did because they observed or otherwise learned of the testimonial hearsay, prosecutors have been able to introduce such evidence with alarming frequency, leaving a misleading limiting instruction the defendant's only possible protection.<sup>155</sup> Without a clear constitutional mandate to avoid this result, courts are rendering the Confrontation Clause's protection against unconflicted, testimonial hearsay illusory. Although this problem encompasses all testimonial hearsay, it is particularly acute for nonassertive conduct. An instruction that tells the jury not to use nonassertive conduct for the truth of the matter asserted is particularly misleading, if not incoherent, because nonassertive conduct is not offered to prove anything that

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155. See, e.g., *United States v. Brown*, 560 F.3d 754, 764–65 (8th Cir. 2009) (evidence that the victim said he knew the person who shot him and his accomplice as “Clean” and “Charmar” was admitted to show why the officer searched a database for those names and found an incident report linking the defendants and providing their full names); *United States v. Pugh*, 273 F. App'x 449, 455 (6th Cir. 2008) (testimony that the officer was given the defendant's name as a suspect was admissible to show why he investigated him); *Decay v. State*, No. CR 08-1259, 2009 WL 3785695 (Ark. Nov. 12, 2009) (court admitted the detective's testimony that “an individual that told us that Mr. Decay told him that he committed the murders” to explain “why Decay was not arrested on April 4, 2007, but was arrested on April 6, 2007”) (internal quotation marks omitted); *People v. Varnado*, Nos. B188489, B194298, B195683, 2007 WL 3025083 (Cal. Ct. App. Oct. 17, 2007) (inculpatory eyewitness identifications were admissible to explain why the officer included the defendants' pictures in a photo array); *State v. Barney*, 185 P.3d 277, 279 (Kan. Ct. App. 2007) (evidence of an anonymous call to police describing a person going to doors and peeking in windows in a certain neighborhood was admitted “to explain the officers' actions after receiving the dispatch” and “how the officer initially approached Barney as a suspect”); *Commonwealth v. Pelletier*, 879 N.E.2d 125, 130 (Mass. Ct. App. 2008) (the victims' statements to police were offered to provide context for the police investigation); *People v. Hall*, 861 N.Y.S.2d 889, 890–91 (N.Y. App. Div. 2008) (testimony that a police officer told the defendant that his mother had not corroborated his alibi was admitted “to explain why the defendant confessed to the police when he did,” although the court did not say why the timing of the defendant's confession was relevant and declined to decide whether the prosecutor used the testimony improperly because the contention was “not preserved for our review”) (internal quotation marks and citation omitted); *State v. James*, 158 P.3d 102, 109–10 (Wash. Ct. App. 2007) (evidence of statements by anonymous informants was admitted to “recount[] the course of the investigation to explain why the investigation was in the . . . neighborhood” and to “connect to” testifying witnesses' claims that they also heard multiple shots); cf. *State v. Simmons*, 233 S.W.3d 235, 238 (Mo. Ct. App. 2007) (police officer's testimony about the victim's description of the details of her sexual abuse, “including where episodes occurred, what sex acts transpired and how Daughter and Defendant cleaned up, afterwards,” was admissible to show motivation behind the investigation and to explain the “Daughter's examination at the emergency room and the seizure and testing of washcloths found in Defendant's home”; court discussed hearsay but not the confrontation issue because an accomplice testified at trial); *People v. Carney*, 795 N.Y.S.2d 10, 11 (N.Y. App. Div. 2005) (court admitted testimony concerning a 911 call made by a non-testifying declarant “as background information explaining why the police took a series of investigatory actions”); *United States v. Burchard*, No. 5:07-Cr-9, 2007 WL 1894257 (W.D. Ky. Jun. 29, 2007) (prosecution may offer officers' testimony about declarants' allegations that the defendant used and sold drugs to explain why the defendant was investigated and searched for committing those crimes); *Commonwealth v. Rega*, 933 A.2d 997, 1017 (Pa. 2007) (trooper's testimony that defendant's accomplice gave an alibi that conflicted with the defendant's was admissible “to explain the justification for further investigating [them]”; court discussed hearsay but not the confrontation issue because an accomplice testified at trial).

the declarant explicitly or implicitly intends to assert. Thus, clarifying the hearsay inferences arising from nonassertive conduct creates a propitious opportunity also to consider the very limited circumstances under which true non-hearsay use of testimonial statements avoids implicating the Confrontation Clause.

As an example, consider the following scenario.<sup>156</sup> The courts in all of the cases discussed in Part II see the light and hold that testimonial, nonassertive conduct triggers the confrontation right. Without producing the declarants, the prosecution nonetheless calls the officers who heard the declarants' inculpatory statements to testify about those statements, which admittedly require confrontation if offered for their truth. But when the defendants object, the prosecutors claim that they are offering the statements only to explain why the officers, having heard the inculpatory statements, decided to take (or forego) some subsequent investigative step, and not for the truth of any matters asserted by the declarants.<sup>157</sup> The court admits the evidence as background evidence to show the course of the investigation, although the defendants have not made an issue of why the officers acted as they did. The court then instructs the jury to consider inferences from the fact that the declarants uttered the statements to investigators, but not to consider inferences that rely on the truth of matters asserted by the declarants. Unbeknownst to the jury, it is trapped in a dilemma that is not of its own making: It can ignore the statements entirely, because there is no issue to which they are relevant for their permissible, non-hearsay purpose, or it can

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156. The scenario is adapted from *Pelletier*, 879 N.E.2d at 130, where the court, although entertaining serious doubts about whether *Crawford* exempts testimonial, nonassertive conduct, nonetheless found that such conduct did not require confrontation when offered "to set [] the context for the police investigation." See also *People v. Salido*, No. B186643, 2007 WL 2325810, at \*6 (Cal. Ct. App. Aug. 16, 2007) (accomplice's false alibi for the defendant that linked the defendant to the accomplice was admissible when offered to explain why officers contacted defendant).

157. The usual limiting instruction is inapt when applied to nonassertive conduct since the declarant's beliefs for which it is offered are unintentionally revealed rather than intentionally asserted. For example, the instruction does not convey that the jury is prohibited from using a declarant's statement falsely exculpating the defendant as evidence that the declarant has knowledge of the defendant's guilt. See *supra* notes 37–42 and accompanying text. Courts have even erroneously held a limiting instruction unnecessary when a declarant's false exculpatory statement is offered to show the declarant's knowledge of the defendant's guilt. *United States v. Trala*, 86 F.3d 536, 544–45 (3d. Cir. 2004) (cautioning the jury against considering the truthfulness of the declarant's statements was unnecessary since they were obviously false and admitted to establish that the declarant was lying to the police about the source of the money in the defendant's car). Similarly, the instruction does not convey that the jury is prohibited from using the declarant's act of looking for the defendant at a place where drugs are sold as proof that the defendant frequents that location. See *supra* notes 80–85 and accompanying text. A coherent instruction would say that the jury is prohibited from using the declarant's statements as proof of anything that the declarant believes. The proper instruction makes clear that the evidence has no permissible purpose whatsoever unless the defendant has questioned the propriety of the investigation.

consider them for their impermissible hearsay purpose in violation of the defendants' confrontation rights. Misled by the court's limiting instruction into believing that there *is* a permissible use for the evidence, the jury uses it improperly.

The scenario described above is entirely avoidable if courts recognize that, unless the defense raises one, no issue exists as to why the police may have acted as they did or why the investigation developed as it did to which the testimonial hearsay is relevant if used for its non-hearsay inference. Judge Easterbrook crystallized the essential problem with the reasoning of courts who consider such testimony relevant despite the defense by noting that "every time a person says to the police 'X committed the crime' the statement (including all corroborating details) would be admissible to show why the police investigated X."<sup>158</sup> Sanctioning that rubric "would eviscerate the constitutional right to confront and cross-examine one's accusers."<sup>159</sup> Out-of-court statements admitted for their effect on the police to explain why they acted as they did are relevant only when the defendant argues that, for example, the officers were "officious intermeddlers staking out [the defendant] for nefarious purposes."<sup>160</sup> When such an argument is not made, however, that type of testimony is not relevant.<sup>161</sup> Meanwhile, other courts have also recognized that "[a]llowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the Sixth Amendment and the hearsay rule."<sup>162</sup>

Nonetheless, many courts continue to hold that there is no error in routinely admitting such evidence as long as juries are told not to consider the evidence for its truth. For example, in *Davis v. State*,<sup>163</sup> the Texas Court of Appeals held that permitting a detective to testify to the substance of anonymous tips inculpatory of the defendant was not error.<sup>164</sup> The court found that the statements had not been admitted for their truth, but rather to put the investigation into "context."<sup>165</sup> The court expressly rejected the defendant's proposal that the court "limit testimony for this purpose to situations where the defendant challenges the investigation as being motivated by vendetta or

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158. *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1020; *see also* *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004); *Sanabria v. State*, 974 A.2d 107, 118–19 (Del. 2009); *State v. Johnson*, No. 34539-1-II, 2007 WL 1417312, at \*4 (Wash. App. Div. May 15, 2007).

163. 169 S.W.3d 673 (Tex. Ct. App. 2005).

164. *Id.* at 676.

165. *Id.*

grudge.”<sup>166</sup> Tellingly, the court provided no explanation as to how this context testimony is otherwise relevant. Instead, it simply denied that there could be error because statements not offered for their truth are not hearsay.

Instructions about limited admissibility cannot be expected to prevent evidence’s impermissible use when, contrary to the court’s instruction, the proof has no permissible use at all. Indeed, many courts’ persistent admission of context evidence to explain the course of the investigation by police, despite the defendant doing nothing to dispute the conduct of the investigation, makes the point. How can we expect the jury to disregard the proof entirely when courts themselves fail to appreciate its irrelevance in that circumstance?

The persistent, though erroneous, assumption of relevancy seemingly rests on two possibilities. First, one can see the evidence as relevant because a criminal prosecution reflects a judgment by police or prosecutors that the defendant is guilty. Consequently, every investigative step taken or foregone, despite whether it results in admissible evidence, is relevant to evaluating whether the prosecution’s conclusion is justified. Second, the evidence’s relevance can be defended as a preemptive strike against a misleading inference that might flow from the prohibition on the prosecution, in the first instance, from “provid[ing] some explanation for [investigators’] presence and conduct.”<sup>167</sup> Presumably, the feared inference is that mentioned by Judge Easterbrook—the police were acting without justification—a conclusion that the jury may draw if prosecutors cannot prove why the police behaved as they did.

The first conception is so obviously improper that one will not find courts explicitly defending it. The law is clear that juries are to find facts by evaluating for themselves the strength of the evidence that is admitted at trial and are not to abdicate their responsibility by evaluating the reasonableness of the conclusion of guilt implicit in the prosecution’s bringing the case to trial.

Whatever the limits of *Daubert v. Merrell Dow Pharmaceuticals*<sup>168</sup> may prove to be, only a sea change in Anglo-American evidence law would permit

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166. *Id.*

167. See *United States v. Levine*, 378 F. Supp. 2d 872, 875 (E.D. Ark. 2005).

168. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), its progeny, and the amended Federal Rule 702 that it spawned, govern the admissibility of expert testimony. In *United States v. Johnson*, the court held that when experts provide opinion testimony that relies on hearsay, the prosecution should be prevented from eliciting the contents of the statements, even though they may bear on the reasonableness of the expert’s conclusion. 587 F.3d 625, 635 (4th Cir. 2009). It noted how important it is “that district courts recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay and exercise their discretion in a manner to avoid such abuses.” *Id.* The *Johnson* court’s attitude toward evidence admissible only to show the basis of an expert’s opinion bears contrast with the courts’ attitude toward evidence admissible only to show background discussed in this Article. In *Johnson*, the court protected the defendant’s

investigators to give expert testimony containing their opinion of the defendant's guilt; such an approach would render the entire investigation admissible to allow the jury to evaluate the basis for the investigators' conclusions. Moreover, we ask jurors in criminal cases to evaluate the strength of evidence admitted at trial, and not to decide whether the prosecution acted with sufficient justification.<sup>169</sup> The latter question is one for the court to decide under the rules of criminal procedure. Standard jury instructions telling jurors not to consider law enforcement techniques are intended to dissuade them from deciding whether they think that the prosecution, given its conduct, *deserves a conviction*, rather than whether the proof, however produced, *eliminates a reasonable doubt that the defendant committed the crime*.<sup>170</sup> To put the point more prosaically, our fundamental conception of evidence relevant at trial still rests on a firm distinction between the first and second half of an episode of the original *Law and Order* television series. Each episode is divided into the story of the police

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confrontation right from exposure to testimonial hearsay statements despite their relevance as a foundation for the expert's opinion and the possibility of a limiting instruction. In many cases discussed in this Article, the courts routinely exposed the defendants' confrontation right to testimonial hearsay statements, despite their inadmissibility as proof of the crimes charged, by claiming that a limiting instruction was sufficient.

169. There are rare exceptions. *Watson v. State* provides a good example. 8 So. 3d 901 (Miss. Ct. App. 2008). In *Watson*, the defendant was charged with feloniously fleeing a law enforcement officer in a motor vehicle pursuant to Mississippi Code Annotated § 97-9-72(2) (2006). One of the elements of that crime requires the pursuing officer to have "reasonable suspicion to believe the driver in question has committed a crime." MISS. CODE ANN. § 97-9-72-(1); *see also Watson*, 8 So. 3d at 904. Thus, it was necessary that the *Watson* court admit an out-of-court statement made to the officer accusing the defendant of shoplifting to explain his reason for giving pursuit. The court instructed the jury to use the statement to explain the officer's conduct, but not to use it for the truth of the matter asserted. *Watson*, 8 So. 3d at 903. The rare exception for when a specific statute makes the basis for investigators' actions an element of the crime proves the rule that an out-of-court statement providing such a basis is not otherwise relevant.

170. *See* FED. R. EVID. 104(a); *United States v. Torres-Castro*, 374 F. Supp. 2d 994, 1008 (2005); *see also Jackson v. Denno*, 378 U.S. 368, 387 (1964) (admissibility of evidence is a question only for the judge, while the credibility or weight of evidence is for the jury; since the voluntariness of a confession bears on both, unlike the issues of probable cause, consent to search, and the issuance of *Miranda* warnings, the voluntariness of a confession can be litigated before the jury after the judge finds it voluntary); *United States v. Arbolaez*, 450 F.3d 1283, 1292 (11th Cir. 2006) (noting that a "defendant alleging a *Miranda* violation is entitled to a determination outside the presence of the jury"); *United States v. Collins*, 439 F.2d 610, 614 n.11 (D.C. Cir. 1971) ("[W]hether a particular set of facts gives rise to a probable cause basis for the belief that a suspect has performed criminal acts is a question of law to be determined by the court outside the presence of the jury."); *Simmons v. United States*, 206 F.2d 427, 429 (D.C. Cir. 1953) (noting that the "issue of probable cause for appellant's arrest [is] a matter solely for determination by the court"). Jury instructions range from a general "law enforcement techniques are not your concern" to instructions that specific techniques such as searches and wiretaps are lawful if the defendant's rights were not violated, that there is no alleged violation before the jury, and that the jury's views about the use of such techniques are not to enter into its deliberations. 4 LEONARD SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL §§ 4.01, 5.08 (2005) (Instructions 4-4 and 5-23).

investigation (which considers whether the officers' suspicions about various suspects' guilt is justified, and whether their investigation is proper) and the story of the trial (which depicts the lawyers' presentation of the admissible evidence). We ask the jury to judge the evidence, not the investigation. If the police bungled their way into proof sufficient to show guilt beyond a reasonable doubt, the jury should convict no less than if a flawless investigation uncovered the same evidence. Conversely, if the evidence falls short of proof beyond a reasonable doubt, the jury should acquit regardless of whether the case was assembled, and implicitly endorsed, by Sherlock Holmes or Inspector Clousseau.

The second assumption, and one that many courts have explicitly defended, is that it is necessary to deviate from the investigation/trial distinction at the outset whenever exclusion of otherwise irrelevant evidence about the investigation would create a misleading impression that the police acted without justification. This position hypothesizes that despite general instructions to focus exclusively on proof of the elements of the crime, juries will nonetheless concentrate on whether investigative steps were justified, even if defendants do not raise that issue. Consequently, anything that rebuts a *potential* attack on the investigation's integrity is relevant, regardless of whether the defendant chooses to launch that attack. But the argument proves far too much.

First, by admitting evidence relevant only to the investigation's integrity, courts undermine their attempt to focus the jury's attention on the quality of the proof. When courts admit proof relevant only to the investigation's appropriateness, they turn the prediction that juries will consider the justification for investigative steps rather than the quality of the proof, despite instruction to the contrary, into a self-fulfilling prophecy. Also, by admitting the evidence before the defendant raises an issue about the investigation's propriety, courts encourage defendants concerned about the evidence's accrediting effect to contest the investigators' conduct, even if they had not otherwise planned to do so, directing the jury's attention that much further afield. Most importantly, the courts eliminate any opportunity for the defense to prevent the jury from hearing evidence, which, *if used at all*, violates the defendant's confrontation right.<sup>171</sup> Ironically, courts justify this result by hypothesizing that juries will *not* properly focus their attention on the trial

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171. If used directly for the truth of the facts it asserts or indirectly for the truth to show a firm foundation for the prosecution's belief in the defendant's guilt, the evidence violates the defendant's confrontation rights. *Cf. People v. Goldstein*, 843 N.E.2d 727, 732–33 (N.Y. 2005) (experts' reliance on testimonial hearsay statements for their truth triggered the defendant's confrontation right because evaluating the expert's opinion required "accepting as a premise . . . that the statements were true," so "[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context").

*despite* instructions to do so, while inconsistently considering a “not for the truth” instruction sufficient to cure the Confrontation Clause problem of the courts’ own making. In effect, courts taking this approach allow the prosecution to “fight fire with fire” before the defendant has struck a match. In so doing, the jury is needlessly exposed to evidence whose use is constitutional error when there is no issue about the investigators’ conduct. There is no justification for this result.

Perhaps the reason why so many courts routinely allow explanatory evidence to prevent juries from possibly inferring government misconduct, even when doing so violates defendants’ confrontation right, is that they have become so accustomed to defense counsel making the argument. It is remarkable how often the defense *does* raise, whether intentionally or not, a question about the propriety of the government’s investigation by pursuing themes such as rush to judgment, sloppy or overreaching investigation, or round up the usual suspect(s). Nonetheless, the frequency with which defendants may open the door to the proof by suggesting government misconduct does not justify admission of the evidence in anticipation. At most, it illustrates how often defendants will choose to suggest impropriety when a witness begins her testimony with, say, a statement that she arrived at the scene to effect an arrest without her first testifying to the radio call that got her there, or that she organized a lineup containing the defendant without her first testifying to the tip that focused suspicion on him. That defendants may often choose a route that justifies admission of the radio call or the tip for its effect on the officer and not for the truth, however, does not justify eliminating the defendant’s option to prevent admission of the evidence in the first place by not questioning the propriety of the arrest or lineup. Courts should welcome that alternative as a first-best solution, fully protective of the defendant’s confrontation right and most likely to concentrate the jury’s attention on what should be its primary focus—the evidence stemming from the arrest along with the identification at the lineup. Indeed, by routinely admitting the evidence and justifying its admission by a limiting instruction, courts have virtually invited defendants to exacerbate the jury’s misdirection toward the question of whether the prosecution’s conduct, rather than the proof, merits a conviction.

Allowing prosecutors to enter evidence explaining why the police conducted the investigation as they did, courts unnecessarily encourage the jury to abandon its proper role of judging the strength of the evidence in favor of evaluating the investigation’s merits and the investigators’ beliefs. When the defense makes an issue of investigators acting without sufficient basis, the confusion of the jury’s role is unavoidable; the prosecution must be allowed to rebut the allegation by showing the basis upon which the investigators acted. In this situation, the most we can expect of the court is an instruction trying to

refocus the jury's attention on the evidence rather than on the investigators' behavior or beliefs.

There is no justification, however, for needlessly confusing those roles when the defense does not advance such a claim. It is already a difficult enough task to keep the jury focused on the evidence rather than on the investigation and the beliefs of the investigators. As subsequent versions of *Law and Order* show, the investigation is usually far more compelling than the trial. *Law and Order: Special Victims Unit* and *Law and Order: Criminal Intent* became long-running hits by spending much more time on the investigation than on the trial, while *Law and Order: Trial by Jury* reversed that emphasis and lasted only one season.<sup>172</sup>

To avoid the constitutional violation that is the inevitable consequence of needlessly exposing the jury to evidence whose only relevance entails a hearsay inference violating the defendant's confrontation right, courts should hold that it is error to admit testimonial hearsay for its effect on investigators unless the defendant has made an issue of their conduct.<sup>173</sup> Few decided cases require that the defendant raise an issue about the investigation before admitting such evidence. In *State v. Munoz*, for example, the court permitted the prosecution to prove that an anonymous caller identified the defendant as someone to "look at" in connection with a recently attempted burglary, gave his name, age, and physical description, and while speaking with a Hispanic accent, identified him as coming from her country.<sup>174</sup> Before trial, the defendant moved to exclude the statements of the anonymous female caller, who was not going to testify at trial, on the grounds that introducing her

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172. See TV.com, *Law & Order: Special Victims Unit* on TV.com, <http://www.tv.com/law-and-order-special-victims-unit/show/334/summary.html> (last visited May 19, 2010); TV.com, *Law & Order: Criminal Intent* on TV.com, <http://www.tv.com/law-and-order-criminal-intent/show/1381/summary.html> (last visited May 19, 2010); TV.com, *Law & Order: Trial by Jury* on TV.com, <http://www.tv.com/law-and-order-trial-by-jury/show/25938/summary.html> (last visited May 19, 2010).

173. *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004), endorsed this view: "If a jury would not otherwise understand why an investigation targeted a particular defendant, the testimony could dispel an accusation that the officers were officious intermeddlers staking out Silva for nefarious purposes. *No such argument was made in this case*, however, and no other explanation was given why the testimony would be relevant." *Id.* (emphasis added). Unfortunately, however, *Silva* stopped short of establishing a rule that the evidence's admission in that circumstance violates the Confrontation Clause, relying instead on an *ad hoc* determination that "too much" hearsay was admitted, and that the trial court failed to give an appropriate limiting instruction or stop the prosecutor from making improper use of the proof. *Id.* at 1020–21. While these factors may influence whether the constitutional error was harmless, they should not affect whether admission of the evidence was error in the first instance. See also *United States v. Cromer*, 389 F.3d 662, 677 (6th Cir. 2004) (inconsistently saying that evidence is helpful to the jury only on the issue of guilt where there is no dispute about the investigation's subjects or reasons for their investigation, and that any link between out-of-court statements and investigators' actions renders the statements relevant).

174. 949 A.2d 155, 157 (N.H. 2008).

statements would violate his confrontation right.<sup>175</sup> The prosecution argued that they were admissible to show why the police obtained the defendant's fingerprint card from the United States Immigration and Naturalization Service (INS).<sup>176</sup> The defendant's fingerprint matched one taken from the balcony from which the burglar unsuccessfully attempted entry.<sup>177</sup> The trial court denied the defendant's motion, finding that since the statements were "being offered to show the state of mind of the police," rather than for their truth, they were admissible to show why the police contacted the INS and investigated the defendant.<sup>178</sup> On appeal, the New Hampshire Supreme Court found that admission of the testimony was not error because it "demonstrate[d] the reasonableness of the police action in contacting the INS."<sup>179</sup> Thus, the *Munoz* court found it proper to admit the evidence even before the defense had a chance to question the investigation and despite whether it ever suggested that the police had acted unreasonably.<sup>180</sup>

Relying on a limiting instruction in that circumstance is unnecessary, ineffective, and ultimately unconstitutional. When there is no permissible non-hearsay purpose for the proof, as when there is no allegation of impropriety to rebut, the improper use of the evidence to buttress the prosecution's case is unavoidable. In the prosecutor's opening statement in *Munoz*, for example, he "used the tip to corroborate the description given by [the testifying eyewitness]."<sup>181</sup> How is the jury, then, to understand the evidence of the anonymous tip? The appellate court did not consider whether that use of the tip entailed a hearsay use of the proof since the defense counsel did not specifically object to the opening statement after losing his motion *in limine* to keep out the description.<sup>182</sup> But one can hardly blame defense counsel.

According to the *Munoz* court's ruling, *anything* that might bear on the reasonableness of the officers' actions—a question it specifically analogized to a court's determination of probable cause<sup>183</sup>—was admissible. The

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175. *Id.* at 159.

176. *Id.* at 160.

177. *Id.* at 157.

178. *Id.* at 160.

179. *Id.* at 161.

180. Indeed, the trial court noted that it was routine to "put in any kind of anonymous tip that's called in," as long as it was "offered to show the state of mind of police" bearing on the basis for their actions. *Munoz*, 949 A.2d at 160 (internal quotation marks omitted); *see also* *State v. Barney*, 185 P.3d 277, 280–81 (Kan. Ct. App. 2007) (deeming the offending proof admissible before trial in a hearing on a motion *in limine*); *United States v. Burchard*, No. 5:06-Cr-9, 2007 WL 1894257 (W.D. Ky. Jun. 29, 2007) (same).

181. *Id.* at 161.

182. *Id.*

183. *Id.*

matching descriptions gave the police reason to credit the tip and therefore obtain the defendant's fingerprint card. How was defense counsel supposed to divine that the court would suddenly accept that the jury would misuse the tip as corroboration supporting the testifying eyewitness's identification rather than as support for the investigators' suspicion that the defendant had committed the crime? And why would the appellate court so anxiously avoid the question of whether the prosecutor's comment amounted to improper use of the tip unless it were plainly apparent that it is unreasonable to expect jurors to distinguish information on which they can rely to decide guilt from information on which they can rely only to evaluate the investigation, after *exposing them to the latter without reason*? After all, if the prosecutor's comment went too far, did that mean that the jury was *not* supposed to note that the descriptions matched, or on its own realize that it was supposed to use the corroboration only as proof of an issue that it was *not* asked to decide (the reasonableness of the investigation), while ignoring the corroboration's obvious value as proof of an issue it *was* asked to decide (the identity of the erstwhile burglar)?

When the consequence of the evidence's use is a constitutional violation because the proof is *testimonial* hearsay, the Confrontation Clause prohibits its admission for its effect on investigators merely because jurors might consider the propriety of the investigators' actions, even when explicitly instructed that the investigators' actions are not their concern. The alternative allows routine evasion of the Confrontation Clause, while its protections evaporate in a nod and wink among prosecutors. Unfortunately, even those courts that are sensitive to this possibility have not clearly stated that admission of the proof before defendants question an investigation's propriety is a constitutional violation. Instead, they have often sanctioned the lesser alternative of "sanitizing" the content of the statements, an expedient which guarantees continued abuse of the "not for the truth" path to admission of testimonial hearsay. For example, some courts have allowed investigators to testify only to having "acted 'upon information received' or words to that effect," reasoning that the need for evidence explaining actions of the police is slight before the defendant challenges them, while the potential for misuse is great.<sup>184</sup> Nonetheless, such an approach still fails to explain how the evidence is relevant at all, why a jury focusing on the investigation despite contrary instruction will discount proof that the police have information besides that admitted at trial, what amounts to proper sanitation, and whether such sanitation can be accomplished.

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184. *United States v. Levine*, 378 F. Supp. 2d 872, 875-76 (E.D. Ark. 2005) (citing 2 MCCORMICK, *supra* note 26, § 249, at 103).

*Munoz*, again, serves as an example. Once the trial court indicated that it would allow the anonymous call to explain “why the investigation took the turn that it did,” the defendant suggested allowing the officer to testify merely that the investigation had led police to suspect the defendant.<sup>185</sup> The trial court rejected the suggestion, stating that it would unfairly prejudice the defendant by suggesting that the police were aware of his past criminal activity. It then allowed the prosecution, as a less prejudicial alternative, to prove the caller’s suggestion that the police “look at” the defendant in connection with the specific burglary for which he was on trial.<sup>186</sup> The trial court was clearly correct to envision that any reference to extrajudicial information implicating the defendant in possession of the police, even if unspecified, would invariably be used for its truth since nobody questioned the propriety of the investigation. But admitting specific information implicating the defendant in the crime for which he was on trial hardly improved matters.

The trial court seemed more concerned with the prospect that the jury would use the proof as evidence of other crimes than it was with the prospect that the jury would violate the defendant’s Sixth Amendment right by using the information *either* as proof that the defendant had engaged in other crimes *or* as proof of the crime for which the defendant was on trial. The court was correct to think that even a general reference to extrajudicial information obtained by the police justifying the investigation would prejudice the defendant by inviting the jury to perceive that information as accurately implicating the defendant in something, if not this particular crime. But the same argument was at least as powerful for the prejudice resulting from admission of the specific information; if the jury would ignore a limiting instruction to find proof of other crimes, why would it not ignore a limiting instruction to find proof of this one? How could evidence of no relevance possibly justify a constitutional violation? Remarkably, all we are told is that courts “put in any kind of anonymous tip that’s called in” if “it’s being offered to show the state of mind of the police,”<sup>187</sup> and that by premising his objection

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185. *Munoz*, 949 A.2d at 160.

186. *Id.*

187. *Id.* (internal quotation marks omitted). Similarly flawed reasoning has caused courts to decide whether testimonial hearsay statements offered to explain investigators’ behavior violate the Confrontation Clause by considering how prejudicial they are rather than whether they have any relevance for a non-hearsay purpose. In *State v. Barney*, the court held that a limit to the admissibility of hearsay in this context requires exclusion when the hearsay “tend[s] to identify the accused and establish his guilt.” 185 P.3d 277, 281–82 (Kan. Ct. App. 2007). The court nonetheless allowed a description of Barney’s physical attributes, clothing, and activities of peeping into windows, approaching doors, and ringing doorbells, finding that “the testimony did not identify a particular individual who had committed a particular crime.” *Id.* at 282. The analysis confuses the question of whether admitting this evidence before the defendant questioned the officers’ actions

only on the Confrontation Clause, defense counsel somehow waived any claim that the evidence's nonexistent probative value was outweighed by its prejudicial effect.<sup>188</sup>

The *Munoz* court avoided addressing how the probative value of the proof justified its prejudice, but others have attempted to address the problem by striking a proper balance. Those courts have had no success in formulating coherent protection for the defendant's confrontation rights because they erroneously concede that explanatory evidence is relevant in the absence of an express or implied challenge to the propriety of the investigators' conduct. They typically begin by exploring the possibility of excising the content of the hearsay statement in favor of having the officer testify merely that he had "received information" before taking subsequent action.<sup>189</sup> But even that simple expedient is problematic. One court prefers it because that court

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violated the Confrontation Clause with whether the violation was harmless error. The Confrontation Clause does not only give a defendant the right to confront testimony that a court thinks is particularly damning any more than it guarantees only the right to confront testimony that a court thinks is unreliable. Puzzlingly, the *Barney* court, after noting that it must "first consider whether the evidence is relevant," never discussed why the officers' reason for investigating Barney was relevant. *Id.* at 281.

188. See also *United States v. Brown*, 560 F.3d 754, 764–65 (8th Cir. 2009). The court there held that a Confrontation Clause objection to evidence that the victim identified the defendants as his assailants admitted to explain why an officer searched a database for the defendants' names was insufficient to preserve a claim on appeal that the purported non-hearsay reason for admission of this evidence was a subterfuge to get the victim's statement about the defendants in front of the jury. The court held that issue was waived because counsel "did not argue at trial that the prejudicial effect of the evidence outweighed its non-hearsay value." *Id.* The holding presupposes that non-hearsay use of the evidence made a fact of consequence more likely than it would be without the evidence, *i.e.*, was relevant, a position that the court assumed, but never articulated. The defendant never alleged misconduct in the way the police got to the defendants. Since the court would or could not articulate the evidence's relevance, it is a hard rule that says that defense counsel, on pain of waiving his Confrontation Clause objection, has to play along and pretend it is relevant to argue that its probative value is nonetheless outweighed by prejudice.

189. *United States v. Cabrera-Rivera*, 583 F.3d 26, 35 (1st Cir. 2009) ("[T]he government fails to show why the details [of the accomplice's] confession were necessary to explain the investigative source . . . . [T]he government could simply have had the officers testify that they discovered the evidence based on 'information received.'"); *United States v. Maher*, 454 F.3d 13, 23 (1st Cir. 2006) (officer should have been required to testify that he "acted on information received" rather than report that he had been told by [the declarant] that the defendant supplied [the declarant] with drugs); *United States v. Cromer*, 389 F.3d 662, 677 (6th Cir. 2004) ("[Officer] O'Brien had merely stated that she 'had information' about the Buchanan residence that led her to begin an investigation. O'Brien thus alluded, in the vaguest possible terms, to the statements made to her by a [criminal informant]"); *Sanabria v. State*, 974 A.2d 107, 112–17 (Del. 2009) ("The trial judge [abused its discretion because it] never considered whether that background explanation could have been provided by simply referencing that Officer Garcia was acting 'on information received.'"); *State v. Johnson*, No. 34539-1-II, 2007 WL 1417312, at \*5 (Wash. App. Div. May 15, 2007) ("It might have been sufficient to elicit that the deputies acted on a tip, or that they received information consistent with Johnson, without setting forth the details that [the declarant] spoke with a prostitute and received a description of a pimp matching Johnson.").

believes testimony that does “not itself quote or paraphrase the declarant’s statements” even if “the jury would necessarily infer that the declarant had said X” does not violate the Confrontation Clause.<sup>190</sup> Other courts concede that such testimony can violate the Clause, but believe it less likely to tempt the jury to rely on the unfronted hearsay.<sup>191</sup>

The first argument simply ignores established doctrine holding that hearsay proved indirectly is no less objectionable than hearsay proved directly.<sup>192</sup> The second argument falters because the assumption that vague references to extrajudicial information are less prejudicial than specific information is doubtful at best. First, as the *Munoz* court realized, vague references to “investigative information” may move the jury to believe that the police has evidence of “other crimes.”<sup>193</sup> Being told that it is hearing evidence of what the police knew so it can understand why the investigation proceeded as it did, the jury’s most natural reaction to being denied the specifics may be to believe that they concern wrongdoing not directly related to the current case. And even courts that prefer vague references concede that investigative background evidence suggesting other crimes is particularly problematic.<sup>194</sup>

Moreover, a concern that jurors will infer misconduct from unexplained official actions is hardly dispelled by testimony from officials that they acted on unspecified information. Jurors satisfied that easily can undoubtedly be trusted to follow the instructions to focus on the proof of the crimes’ commission, not the legality of the investigators’ conduct, eliminating the need for the proof at all. In fact, drawing jurors’ attention to the propriety of the investigators’ conduct by allowing the prosecution to establish that it had unspecified information can create the need for more specific proof to dispel doubts about whether the information withheld was sufficient to justify the subsequent action. In one case, for example, the court first suggested allowing police officers to testify that when they arrested the defendant, they were acting “on a tip” and then, apparently on second thought, suggested allowing them to say “that they received information consistent with [the

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190. *Maher*, 454 F.3d at 21.

191. *Id.* at 23; *Sanabria*, 974 A.2d at 114–15; *Cromer*, 389 F.3d at 677.

192. *United States v. Figueroa*, 750 F.2d 232, 238 (2d Cir. 1984); *United States v. Check*, 582 F.2d 668 (2d Cir. 1978); *see also Cromer*, 389 F.3d at 677 (testimony that “explicitly, albeit not directly, informed the jury that someone had implicated [the defendant] in illegal activities” implicates the Confrontation Clause; the officer testified that the defendant was a subject of the investigation); *cf. Johnson*, 2007 WL 1417312, at \*4 (although the officer testified to information received from another officer, “it was clear” that the second officer relayed the declarant’s description of the defendant).

193. *State v. Munoz*, 949 A.2d 155, 160 (N.H. 2008).

194. *Sanabria*, 974 A.2d at 112.

defendant].”<sup>195</sup> But if the reason why the police officers acted as they did is *really* an issue, how can one stop short of allowing them to tell the whole truth—that an officer received a description of the defendant and his car from a prostitute who said he was her pimp? And if it is not enough of an issue for the officer to fully report his reason for stopping the defendant in his car, why is it admissible at all? Meanwhile, holding the specific information admissible is, of course, no improvement on the vague reference to unspecified wrongdoing. The same courts that hold references to other crimes are particularly prejudicial find similarly damaging statements “relat[ing] to an element of the charged offense.”<sup>196</sup>

Thus, even those courts that have endorsed the “information received” alternative have required it only when more specific information is “not necessary” to explain the investigator’s conduct, by which they often seem to mean that the specific information has no logical connection at all to investigators’ subsequent conduct. For example, in one case, the court allowed proof that the officers had information about drug use on the premises they searched, but not evidence that they were looking for the defendant, because it did not affect their subsequent conduct by, for example, explaining his arrest or the search of his room.<sup>197</sup> In another, the court found error where evidence purporting to explain an officer’s actions was unknown to him when he acted.<sup>198</sup> What purports to be a balancing test for excluding insufficiently probative or unduly prejudicial hearsay often turns out to be merely a way of excluding the details of statements that are not even relevant to explain the investigators’ conduct.<sup>199</sup> In many cases, the only consequence will be for prosecutors to be more careful about selecting the officer whose actions could have been affected by knowledge of the hearsay declarations—for example, the arresting officer who can act upon all the information generated by the investigation up to that point.

Meanwhile, the courts weighing evidence that has some logical relevance as explanatory proof unwittingly demonstrate that the Confrontation Clause problem cannot be balanced away. One court, for example, purported to find the evidence inadmissible “because it provided the primary evidence relevant”

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195. *Johnson*, 2007 WL 1417312, at \*5.

196. *Sanabria*, 974 A.2d at 112.

197. *Cromer*, 389 F.3d at 677.

198. *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004).

199. *See, e.g.*, *United States v. Cabrera-Rivera*, 583 F.3d 26, 34–35 (1st Cir. 2009). In that case, the court found (1) that admission of context evidence violated the Confrontation Clause because detailed testimony about the amounts that accomplices admitted to receiving in the robbery “bore no relevance” to the defendant’s investigation and (2) that one accomplice’s confession provided no investigative leads. *Id.*

to an element of the charged crime.<sup>200</sup> But the evidence violated the Confrontation Clause if the jury used it for its truth, despite how critical; the latter circumstance might affect whether its admission was harmless error or whether the court should have dismissed the charge for insufficient proof. Meanwhile, believing that more was required to explain the evidence's exclusion, the court fell back onto claiming that the jury likely misused the proof only because the prosecutor did so in his opening statement and closing argument.<sup>201</sup> But given the court's concession that the reason why the officers arrested the defendant was relevant, the line between using the declarant's statements to show why "the *deputies* conclude[d the defendant] was the pimp" and why the *jury* should so conclude was nonexistent.<sup>202</sup> Other cases purporting to analyze the evidence's prejudicial effect often reach a similar conclusion: there is insufficient basis to reverse admission of the evidence unless there is an additional error, such as omission of a limiting instruction or improper use of the evidence by the prosecutor.<sup>203</sup>

At the end of the day, the balancing test devolves into an ad hoc test focused more on the actions of the prosecutor and the trial judge than on the conceded impact on the defendant's confrontation right of evidence whose impermissible inference is the only one relevant to the jury's charge.<sup>204</sup> It gives the prosecution every reason to think that if they "do it right," they are entitled to get before the jury evidence that helped persuade investigators of the defendant's guilt, even though the jury is not allowed to rely on it for that purpose. However well-intentioned the balancing approach may be, it serves mostly to perpetuate the fiction that explanatory evidence is "surely relevant"<sup>205</sup> because it "arguably provides some assistance to the jury in understanding the background of the case."<sup>206</sup> Indeed, this fiction can assure

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200. *Sanabria*, 974 A.2d at 116; see also *Cromer*, 389 F.3d at 677 (evidence implicated the defendant in a way that went to the heart of the prosecution's case); *Cabriera-Rivera*, 583 F.3d at 35 (evidence was "the sole basis for the government's argument" that the defendant "went to hide" with the accomplice because "[t]hey wanted to have an alibi").

201. *State v. Johnson*, No. 34539-1-II, 2007 WL 1417312, at \*5 (Wash. App. Div. May 15, 2007).

202. The court said that "the prosecutor in this case clearly relied on the descriptions as proof that the person described was the pimp," though it described her comments as addressing what led the deputies to so conclude, not what should persuade the jury. *Id.*

203. *Sanabria*, 974 A.2d at 120 (evidence admitted without a limiting instruction); *United States v. Maher*, 454 F.3d 13, 23 (1st Cir. 2006) (spontaneous limiting instruction prevented admission of evidence from being plain error); *Silva*, 380 F.3d at 1020–21 (improper argument and no limiting instruction).

204. *Maher*, 454 F.3d at 23 (stating that the dividing line is between "true background to explain police conduct" and "an attempt to evade *Crawford*," and warning the prosecutor against "backdoor attempts to get statements by non-testifying confidential informants before the jury").

205. *Id.*

206. *United States v. Cromer*, 389 F.3d 662, 677 (6th Cir. 2004).

that the balancing approach, even as applied by a sympathetic court, can perpetuate the error that it purports to alleviate.

In *United States v. Hinson*,<sup>207</sup> for example, the court set out to prevent admission of out-of-court statements inadmissible for their truth as background or context evidence, unless they were “necessary to explain the government’s subsequent actions.”<sup>208</sup> It held that allowing a detective to testify that she investigated Hinson because she heard that he supplied another target with drugs was error. But the court’s reasoning unwittingly guaranteed that the practice of admitting such evidence will continue unabated.

The court began by making a fatal mistake that should be familiar by now. It conceived that the necessity of the explanatory proof is measured by its allowing “the government . . . to tell a coherent story *about its investigation*,” not a coherent story about the *defendant’s commission of the crime*.<sup>209</sup> Having decided to measure materiality by the evidence’s connection to the investigation’s progress rather than to the elements of the crime, the court was forced to conclude that out-of-court statements implicating the defendant will *typically* be admissible non-hearsay evidence to explain why he was investigated. It just so happened that the government in *Hinson* had *already* introduced another out-of-court statement accusing Hinson that made it “perfectly clear” why the police focused their investigation on him. Thus, that the detective also heard from *another* source that Hinson was a drug supplier was “completely unnecessary to explain the police’s subsequent actions.”<sup>210</sup>

As if by alchemy, the protective balancing test becomes a per se rule guaranteeing admission of “ample admissible evidence” of at least one out-of-court accusation to show why the police investigated the defendant, even if he never claims that he was improperly targeted. Before embarking on this analysis, the *Hinson* court observed, “Ascertaining the purpose evidence serves, while essential to a determination of whether it constitutes inadmissible hearsay or admissible background information, is not an easy task.”<sup>211</sup> The difficulty in this case, however, is simply the result of a self-inflicted wound created when the court, like so many others, confused the importance of the story of the investigation with the story of the defendant’s criminality as told through admissible evidence.

Absent the defendant’s claim that the police acted improperly, and considering that we do not ask jurors to decide whether they did, why is it relevant, much less necessary, to show why the police suspected the defendant

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207. 585 F.3d 1328 (10th Cir. 2009).

208. *Id.* at 1336.

209. *Id.* (emphasis added).

210. *Id.*

211. *Id.*

at a cost to the Sixth Amendment, a cost that courts generally acknowledge? If we look to the few courts that have addressed the question, we find this explanation:

The non-hearsay evidentiary function of testimony about a police radio call is to provide a “background” explanation for the testifying officer’s actions—that is, to explain what the officer was doing at the scene. The jury need not . . . be led to believe that officers responding to a report of criminal activity just “happened by.” Neither, however, may the other officers relate the contents of that report if the same contextual explanation could be adequately conveyed by the statement that the officer was responding to “information received.”<sup>212</sup>

But why is it any more misleading to ask the officer in the first instance to omit mentioning the radio call than to ask any witness to omit inadmissible evidence whose exclusion invariably interrupts the flow of events as they unfolded? In any event, what would be the harm if the jury did imagine that the police just “happened by?” Surely that would not adversely affect the jury’s deliberation in any way, much less justify violating the defendant’s confrontation rights. The only possible harm would be if the jury were to conclude that the prosecution engaged in misconduct sufficient to justify an acquittal despite finding proof beyond a reasonable doubt that the defendant committed the crime.

The likelihood of such an eventuality occurring *sub rosa*—that is, contrary to instruction and without the defendant arguing government misconduct and thus justifying admission of the explanatory evidence—is exceedingly remote. Consequently, allowing the jury to think that officers just happened upon the scene does nothing to mislead the jury with respect to issues before it. Apart from whether that remote possibility justifies risking evidentiary error, it surely does not justify unnecessarily admitting testimonial hearsay whose use violates the Confrontation Clause. Such hearsay should not be admitted at all until the defendant challenges the propriety of the investigation. Only then should it be admitted for a limited purpose, requiring courts to give a limiting instruction and also to consider whether other expedients, such as redaction, better satisfy the need to rebut the defendant’s claims without unduly infringing the defendant’s confrontation right.

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212. *United States v. Price*, 458 F.3d 202, 208 (3d Cir. 2006). Of course, if defense counsel seeks to exploit the omission of the radio call by saying something on cross-examination such as, “So you just happened by the scene and arrested my client for no reason,” he would open the door to evidence explaining how the officer came to be there.

Thus, admission of testimonial hearsay to justify investigators' actions should be a violation of the Confrontation Clause, unless the defendant first interjects the issue. Without such a clear constitutional rule, there will be no hope of preventing the supposed non-hearsay use of testimonial hearsay from undermining *Crawford*. That is not to say that every violation will amount to reversible error; some errors will undoubtedly be harmless. But without the rule, even well-meaning expedients only serve to perpetuate a practice that assures that the Sixth Amendment will be honored in the breach.

## VI. CONCLUSION

*Crawford's* historical analysis of the Confrontation Clause requires that testimonial hearsay inadmissible at the Founding be inadmissible today without confrontation. Hearsay, as defined by the common law during the Founding era, did not exclude nonassertive conduct as Federal Rule 801 excludes it today. Consequently, although defined as non-hearsay by the Federal Rules, testimonial, nonassertive conduct is inadmissible without confrontation. To satisfy this requirement with minimal disruption, evidence rules should redefine hearsay according to the declarant-centered definition that includes *all* out-of-court statements whose probative value implicates the declarant's credibility. Changing the statutory rule will familiarize courts and counsel with the definition of hearsay that the Constitution requires them to apply when prosecutors offer out-of-court, testimonial statements against criminal defendants. Different jurisdictions can then choose whether to adopt a hearsay exception for nonassertive conduct, which will apply to all hearsay besides testimonial hearsay offered against criminal defendants.

To make the expanded confrontation right meaningful for testimonial, nonassertive conduct and other testimonial hearsay, courts also need to establish a constitutional rule holding that prosecutors cannot offer testimonial hearsay for the non-hearsay purpose of explaining or justifying the actions of investigators, unless the defendant questions the propriety of the investigation. Courts currently allow prosecutors to exploit that rubric by routinely admitting testimonial hearsay to explain actions that the defendant has not questioned. By admitting the proof, courts have sanctioned an easy end run around the Confrontation Clause that a "not for the truth of the matter asserted" limiting instruction does not block. Courts that admit testimonial hearsay, supposedly to justify investigatory steps about whose propriety there is no contest, invite juries to misuse the evidence to buttress the prosecution's case. Having been told that there is a permissible use for the proof, juries are certain to accept the judge's unwitting invitation to violate the Confrontation Clause by confusing the significance of evidence available to investigators and admissible at trial on the issue of the defendant's guilt.

The common law's definition of hearsay includes nonassertive conduct and prohibits the use of testimonial hearsay to show its effect on investigators,

unless it is needed to rebut an express or implied charge of investigative impropriety. Without a firm appreciation for the common law's definition of hearsay, which includes nonassertive conduct, and for the true use of testimonial hearsay for its effect on investigators, which prohibits its use entirely unless to rebut a charge of investigative impropriety, *Crawford's* mandate will remain unfulfilled.