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McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers

Roger C. Park*

Few modern one volume treatises are as widely used or as influential as McCormick's *Handbook of the Law of Evidence*.1 The book has been employed by teachers as a casebook substitute in law school evidence courses,2 used by attorneys in the practice of law, and cited extensively by the Advisory Committee on the Federal Rules of Evidence.3 *McCormick* deserves the popularity that it has achieved as a teaching tool and a reference work. On most topics, the book's explanation of evidence doctrine is clear and illuminating. Nonetheless, the sections on hearsay are of mixed quality. Although the book's treatment of exceptions to the hearsay rule is usually helpful,

* Professor of Law, University of Minnesota. I wish to thank my colleague Donald G. Marshall for his helpful comments on earlier versions of this Article, while exonerating him of responsibility for its content.
3. The Advisory Committee's Notes to the Federal Rules of Evidence include frequent references to the first edition of the treatise. See, e.g., Advisory Comm. Note, Fed. R. Evid. 801(c). For the most part, Dean McCormick's original treatment of the concept of hearsay was left untouched by the revisors, whose principal contribution was updating the footnotes by adding cases decided after 1954. Compare C. McCormick, *Handbook of the Law of Evidence* §§ 223-229 (1st ed. 1954) [hereinafter cited as First Edition] with McCormick, supra note 1, §§ 244-250. The only change of importance was the one described in text accompanying notes 76-78 infra. Minor changes are described in notes 8, 47, 68 & 116 infra.

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its discussion of the distinction between hearsay and nonhearsay is flawed; often, it reflects the perplexities of hearsay caselaw without clarifying them.

This Article discusses the theoretical difficulties with McCormick's treatment of the concept of hearsay and suggests alternative approaches. Part I analyzes the book's definition of hearsay and criticizes its assertion that certain classes of utterances are nonhearsay under that definition. Part I also discusses the use of subsidiary concepts such as "circumstantial evidence" and "verbal acts" as a way of classifying these utterances. Part II presents teaching suggestions for the many law teachers who use McCormick as the principal text for their evidence courses.

I.

Definitions of hearsay are commonly either assertion-oriented or declarant-oriented. An assertion-oriented definition focuses on whether an out-of-court assertion will be used to prove the truth of what it asserts,4 while a declarant-oriented definition focuses on whether the use of the utterance will require reliance on the credibility of the out-of-court declarant.5

The exposition of the concept of hearsay in McCormick draws on both of these traditions. The book defines hearsay as follows:

Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.6

5. For examples of declarant-oriented definitions, see 2 Jones on Evidence § 8:1, at 159 (6th ed. S. Gard 1972); Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 959 (1974). A modified declarant-oriented definition is offered in R. Lempert & S. Saltzburg, A Modern Approach to Evidence 340-41 (1977), though the authors treat their definition as also being consistent with the assertion-oriented definition. For a description of their definition, see note 65 infra.
6. McCormick, supra note 1, § 246, at 584 (emphasis omitted). This definition is a verbatim repetition of the version contained in the original. See First Edition, supra note 3, § 225, at 460. McCormick contains caveats about its definition of hearsay, maintaining that the most that any definition can do is to "furnish a helpful starting point for discussion of the problems, and a memory aid in recalling some of the solutions. But if the definition is to remain brief and understandable, it will necessarily distort some parts of the picture. Simplification has a measure of falsification." McCormick, supra note 1, § 246, at 584; accord, First Edition, supra note 3, § 225, at 459-60. A footnote attached to this passage suggests that the author believed that "[t]wo problems dealt with
Although this definition is essentially assertion-oriented, the final clause introduces a declarant-oriented aspect by stating that when an utterance is offered for its truth, then it rests for value on the declarant's credibility.\(^7\) The text immediately following the definition goes further, and indicates that when an assertion is \textit{not} offered for its truth, then it does not depend for value on the declarant's credibility.\(^8\) Taken together, these

\footnotesize{in later discussion} were \textit{"left ambiguous"} by the definition. One of these problems was the hearsay status of nonverbal conduct; the other, whether depo-

\footnotesize{sitions and former testimony should be admitted as hearsay or under a hear-

\footnotesize{say exception}. \textit{McCormick}, \textit{supra} note 1, § 246, at 584 n.47; \textit{First Edition}, \textit{supra} note 3, § 225, at 460 n.2.

7. Like other treatments of hearsay, the discussion in \textit{McCormick} states that \textit{"credibility"} refers not only to the declarant's sincerity, but also to his or her powers of memory, perception, and narration. \textit{See McCormick}, \textit{supra} note 1, § 246, at 585 (declarant's \textit{"credibility"} refers to \textit{"his opportunity and capacity to observe, his powers of memory, the accuracy of his reporting, and his tendency to lie or tell the truth"}); \textit{First Edition}, \textit{supra} note 3, § 225, at 460. \textit{See also McCormick}, \textit{supra} note 1, § 245, at 581. The revisors inserted the curious statement that \textit{[t]he factors upon which the credibility of testimony depends are perception, memory, and narration of the witness... While some writers add sincerity as a fourth factor, it seems rather to be only an aspect of the three mentioned above. Regardless of whether the witness lies deliberately or makes an honest mistake, his credibility is impaired.}\textit{Id.} The notion expressed here that there are only three elements of credibility is ignored in subsequent discussion in favor of the more conventional view that sincerity is a separate element. \textit{See, e.g., McCormick}, \textit{supra} note 1, §§ 246, 249-250, at 584, 585, 590 n.92, 596.

8. The definition, \textit{see text accompanying note 6 supra}, merely says that when a statement is offered to show its truth, then it rests for value on the declarant's credibility. \textit{McCormick}, \textit{supra} note 1, § 246, at 584; \textit{First Edition}, \textit{supra} note 3, § 225, at 460. That definition does not expressly state that an utterance not offered for its truth does not rest for value on credibility. This idea is, however, expressed in the description of reasons why utterances that fall outside the definition are not hearsay. The book notes that there is no need for cross-examination under oath when use of an utterance does not require reliance on the declarant's credibility, and concludes that \textit{"the suggested definition... seeks to limit the term 'hearsay' to situations where the out-of-court assertion is offered as equivalent to testimony to the facts so asserted by a witness on the stand. Only then does the want of such safeguards as cross-examination become material."} \textit{McCormick}, \textit{supra} note 1, § 246, at 585; \textit{First Edition}, \textit{supra} note 3, § 225, at 460-61 (emphasis added). A similar suggestion that the declarant's credibility is not an issue when the utterance is not offered for the truth of the matter asserted is found in the introduction to the section on out-of-court utterances that are not hearsay:

\footnotesize{The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. Manifestly, proof of utterances and writings may be made with an almost infinite variety of other purposes, not resting for their value upon the veracity of the out-of-court declarant and hence falling outside the hearsay classification.}\textit{McCormick}, \textit{supra} note 1, § 246, at 588; \textit{accord, First Edition}, \textit{supra} note 3, § 223, at 463. The revisors added a footnote to the second edition acknowledging that utterances offered as circumstantial evidence of the declarant's state of
passages in *McCormick* suggest that the assertion-oriented and declarant-oriented definitions are functionally equivalent.

This suggestion is misleading, since choice of one definition over the other can lead to different results.9 An utterance offered as a falsehood provides the most vivid example. Suppose that X is charged with committing a crime in Boston. The police talk to X's wife, who tells them that X was with her in Denver on the day in question. The wife's statement is demonstrably false, and the prosecution seeks to use it against X for the inference that X's wife lied because she knew him to be guilty. Under an assertion-oriented definition, the wife's statement is not hearsay because it is not offered to prove the truth of the matter asserted.10 Under a declarant-oriented definition, however, the statement would be hearsay because the trier's use of it requires reliance on the wife's powers of memory, perception, and narration.11

mind are "admittedly... subject to all the hearsay dangers, except to the extent that deliberate falsification diminishes when a statement is not used to prove anything asserted therein." *McCormick*, supra note 1, § 249, at 590 n.92. The revisors, however, did not incorporate this insight into the text or eradicate inconsistent passages.


10. *See* Anderson v. United States, 417 U.S. 211, 219-20 (1974); 6 J. Wigmore, *supra* note 4, § 1766, at 250. Appealing from an election fraud conviction, the defendant in *Anderson* argued that the trial judge had erred in admitting testimony about falsehoods uttered by his associate during a cover-up attempt. The Court affirmed the defendant's conviction, stating that testimony about the utterances was not admitted into evidence... to prove the truth of anything asserted therein. Quite the contrary, the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false. 417 U.S. at 219-20 (footnotes omitted). The Court expressly eschewed any reliance on a theory that the utterances might be admissions of co-conspirators; the conspiracy had ended by the time the utterances were made. *Id.* at 218-19. The sole rationale for admission was that the utterances were not offered to show the truth of the matters asserted therein.

11. The wife might not have intended a cover-up; she may simply have been mistaken about the date of her husband's presence in Denver. Even if she intended to mislead the police because she believed her husband was guilty, her belief may have been based on a bare suspicion or an insane delusion. Alternatively, she may have misspoken, saying "June first" when she meant "July first." Thus, substantial reliance on her memory, perception, and narrative ability are required in order to reach the final inference that her husband is guilty. For examples of declarant-oriented definitions that would seem to classify the wife's utterance as hearsay, see R. Lempert & S. Saltzburg, *supra* note 5, at 340-45; Tribe, *supra* note 5, at 959-60. *See also* Morgan, *Hearsay Dangers, supra* note 9, at 218-19.
McCormick itself deems certain utterances nonhearsay even though they depend for value upon the declarant's credibility. For example, the book states that the utterance “Harold is the finest of my sons,” offered to prove that the declarant was fond of Harold, is nonhearsay because it is not offered to show the truth of its assertion.\textsuperscript{12} Under a declarant-oriented definition, however, the utterance would be hearsay because it rests on the declarant’s sincerity and narrative ability.\textsuperscript{13}

Perhaps careful readers will not be misled by the passages in McCormick that suggest that declarant-oriented and assertion-oriented definitions of hearsay lead to the same results. Although the initial discussion in McCormick is likely to cause readers to think that assertions not offered for their truth are always free from credibility dangers, readers who carefully consider the subsequent examples in McCormick should be able to avoid this misconception.\textsuperscript{14}

There is, however, a much more serious defect in the book. McCormick often deems assertions nonhearsay even though they are offered to show the truth of their assertions and they rest on the declarant’s credibility. For example, McCormick endorses the view that the utterance “I believe that I am King Henry the Eighth,” offered to show the declarant’s insanity, is not hearsay because it is “verbal conduct offered circumstantially.”\textsuperscript{15} By calling it “conduct,” McCormick insinuates that the utterance is in some way similar to nonassertive conduct.

\textsuperscript{12} McCormick, supra note 1, § 249, at 590-91; First Edition, supra note 3, § 228, at 465-66. See also McCormick, supra note 1, § 249, at 591 n.94; First Edition, supra note 3, § 228, at 466 n.15.

\textsuperscript{13} The utterance rests on the declarant’s narrative ability because it loses value if the declarant meant to say “Arnold is the finest of my sons” or “Harold is the first of my sons.” It rests on the declarant’s sincerity because a deliberate lie about Harold’s character, for example to his prospective employer, would undercut the inference that the declarant was especially fond of Harold. Another hearsay danger, ambiguity of inference, is also present because the declarant might genuinely believe that Harold is the finest, but might nevertheless be more fond of his youngest son Joe. On the hearsay danger of ambiguity of inference, see Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 STAN. L. REV. 682, 686-91, 695-98 (1962). For an example of a declarant-oriented definition under which “Harold is the finest of my sons” would be hearsay, see Tribe, supra note 5, at 958-61. Lempert and Saltzburg, who advocate a modified declarant-oriented definition, might reach a different result. See R. LEMPERT & S. SALTZBURG, supra note 5, at 340-41 (utterances are hearsay when they rest on memory and perception of declarant, but not when they rest only on sincerity and narration).

\textsuperscript{14} See examples in McCormick, supra note 1, § 249, at 590-94. See also id. at 590 n. 92.

\textsuperscript{15} McCormick, supra note 1, § 249, at 593; First Edition, supra note 3, § 228, at 467-68.
This particular “verbal conduct,” however, manifests an intent both to communicate an idea and to affirm a proposition that could be false, hence it is assertive. The further statement in the book that the utterance is offered “circumstantially” is tantalizing but not helpful. If the definition of “circumstantial evidence” set forth earlier in McCormick is applied, then to say that an utterance is “offered circumstantially” is merely another way of saying that it is not being offered to show the truth of what it asserts.

If the reader succeeds in penetrating the language of the book to the point of understanding that “verbal conduct offered circumstantially” is a variety of “statement not offered for the truth of its assertion,” he or she may decide that the utterance is not offered for its truth because it is offered to show that the

16. McCormick never specifically defines the term “assertion”, but the book’s discussion of the difference between assertive and nonassertive conduct indicates that conduct is considered assertive when it is “an effort at expression.” See McCormick, supra note 1, § 250, at 596; First Edition, supra note 3, § 228, at 471; cf. Morgan, Hearsay Dangers, supra note 9, at 216 “assertion generally is taken” to include words and nonverbal conduct offered on the assumption that the declarant intended them as a communication or expression. See also Uniform Rule of Evidence 62(1), 63. Hearsay scholars sometimes use “assertion” as if identical in meaning to “statement offered for its truth”; when these scholars say that an utterance is not “assertive” they mean that it is not offered for the truth of the matter stated. See 3A J. Wigmore, supra note 4, § 1018, at 996. Finally, legally operative language is sometimes said to be “nonassertive.” Cf. 6 J. Wigmore, supra note 4, § 1772, at 267 (words that are a “verbal part of an act” are “not offered as assertions”).

17. The discussion in McCormick states:

The characterization of evidence as ‘direct’ or ‘circumstantial’ points to the kind of inference which is sought to be drawn from the evidence to the truth of the proposition for which it is offered. If a witness testifies that he saw A stab B with a knife, and this testimony is offered to prove the stabbing, the inference sought is merely from the fact that the witness made the statement, and the assumption that witnesses are worthy of belief, to the truth of the asserted fact. This is direct evidence. When, however, the evidence is offered also for some further proposition based upon some inference other than merely the inference from assertion to the truth of the fact asserted, then the evidence is circumstantial evidence of this further fact-to-be-inferred.

McCormick, supra note 1, § 185, at 435; First Edition, supra note 3, § 152, at 316 (footnotes omitted). Applying these definitions, the utterance “I believe I am King Henry the Eighth” would be direct evidence that the declarant believed he was King Henry the Eighth and circumstantial evidence that he was insane. If the direct inference that the speaker believed himself to be Henry the Eighth is a necessary step toward reaching the circumstantial inference that the speaker was insane, then the circumstantial nature of the second inference does not save the utterance from being classified as hearsay. See note 21 infra and accompanying text. The distinction between circumstantial and direct evidence employed in McCormick is the standard one found in works on evidence. See 1 J. Wigmore, Evidence § 25 (3d ed. 1940) [hereinafter cited as Wigmore, 1940 Edition].
declarant was insane, rather than that the declarant believed he was Henry the Eighth. This theory must be rejected. As McCormick elsewhere recognizes, an assertion is hearsay if the trier's first inference runs from the assertion to the proposition asserted, even if the proponent's ultimate purpose is to establish a different proposition.19 Otherwise, the assertion "I saw Smith running from the bank" would not be hearsay if the proponent's ultimate purpose was to prove that Smith robbed the bank.

The question whether "I believe that I am King Henry the Eighth" is hearsay, therefore, turns on whether the trier can use the utterance without, as a first step, inferring that the declarant believed he was King Henry the Eighth. In certain unusual situations, the trier might be able to skip this step. For example, if the only words the declarant ever uttered from birth to death were "I believe that I am King Henry the Eighth," then the trier might infer insanity indirectly. The classification of the utterance as nonhearsay in McCormick, however, is categorical—it applies to utterances by declarants whose past behavior has been comparatively commonplace, including declarants with a motive for feigning insanity.20

Classification of "I believe I am King Henry the Eighth" as hearsay would have no effect on its admissibility because, if hearsay, the utterance would be admissible under the except-

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18. Careful verbalists might prefer to call an inference from an assertion to the proposition asserted a second or third inference, on grounds that the trier's preliminary inferences would be that the declarant meant what he said and that he believed what he meant. However, McCormick treats the proposition asserted as the first inference, see note 19 infra, and this usage has been followed here.

19. The book's discussion of this matter reads as follows:

The requirement in the definition of hearsay is that the statement be offered to prove the truth of the matter asserted. What if the immediate purpose is to prove the fact asserted but the ultimate purpose is to draw a circumstantial inference of another fact, not asserted in the statement? Suppose the witness reports that D told him, a week before D's body was found in the bay, that he was planning to go fishing the next day with X in the latter's boat. If offered to show D's intent it is plainly hearsay, and it is no less subject to the hearsay weaknesses simply because a further inference, i.e., that D did go fishing with X, is to be built upon the matter asserted, i.e., D's intent. Accordingly we find the courts treating the statement as hearsay whenever the first purpose is to prove the fact asserted in it, even though other secondary inferences are sought to be built upon the first.

McCormick, supra note 1, § 246, at 566 (emphasis in original); accord, First Edition, supra note 3, § 225, at 461.

20. For example, under McCormick's analysis, the utterance would still be nonhearsay even if made by a declarant after raising the insanity defense to a charge of murder.
tion for declarations of present state of mind. Therefore, the only justification for discussing whether it is hearsay or not is to illustrate the distinction between utterances used circumstantially and those used directly, so that readers will be able to apply that distinction when admissibility actually turns on it. Sometimes the distinction does make a difference. When an utterance manifesting the declarant's state of mind is used for an inference about a past event, the state of mind exception does not apply and the utterance might be excluded unless it could be classified as circumstantial evidence. For example, if the prosecution offers "I was entering the bank when I saw X run out" to support the inference that X robbed the bank, the utterance would be hearsay that is not admissible under the standard exception. By suspending common sense and reasoning by analogy to the McCormick example of the "circumstantial" use of "I believe I am Henry the Eighth," however, a reader could create a theory under which "I saw X run out" is also "circumstantial" evidence and hence not hearsay. Thus the

21. The utterance would clearly be admissible in jurisdictions following the state of mind exception of the Federal Rules of Evidence. See Fed. R. Evid. 803(3). However, if the utterance was made under circumstances indicating a motive to fabricate or was lacking in "spontaneity," some common law jurisdictions might still refuse to admit it. McCormick, supra note 1, § 294, at 695 & n.56.

22. See McCormick, supra note 1, § 296, at 701-04; First Edition, supra note 3, § 271, at 576-78. Under the federal state of mind exception, however, certain statements about wills may be used for inferences about past events. Rule 803(3) of the Federal Rules of Evidence provides an exception that admits [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

This broadening of the exception had precursors at common law. See McCormick, supra note 1, § 296, at 702-03; First Edition, supra note 3, § 271, at 577-78. The state of mind exception can also be employed to admit utterances used for inferences about past events if the use of the utterance does not involve reliance on the declarant's memory. For example, if the declarant said that he or she hated Harold, the utterance can be used as evidence that the declarant did not intend that money transferred to Harold two weeks earlier be a gift. The trier would be permitted to infer that the state of mind of hatred was continuous in time, and thus to make inferences about previous events on the basis of later states of mind. See McCormick, supra note 1, § 294, at 695-96; First Edition, supra note 3, § 269, at 569-70.

23. There are a number of spurious circumstantial evidence theories that are no more far-fetched than the treatment of "I believe I am Henry VIII" in McCormick. First, it might be argued that the testimony is not offered for the truth of its assertion because it is offered for the inference that X robbed the bank, not merely to show that X was running out of the bank. Cf. McCormick, supra note 1, § 293, at 692; First Edition, supra note 3, § 267, at 565-66 (patient's
Henry the Eighth example in *McCormick* teaches the reader how to change hearsay into nonhearsay simply by calling it "circumstantial evidence," a lesson that courts have often heeded.\(^2\)

Another example of the misleading use of the term "circumstantial" in *McCormick* appears in the analysis of a decedent's assertion that he made a will.\(^2\) *McCormick* notes that some courts have created a special hearsay exception for retrospective declarations by testators when used to prove that the testators have made wills, while others have admitted such utterances under the exception for declarations of state of mind.\(^2\) The book then states, without any sign of disapproval, that "[i]n the alternative, the declarations may be regarded not as statements offered to prove the truth of assertions contained therein, but as conduct circumstantially evincing a belief and thus not falling within a restrictive definition of hearsay."\(^2\)

This passage means that the decedent's assertion "I made a will" can be regarded as nonhearsay because the trier can use an indirect or "circumstantial" chain of inferences, inferring first that the decedent believed his or her utterance, and second that the belief was accurate.\(^2\)

statement of medical history to physician deemed hearsay when offered to prove truth of patient's statement but nonhearsay when offered to support inferences that physician drew from patient's statement). *But see McCormick, supra* note 1, § 247, at 586; *First Edition, supra* note 3, § 226, at 461. Second, it might be argued that the testimony is not offered to show that X was in fact running out of the bank, but only to show that X was in the presence of the testifying witness at the time and place in question. C*f.* Bridges v. State, 247 Wis. 350, 19 N.W.2d 529 (1945) (child's assertion that she had been in apartment with certain features was "circumstantial" evidence that she had been there; assertion deemed not offered for truth because not offered to show that apartment had those features). Finally, it might be argued that the evidence is offered as circumstantial evidence that the witness believed he saw X running out of the bank, as the basis for a further "circumstantial" inference that X was in fact running out of the bank. *See McCormick, supra* note 1, § 296, at 702-03; *First Edition, supra* note 3, § 271, at 577-78.


26. *Id.* at 702; *First Edition* at 577-78.

27. *Id.* at 703; *accord, First Edition* at 578.

28. My conclusion that Dean McCormick had this double inference in mind is a guess, but not a fanciful one. Wigmore discussed the same example at great length, *see 2 Wigmore, 1940 Edition, supra* note 17, § 267, and Dean McCormick in all likelihood knew about Wigmore's analysis. After spelling out a "circumstantial" chain of inferences from the declarant's assertion to his belief and back to the existence of the fact asserted, Wigmore pronounced that
Acceptance of the theory that the decedent's assertion about his or her will is not hearsay requires leaping two formidable conceptual hurdles. First, it requires acceptance of the notion that "I wrote a will" is not the equivalent of "I believe I wrote a will," so that asserting the former does not assert the truth of the latter. This idea has found support in both caselaw and scholarly writing, but reasoned justification for it is entirely lacking. Second, the theory involves acceptance of what might be called the doctrine of the curative initial inference, under which an utterance is not offered for the truth of the matter asserted if the first inference in the line of proof is not the fact asserted, even though the final inference is that the fact asserted is true. Although the doctrine of curative initial inference has respectable lineage in a limited set of situations, categorical acceptance of such a theory would severely...
reduce the exclusionary power of the hearsay rule.

Acceptance of this reasoning in *McCormick* leads to a view that in effect abolishes the hearsay rule. Wigmore, who was tempted to use the curative initial inference doctrine as a way of dealing with retrospective declarations about wills, did tell his readers that this approach could lead to evasion of the hearsay rule. The *McCormick* treatise does not offer any caveats of this nature. It leaves open, at least in theory, the argument that the declarant's utterance "Defendant killed Jones" is nonhearsay because it is offered to prove the declarant's belief "circumstantially" en route to the final inference that the defendant killed Jones.

*McCormick* also uses the password "circumstantial" to avoid a serious hearsay problem with respect to negative results of inquiries. The book correctly states that testimony about fruitless inquiries is nonhearsay when the issue is whether a diligent search was made to locate a missing person. It goes on to assert that such testimony is nonhearsay even when offered to show the nonexistence of the person inquired about. An escape from hearsay "is furnished by the theory that fruitless inquiries are evidence of inability of the inquirer to find [the person] after diligent search and this in turn is circumstantial evidence of the nonexistence or nonresidence of the person in question." Under this theory, testimony that townspeople said they had not seen X is nonhearsay when offered to show that X was no longer a resident of the community.

Classification of these new category of nonhearsay, see Fed. R. Evid. 801(d)(1); however, because of limits on the new category, others must find their way into evidence under the traditional theory that they are not offered for the truth of the matter asserted.

There are other examples of use of the doctrine of curative initial inference to avoid hearsay classification. For example, a number of courts have evaded the hearsay rule by finding an "indirect" inference from an utterance to a declarant's belief in the utterance and then back to the proposition asserted in the utterance. See, e.g., the cases described in 2 Wigmore, 1940 Edition, supra note 17, §§ 267-272.

32. See 2 Wigmore, 1940 Edition, supra note 17, § 267, at 92-93. For a similar view, see Seligman, supra note 28, at 151-52.


34. Here, classification of the utterances as hearsay could make a difference because the testimony does not fit easily under any of the standard exceptions. Under the Federal Rules of Evidence, the proponent could seek to have the testimony admitted under the residual exceptions established by Rules 803(24) and 804(b)(5). These identical sections provide a hearsay exception for any statement not specifically covered by any of the foregoing exceptions.
fruitless inquiries as nonhearsay is inconsistent with both assertion-oriented and declarant-oriented definitions of hearsay. The responses of the townspeople are hearsay under an assertion-oriented definition because the inference that the declarants had not seen the missing person is an indispensable link in the trier’s chain of inferences. Maintaining, as McCormick does, that the responses “are evidence of inability of the inquirer to find [the person] after diligent search”35 is merely an abstract way of saying that the searcher heard assertions from numerous declarants. Unless one accepts the kind of reasoning used by McCormick in dealing with retrospective utterances about wills,36 one must conclude that the declarants’ utterances are being used directly to show the truth of the matters asserted therein. The susceptibility of the searcher’s testimony to characterization as evidence of “diligent search” does not save the testimony from classification as hearsay. If the McCormick analysis is followed to its logical end, then testimony that townspeople said they saw Y rob a bank is circumstantial evidence that Y robbed it and hence not hearsay. Any proposition asserted by numerous declarants in response to questioning leads to the inference that a diligent search occurred, and thus it is always possible to posit a curative initial inference in such cases. The curative initial inference37 theory proves too much

but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24), 804(b)(5). See generally Yasser, Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule, 11 TEX. TECH. L. REV. 587 (1980). Note, however, that if the notice requirements of the residual exceptions are read literally, they would be inapplicable in cases in which the proponent neglected to give notice before trial of intent to offer the testimony about fruitless inquiries. If the residual exceptions are inapplicable, then the testimony would appear not to fit under any of the other federal hearsay exceptions, unless it could be recast in the form of reputation testimony and proffered under the theory that it is “reputation concerning personal history” within the meaning of FED. R. EVID. 803(19).

35. McCormick, supra note 1, § 249, at 594; FIRST EDITION, supra note 3, § 228, at 469.
36. See text accompanying notes 25-28 supra.
37. For an explanation of the “curative initial inference,” see text accompanying notes 30-32 supra.
in this instance.

Declarant-oriented definitions also fail to provide an escape for testimony of fruitless inquiries. The trier of fact must clearly rely on the declarants' credibility to reach the inference that the missing person does not reside in the community. Moreover, the trier's reliance cannot always be characterized as de minimis. The degree to which the value of the testimony is affected by reliance on credibility depends on the circumstances. The declarants' denials are likely to be reliable when the searcher is a minister, but unreliable when the searcher is a bill collector.

The best reason for admitting evidence of a fruitless search is necessity. There is often no better way to prove nonresidence. Necessity can be grounds for creating a new hearsay exception or for invoking a residual exception, but necessity has nothing to do with whether the trier's inference is direct or indirect. Necessity, therefore, does not provide an analytically sound basis for classifying an utterance as circumstantial evidence.

The examples discussed so far have involved instances in which McCormick evades a hearsay problem by labeling utterances "circumstantial evidence." The following two examples illustrate another escape from the hearsay rule. In these situations, McCormick rescues assertions that seem to be offered for their truth by saying that they do not require reliance on the declarant's veracity. The first example involves a declarant's assertion that his brakes are defective. McCormick states that this assertion is "evidence tending to show circumstantially" that the operator knew that the brakes were bad. This is merely an application of the theory that asserting a fact is true is not the same as asserting that one believes it to be true. McCormick then addresses the situation in which the declarant asserts the exact proposition to be proved:

Even [when] the statement is assertive as to the existence of knowledge, "I know the brakes are bad," and is offered to show he did know it, it can still rest on the nonhearsay ground that (bad brakes having been otherwise shown) his remark tends to show that if the brakes were bad he was aware of it. The existence of knowledge is apparent.

38. See the necessity requirement in Fed. R. Evid. 803(24)(B), 804(b)(5)(B).
40. See text accompanying notes 27-29 supra.
If classified as hearsay, the utterance "I know the brakes are bad" would still be admissible under the exception for declarations of present state of mind. Usually the utterance would also be admissible as a personal or vicarious admission of a party-opponent. Therefore, the point of using this example must be to teach learners something about the concept of hearsay, and not to show that this particular utterance is admissible.

There is indeed a useful teaching point implicit in the quoted passage. Even though an utterance may at first seem to be hearsay under an assertion-oriented definition, it is not hearsay if it satisfies the declarant-oriented definition. In other words, even if the utterance asserts the exact proposition to be proved, it is not hearsay if it does not rest for value on the credibility of the declarant. Thus, "I am alive" is not hearsay when offered to show that the declarant was alive.

The "I know the brakes are bad" example in McCormick is flawed, however, because the usefulness of the utterance rests to some degree on the declarant's credibility. First, it depends for value on the assumption that the declarant is sincere. The declarant might believe the brakes are good, but nonetheless be lying about his belief—for example, he might be trying to end a conversation with an obnoxious critic who asserted that brakes on the kind of car the declarant owns are always bad. Second, the utterance depends for value on the declarant's narrative ability. The declarant may have intended to say "I know the brakes aren't bad."

Admittedly, the trier will not be required to rely very much on the declarant's veracity in the usual situation in which "I know the brakes are bad" is offered. If, however, McCormick's analysis of this example were applied to all utterances offered to show a declarant's then-existing knowledge, there would be situations in which the trier would need to rely heavily on the declarant's credibility. Suppose, in an action alleging breach of

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41. McCormick, supra note 1, § 249, at 592; First Edition, supra note 3, § 228, at 466 (emphasis added on final sentence).
42. See note 21 supra and accompanying text.
43. Normally the declarant would be a party and his declaration would be offered to show that he had been negligent. If the declarant was not joined as a party in a negligence action against his employer, the utterance would be a vicarious admission of the employer, see Fed. R. Evid. 801(d)(2)(D), but would not be a vicarious admission in common law jurisdictions that require that the employee be authorized to speak for his principal on the matter. See McCormick, supra note 1, § 287, at 640-41; First Edition, supra note 3, § 244, at 517-18.
an employment contract, the defendant maintains that the plaintiff was properly fired for cause because she operated the defendant's nuclear reactor without knowing whether it was safe to do so. The plaintiff offers in evidence her utterance, made immediately prior to ordering that the reactor be activated, that she had checked each instrument and all readings were normal. Even if the plaintiff offered other evidence establishing that the instrument readings were in fact normal, the trier would still be required to rely on her credibility to reach the conclusion that she knew the readings were in the range of safety at the time of the utterance. Further, any assertion of knowledge that comes in response to a question is suspect. A student can correctly answer "true" on a true-false test without knowing the proposition to be true. Credibility dangers are even greater when the question suggests an answer. For example, a foreman's answer to the question "Do you know that Joe was late?" is subject to the danger that the foreman will falsely assert knowledge because a foreman is expected to know whether employees are on time.

Immediately after the discussion of "I know the brakes are bad," McCormick turns to the hearsay problem in the celebrated case of Bridges v. State.44 The defendant in Bridges had been convicted of taking indecent liberties with a seven-year-old girl. The prosecution argued that the defendant lured the girl into his apartment, molested her, and then allowed her to walk home. Soon afterwards, the girl made statements to her mother and to police describing the building and apartment in which she had been molested. The police were not able to locate the apartment on the basis on her description, and did not suspect that the defendant was the molester until he was arrested a month later for another offense.45 The trial judge admitted the girl's pretrial utterances about the apartment, and the Wisconsin Supreme Court affirmed, stating that the girl's utterances were not offered for the truth of the matter asserted (that the apartment had certain features), but only to show "circumstantially" that the girl had been in the apartment.46 This theory is fallacious because the girl's assertion was that she had been in an apartment that had certain features, and her assertion was offered to show that she had in fact been in an apartment with those features.

44. 247 Wis. 350, 19 N.W.2d 529 (1945), discussed in McCormick, supra note 1, § 249, at 592; First Edition, supra note 3, § 228, at 467.
45. 247 Wis. at 357, 19 N.W.2d at 532.
46. 247 Wis. at 364-66, 19 N.W.2d at 535-36.
In its analysis of *Bridges*, McCormick does not endorse the court's "circumstantial evidence" theory. Instead, the book employs the declarant-oriented aspect of its hearsay definition, maintaining that the evidence was nonhearsay because the girl's assertions "had value without regard to her veracity." Although this proposition is correct, it proves too much. Admittedly, the girl's assertions had value without regard to her veracity, if by veracity one means her general propensity to describe events accurately. Even if the girl was a chronic liar and had poor memory, perception, and narrative ability, her ability to describe the apartment made it more likely that she had been there. However, every hearsay declaration that is relevant to a fact in issue has some value without regard to the declarant's propensity to be accurate. For example, the ability of Whittaker Chambers to describe the interior of Alger Hiss's home made it more likely that Chambers had been there, whether or not Chambers was (as the defense claimed) a psychopathic liar. Nevertheless, one doubts that the government would have been permitted to prove its case against Hiss with out-of-court utterances by Chambers about Hiss's house.

If utterances are nonhearsay whenever they have any value regardless of the declarant's character for veracity, then the hearsay rule is a curiosity of no current significance. If utterances are nonhearsay when their value would not be diminished very much by negative information about the declarant's veracity, then the hearsay rule poses no obstacle to reliable utterances even if they do not fit within an established exception; and the failure of the reformers to achieve codification of this

47. McCormick, supra note 1, § 249, at 592. The first edition used slightly different language, stating that the testimony "has value apart from her veracity." First Edition, supra note 3, § 228, at 467. The book also asserts that "the undisputed proof excluded the possibility of other means by which she could have acquired the knowledge, and thus the hearsay dangers were eliminated." McCormick, supra note 1, § 249, at 592; accord, First Edition, supra note 3, § 228, at 467. The defendant, however, did not stipulate that the only way the girl could have obtained the knowledge of the contents of the apartment was by being there on the day of the crime, and the mere failure of the defendant to discover and offer testimony providing an alternative explanation does not eliminate the possibility that such an explanation existed. See the possible explanations described in note 50 infra.

principle makes no difference, for both they and their opponents were working under a fundamental misconception. On the other hand, if utterances offered for the truth of their assertions are hearsay unless their value would not be diminished to any degree by negative information about the declarant's veracity, then the *McCormick* analysis of the Bridges case is plainly wrong. The value of the girl's utterances would have been diminished by unfavorable information about her memory, perception, sincerity, or narrative ability.

By stating that the utterances did not depend for value on the girl's credibility, *McCormick* ignores a sound basis for admitting her utterances under another theory and fails to dis-


The original version of the Federal Rules of Evidence had a similar fate. As promulgated by the Supreme Court, the Rules contained a broad exception for utterances made soon after the matter was perceived by the declarant, while his memory was clear, in good faith, and prior to the commencement of the action. *See Proposed Fed. R. Evid. 804(b)(2), reprinted in Federal Rules of Evidence for United States Courts and Magistrates 224 (West 1979).* Congress struck this entire provision. The rules enacted by Congress do contain residual exceptions, *see Fed. R. Evid. 803(24), 804(b)(5)*, but these exceptions are far more restrictive than the broad reform proposed by the Model Code and the 1953 Uniform Rules of Evidence. Under the current residual exceptions, the testimony must not only have guarantees of trustworthiness equivalent to those of the standard exceptions; it also must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," and notice of intent to offer it must be given in advance of trial. *See Fed. R. Evid. 803(24), 804(b)(5).* The latter requirement is particularly important because the proponent is likely to overlook it. Some courts have responded by more or less ignoring the requirement of notice before trial and have allowed admission when notice was given during trial and the opponent was not prejudiced, but others have enforced the requirement as written. *See Yasser, supra* note 34, at 595-97, 601-03.

50. In an out-of-court statement made prior to the discovery of defendant's apartment, the girl said that the room to which she had been taken contained a bed, a chest of drawers, a dresser, a table with a picture of a lady on it, and a chair by the bed with a radio and alarm clock on it. Bridges v. State, 247 Wis. 350, 356, 19 N.W.2d 529, 531 (1945). She also described some of the exterior features of the building and a nearby "doll house" (cottage). *Id.* at 350, 19 N.W.2d at 531-32. The value of these utterances vary, if only slightly, with our assumptions about the veracity of the declarant. If we assume that the girl was a psychopathic liar or was living in a world of fantasy, we would be more likely to entertain the possibility that she fabricated or imagined a story about what she saw and that the articles she described coincidentally matched those in the apartment. Alternatively, she might have received a description of the apartment from someone else who had visited there. These possibilities seem far-fetched, but only because of assumptions that we entertain about the veracity and motives of the declarant. *See Morgan, The Law of Evidence 1941-45, 59 HARV. L. REV. 481, 544 (1946), cited in McCormick, supra* note 1, § 249, at 592.
cuss the facts that provide compelling reasons for admitting them. The girl's description of the defendant's apartment was sparse and somewhat inaccurate,51 but she made her statement at a time when the events were fresh in her mind and when the likelihood of adult influence was relatively small. What she said soon after the crime was likely to be more accurate than the testimony she gave at trial; memories fade and children are susceptible to suggestion. Moreover, some of the safeguards that are thought to make courtroom testimony reliable lose their force when the witness is a child. The solemnity of the proceedings, the religious and moral obligation to testify truthfully under oath, and the possibility of penalty for perjury would not add value to her testimony. On the other hand, the courtroom safeguards of cross-examination and observation can be crucially important in assessing a child's testimony, and in the actual Bridges case, the defendant had these protections because the girl testified at trial.52

Thus the decision to admit the girl's prior utterances was a wise one. The dictates of common sense undoubtedly led both the Wisconsin Supreme Court and the authors of McCormick to strain for a way to find the evidence admissible. The court accomplished this by misusing the concept of circumstantial evidence; McCormick justifies admissibility by bending the declarant-oriented aspect of its hearsay definition. Neither of these manipulations are necessary, however, because the evidence could be admitted as the prior consistent statements of a witness. It is true that the admission of prior consistent statements is hedged with limitations53 because, in the absence of a claim of recent fabrication or undue influence, their probative

51. Although the opinion does not describe with particularity how her description differed from reality, it appears that there were some significant differences. The court, in responding to the defendant's argument that the evidence was not sufficient to support conviction, said somewhat apologetically that the girl's testimony does not appear to be so contradictory as to impair its credibility as a matter of law. The statements made by her to her mother and police officers . . . were fairly accurate for a child of her age and limited schooling and vocabulary, and her first description of the room and articles therein was not too much out of line, although it was not distinctive enough to be of much value either way. Id. at 362, 19 N.W.2d at 534.

52. See id. at 355, 19 N.W.2d at 531. Under McCormick's analysis, her utterances would be admissible even if she did not testify at trial. See McCormick, supra note 1, § 249, at 352.

53. See McCormick, supra note 1, § 49, at 105-07; 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607[08] (1975); 4 id. ¶ 801(d)(1)(B)[01]; 4 J. Wigmore, supra note 4, §§ 1122-1144.
value is normally outweighed by the dangers of waste of time and confusion. Evidence that a witness made consistent statements opens up the collateral issue of whether the utterances were in fact made without really adding much to his or her courtroom testimony. When the prior consistent statements have substantial probative value, however, courts seldom hesitate to admit them. For example, evidence that a rape victim reported the criminal act soon after its occurrence has been admitted, as the Wisconsin Supreme Court amply said in a case predating Bridges, "from the beginning of the history of the administration of criminal law," on grounds that without the evidence the trier might be unfairly skeptical about the victim's courtroom testimony. Citing this precedent, the Bridges court summarily rejected the defendant's argument that the child's out-of-court utterances describing his alleged sexual acts were inadmissible. Her utterances describing his apartment should have been admitted under the same principle. Without such evidence, the jury might have viewed the girl's testimony describing the apartment with skepticism, especially if she described it in detail. The jury would be well aware that her in-court testimony might be tainted by adult influence.

Thus far this Article has focused on instances in which McCormick escapes the hearsay ban by saying that utterances are being used "circumstantially" or that they do not depend for value on the credibility of the declarant. Instances in which the book deems utterances nonhearsay because they are "verbal acts" or "verbal parts of acts" will now be considered. McCormick does not expressly define these two concepts or explain the relationship between them and the book's more general definition of hearsay. For that matter, McCormick does not expressly describe the difference between the two categories. However, by examining the book's principal examples of the two types of utterances, the reader can infer that "verbal acts" are utterances "to which the law attaches duties and liabili-

54. Hannon v. State, 70 Wis. 448, 450-53, 36 N.W. 1, 2-3 (1888), cited in Bridges v. State, 247 Wis. at 363, 19 N.W.2d at 534; accord, 4 J. Wigmore, supra note 4, §§ 1134-1139.
55. Bridges v. State, 247 Wis. at 363, 19 N.W.2d at 534-35.
56. The danger was especially great in Bridges because the police took the girl to the defendant's apartment after his arrest. See 247 Wis. at 358, 19 N.W.2d at 532. Even if her courtroom testimony had not been susceptible to attack on grounds that she had been taken to the apartment so that she could identify it, however, her prior utterances should still have been held admissible to rebut suspicion that her courtroom testimony had been shaped by adults.
ties" without the need for accompanying nonverbal conduct, while "verbal parts of acts" are utterances that help explain the significance of contemporaneous nonverbal conduct. McCormick's examples of "verbal acts" include words of offer and acceptance in contract and utterances offered to show slander or deceit by the declarant; the book's examples of "verbal parts of acts" include words accompanying the transfer of money that designate the transaction as loan, payment, debt, bribe, or gift.

The general definition of hearsay in McCormick explains the nonhearsay status of some of these utterances, but not that of others. The examples involving slander and deceit are easy to reconcile with the general definition because the utterances are clearly not offered for the truth of their assertions. Indeed, a proponent would lose on the overall claim if the trier believed the utterances to be true. The example of offer and acceptance in contract is somewhat more difficult to reconcile with the basic hearsay definition presented in McCormick. Common sense suggests that "I accept your offer" must be admissible, but the assertion-oriented aspect of the definition would suggest a different result; after all, the utterance states the exact proposition that it is offered to prove. There are various ways to respond to this concern. The simplest response is that when an utterance can be used without any reliance on the declarant's credibility, one need not worry about whether it is offered for the truth of its assertion. In other words, an utterance that is not hearsay under the declarant-oriented definition is not hearsay even in jurisdictions that purportedly follow an assertion-oriented definition.

57. McCormick, supra note 1, § 249, at 588.
58. Id. at 588-89.
59. See, e.g., E. Kimball, supra note 2, at 273 (1978) (words constituting acceptance of a contract offer "themselves have operative effect" and "are not offered for their 'truth,' because they cannot be false") (emphasis omitted); G. Lilly, An Introduction to the Law of Evidence 160 (1978) ("I accept your offer" is not hearsay because the "proponent only need establish that the operative words which formed the contract were spoken, not that these words were, in any sense, true"); Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 231 (1922) (an utterance accepting a contract offer is an operative fact that "is offered, not for the purpose of proving its truth, but merely for the purpose of showing that it was made"). See also 6 J. Wigmore, supra note 4, § 1772, at 267.
60. For purposes of this example, it is assumed that the jurisdiction follows a completely objective test for contract formation, so that insincerity or misnarration would not affect the creation of the contract. If the jurisdiction followed a subjective test, the analysis for contracts would be the same as that for bribes and gifts. See text accompanying notes 61-63 infra.
This answer works for "I accept your offer," but it does not work for some of the *McCormick* examples of words accompanying the transfer of money. Suppose that the declarant characterizes the transfer as a bribe and his or her words are offered to show that the declarant committed a crime. The utterance should be admitted, even if it is not the admission of a party, but why is it admitted as a nonhearsay verbal part of an act as opposed to being admitted, for example, under the state of mind exception? When the utterance "I offer you a bribe" or its equivalent is used to show that the declarant offered a bribe, then the statement both states the proposition to be proved and rests for value on the declarant's credibility. It rests on credibility because one element of the crime of bribery is subjective criminal intent. If the declarant was insincere (for example, if he or she were offering a sham bribe as part of an investigation), or defective in narration, then the utterance does not establish the point for which it is offered. The same analysis applies to the utterance "This is a bet" offered to show that the declarant was guilty of illegal gambling. Even words characterizing a transfer as a loan, payment, or gift may rest on the declarant's credibility.

Admittedly, the principal examples of verbal parts of acts in *McCormick* are utterances whose nonhearsay status is supported by ample legal precedent. The theoretical difficulty of

63. In a jurisdiction in which the making of a gift requires subjective donative intent, a transfer of money accompanied by "This is a gift" would not be legally effective if the declarant misstated his or her intent. For a case in which an apparently unambiguous outward manifestation was overcome by evidence of contrary subjective intent, see Kakanskis v. Jasut (Estate of Skucas), 169 Conn. 29, 362 A.2d 898 (1975). In *Kakanskis*, the putative donor delivered two bankbooks and a bank statement to the putative donee, stating that the donee was to have the money in the three bank accounts as a gift. The court sustained the trial judge's determination that the donor had made a valid gift of only two accounts on the ground that the donor's subsequent use of the third account for his own purposes was sufficient evidence that he did not really intend to transfer that account. *Id.* at 36, 362 A.2d at 903. Cases in which gifts have been voided for mistake also illustrate that outward manifestations of intent are not always controlling. See Ellis v. Drake, 206 Ala. 145, 99 So. 388 (1921) (overruling demurrer to complaint seeking rescission on the ground that father executed deed to his daughter under a mistaken impression as to its effect); Twyford v. Hufaker, 324 S.W.2d 403 (Ky. 1959) (gift voided because of unilateral mistake by donors as to amount of property transferred by deed); White v. White, 346 Mass. 76, 190 N.E.2d 102 (1963) (transfer by mother to her son and herself as "joint tenants" voided because of parties' mistake about legal effect of joint tenancy).
64. See 6 J. Wigmore, supra note 4, § 1777, and authorities cited therein.
reconciling this result with hearsay definitions has usually gone unrecognized, perhaps because common sense so strongly supports their admission. However, some of the secondary examples in McCormick rest on shakier grounds. For example, the book asserts that a "mortgagor's statements that he wanted [his] property 'plastered' so that his estranged wife could not 'get her hooks into it'" is, when used to attack the validity of the mortgage, a nonhearsay verbal part of an act. Because such an utterance has no independent legal significance and would be used only to show intent, the utterance

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65. A notable exception to the tendency to disregard hearsay dangers in this kind of case appears in Lempert & Saltzburg's case book. With respect to an example in which the declarant hands his friend $20 and says "take this as a loan," Lempert and Saltzburg maintain that the evidence appears relevant because it negates donative intent. This inference about donative intent seems to require the jury to reason from the making of the statement to the donor's belief about the transaction and from this belief to the fact in issue. Most courts, however, do not engage in such fine analysis. They treat all clarifying statements as part of the acts they accompany and assume the jury can reason directly from them to facts in issue.

R. LEMPERT & S. SALTZBURG, supra note 5, at 342-43.

Lempert and Saltzburg solve this problem of hearsay classification by creating a definition of hearsay under which an utterance is hearsay if the trier's use of it requires reliance on the declarant's memory and perception but is not hearsay if the trier's use requires reliance only on sincerity and narrative ability. Id. at 333-46. Although this modified declarant-oriented definition guides readers to the correct result in cases involving statements about donative intent, it is not consistent with well-established precedent in other areas. For example, it is inconsistent with classification of direct utterances of state of mind as hearsay (e.g., "I don't love you any more" offered to show what it asserts). The authors argue that "[a]nalytically" such utterances are nonhearsay, but warn readers that

[f]or the purpose of dealing with the problems in this book or examination questions we make the suggestion that you arbitrarily classify statements offered to prove precisely the state of mind asserted as hearsay. We do this because it accords with the view of most commentators and because most courts if faced with a hearsay objection to such a statement will more easily follow the claim that the statement comes within the state of mind exception than they will a sophisticated argument as to why the statement is not hearsay.

Id. at 346 (footnote omitted).

The Lempert and Saltzburg definition, like the more conventional declarant-oriented definition, see Tribe, supra note 5, at 958-61, also fails to explain why some utterances that involve all four hearsay dangers nevertheless are commonly classified as nonhearsay. See text accompanying notes 9-11 supra (utterances offered as falsehoods); text accompanying notes 69-72 infra (intercepted calls to bookmakers). See also 1 WIGMORE, 1940 EDITION, supra note 17, §§ 148-157 (name tags, labels, etc. are not hearsay when offered to show ownership of the article labeled).


67. In Barnett, the decedent attempted to put property beyond his wife's reach by setting up a sham mortgage with the understanding that the mortga-
rests for its value on the declarants’ credibility. Moreover, *McCormick* itself later treats as hearsay declarations offered to show intent to defraud creditors.\(^{68}\)

In another questionable passage, *McCormick* asserts that “statements made in connection with activities taking place on the premises” are “verbal parts of acts” when used to show the “character of an establishment,” and it offers as an example utterances that are “indicative of gambling,” including telephone calls intercepted by police while raiding a bookmaker.\(^{69}\) Although there are good reasons why testimony about these calls should be admitted,\(^{70}\) and a respectable argument can be made that they are not hearsay under the assertion-oriented definition,\(^{71}\) it is difficult to understand why they are “verbal parts of gee would never foreclose. When the mortgagee sought to foreclose after the decedent’s death, the court admitted testimony that the decedent had told a third party that he wanted the property “plastered” so that his estranged wife could not “get her hooks into it.” The utterance was not made at the time of execution and was relevant only for the inference that the declarant intended the subsequently executed mortgage to be a sham. Indeed, the *Barnett* court correctly treated the utterance as evidence falling under the state of mind exception, instead of classifying it, as is done in *McCormick*, as a nonhearsay “verbal part of an act.” See 101 Ariz. at 490, 421 P.2d at 509; *McCormick*, supra note 1, § 249, at 589 & n.80.

68. In *McCormick*, utterances offered to show intent to defraud creditors are listed among the examples of hearsay utterances admissible under the state of mind exception. See *McCormick*, supra note 1, § 294, at 695; FIRST EDITION, supra note 3, § 269, at 568-69. The inconsistency may have resulted because the revisors inserted the mortgage case into their new “verbal part of an act” category without changing the first edition’s classification of declarations showing intent to defraud creditors. Wigmore classifies the fraudulent declarations as nonhearsay verbal acts. See 6 J. WIGMORE, supra note 4, § 1763, at 309.

69. See *McCormick*, supra note 1, § 249, at 589 & n.81.

70. In the bookmaker cases, the evidence usually takes the form of testimony that while on the premises police answered calls from unidentified persons who attempted to place bets. The calls are usually reliable evidence because they are corroborated by each other and by evidence found on the premises (racing newspapers, multiple telephone lines, or bookmaking paraphernalia). Also, unless bizarre facts are assumed, the callers would have no motive to falsify.

71. In a typical case, the callers made utterances such as “This is Al, Charlie; the Doc wants a $10.00 number hitch on eight races at Saratoga.” State v. Toliscano, 136 Conn. 210, 214, 70 A.2d 118, 119 (1949), cited in *McCormick*, supra note 1, § 249, at 589 n.81. Under an assertion-oriented definition, one can make an argument that the utterance is circumstantial evidence that the person for whom the call was intended was a gambler, i.e., that the statement is not offered for the truth of any assertion contained therein. See 6 J. WIGMORE, supra note 4, § 1790, at 325 n.2. On the other hand, one might argue that the utterance is equivalent to saying “I want to place a bet” and that the trier must accept the truth of this assertion in order to reach the conclusion that the person the caller thought he was talking to was a bookmaker. However, a plausible argument can be made that even if the caller did not truly want to make a bet (for example, if he was in the habit of making prank calls) the utterance still has some probative value on whether the person for whom the call was intended
acts.” One reason that this classification is puzzling is that, unlike *McCormick*’s examples of words characterizing the transfer of money, the bookmaker calls do not seem to be “part” of an independently relevant “act.” More importantly, the calls do not seem at all comparable to *McCormick*’s principal examples of utterances that fall within the book’s two “verbal act” categories. When “I accept your offer” is used to show acceptance, or “This is a gift” is used to establish that a contemporaneous transfer was a gift, legally operative language is being used to show the existence of the legal relationship it creates. By contrast, even if one assumes that attempted betting is a crime and hence that the bookmaker calls were legally operative, the utterances were not being used for what they did (subjected the declarant to criminal liability) but to show what they expressly or implicitly said (that the intended addressee was a bookie); when used in this fashion, operative language is not necessarily admissible.

As for the general category of statements “made in connection with activities on the premises” used to show “the character of an establishment,” the basis for deeming

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72. The term “legally operative” is being used loosely here, in the manner of those who classify words of bet, bribe, or gift as “legally operative,” so that the term includes not only utterances that have operative effect regardless of the declarant’s subjective mental state, but also words that have operative effect only if uttered in conjunction with a specified subjective intent. In this instance, the subjective intent required would be intent to place a bet.

73. When legally operative language is offered for something other than what it “does” (that is, for something other than showing the existence of the legal relationship that it creates), the language does not escape from the hearsay rule simply because it is legally operative. For example, allegations in pleadings are legally operative language; they define the controversy, limit proof, and provide the predicate for the next step in pleading. No one, however, would assert that pleadings are nonhearsay when offered for what they say instead of for what they do. Pleadings would be patently unreliable when used for that purpose. If the pleadings of plaintiff and defendant survive a motion for judgment on the pleadings, then some of the facts alleged in the complaint or answer must be false. The doctrinal treatment of the judgment of prior conviction is another example; if a conviction was considered a nonhearsay “verbal act” when offered to show the belief it reflected, as opposed to the legal effect that it had, then there would be no need for the limited hearsay exception addressed to the use of prior convictions. See Fed. R. Evid. 803(22). This is also the case with recitals in wills, contracts, and the like: when offered to show the legal relationship they create, they are not hearsay; when offered to show the truth of other assertions contained in them, they are hearsay unless they fall under an exception or exclusion.
these utterances nonhearsay is unexplained in *McCormick* and seems unjustifiable. The category is broad enough to include conversation between customers in a tavern about prostitution on the premises, or gossip among guests at a party about the host's cache of drugs. Admission of this evidence in a prosecution of the tavern owner or the host would involve both use of utterances to show the truth of their assertions and reliance on the declarant's credibility.

Recognition that utterances made about the character of an establishment are hearsay would not thwart justice. If the utterances were addressed to the defendant, the adoptive admission theory would normally provide an escape from the hearsay rule;\(^7\) if the utterances described activities that the declarants were then observing, the present sense impression exception could be employed in jurisdictions taking a modern view of the exception's scope.\(^7\) There is no need to strain for a way to classify statements about the character of an establishment as "verbal parts of acts;" if such utterances are reliable, they will be admitted into evidence by another route.

The "verbal acts" and "verbal parts of acts" categories were added by the revisors of the second edition of *McCormick*. In the first edition Dean McCormick employed the more manageable concept of "utterances proved as operative facts" and offered a reduced list of examples.\(^7\) This concept of "operative" language explains the examples involving slander, deceit, and contracts very well. If glossed to include not only language that has operative effect by itself but also language that has operative effect when uttered with a specified intent, the concept would also identify utterances characterizing transfers of money as nonhearsay.

The revisors' change to "verbal acts" and "verbal parts of acts" is not an improvement. These terms may help readers a bit by hinting that utterances are admissible when offered for what they do instead of what they say,\(^7\) but the benefit of this hint is outweighed by the resulting confusion about the limits of these categories, which show signs of becoming a modern

\(^7\) See generally *McCormick*, supra note 1, §§ 269-270.

\(^7\) See FED. R. EVID. 803(1); *McCormick*, supra note 1, § 298.

\(^7\) First Edition, supra note 3, § 228, at 463-64.

\(^7\) Cf. J.L. Austin, *Philosophical Papers* 235-36 (2d ed. 1970). Austin discusses what he calls "performative utterances," providing as examples "I do [take this woman as my wife]," "I apologize," and "I name this ship the Queen Elizabeth." These utterances, he says, "couldn't possibly be true or false," and "if a person makes an utterance of this sort we should say that he is doing something rather than merely saying something." *Id.* at 235.
substitute for *res gestae*. A computer-aided search indicates that recent cases containing, in conjunction, the words “hearsay” and “verbal act(s)” or “verbal part(s) of act(s)” are not concerned with language creating contracts, gifts, or the like. Apparently the absurdity of excluding such utterances is so obvious that there has been no occasion for appellate courts to write opinions explaining that statements of this kind are admissible. Instead, the terms have been applied repeatedly to language that is not legally operative, but merely explains the declarant’s contemporaneous nonverbal conduct. Many of the utterances in these cases asserted the proposition to be proved, rested for value on the declarant’s credibility, and did not fit under any established hearsay exception. Since almost any utterance helps to explain conduct, the “verbal act” categories provide a discretionary hearsay escape that can be invoked without the necessity of explaining why the evidence is trust-

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78. For a general discussion of *res gestae*, see McCormick, *supra* note 1, § 288; *First Edition*, *supra* note 3, § 274.

79. This search was performed on the LEXIS federal case library. The search request asked for retrieval of all cases in which the words “verbal act(s)” or “verbal part(s) of act(s)” appeared within 20 words of the word “hearsay.” For a discussion of some of the cases that resulted from this search, see note 80 infra and accompanying text.

80. For example, in a case where B’s statement that he was going to meet with his suppliers for purposes of obtaining heroin was admitted against A to show that A was one of the suppliers, the Second Circuit held that the statement was a “verbal act,” defined “verbal acts” as “contemporaneous utterances explaining nonverbal conduct or its tenor,” and let in the utterance on the apparent ground that it “explain[ed]” both B’s conduct in getting into a car with A and A’s conduct in taking evasive action when surveillance was detected. See *United States v. D’Amato*, 493 F.2d 359, 363-65 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). See also *United States v. Jackson*, 588 F.2d 1046, 1049-50 n.4 (5th Cir.) (utterance by unidentified declarant who gave J heroin that P would meet her to pick up heroin was admissible against P as an utterance “contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light on it”), *cert. denied*, 442 U.S. 941 (1979); *United States v. Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975) (alternative holding); *United States v. Annunziato*, 293 F.2d 373, 376-77 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). But see *Kivitz v. SEC*, 475 F.2d 956, 959-60 (D.C. Cir. 1973).

A different panel of the Second Circuit used the “verbal act” concept to permit admission against Y of an utterance by X saying that Y was going to give X a kilo of heroin. See *United States v. Tramunti*, 513 F.2d 1087, 1109 (2d Cir.), *cert. denied*, 423 U.S. 332 (1975); cf. *United States v. Manfredi*, 486 F.2d 583, 596 (2d Cir.) (utterance indicating that uncle was source of heroin admissible against uncle because it “shed light” on declarant’s conduct during clandestine visit to uncle), *cert. denied*, 417 U.S. 936 (1973).

The Fifth Circuit has invoked “verbal act” to let in A’s threat that third parties would harm the addressee in a case in which the utterance was offered against the third parties to show that they were part of an extortion scheme. *United States v. Burke*, 495 F.2d 1226, 1231-32 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).
worthy or meeting the other requirements of the residual hearsay exceptions.

II.

The remainder of this Article is addressed to law teachers who plan to use *McCormick* as a primary text in courses on evidence. Proper emphasis on the limitations of the book’s analysis of hearsay can prevent students from being misled and can promote critical thought. In an effort to be specific, I will present a lesson plan that could be followed when *McCormick* is used as a casebook substitute.

I would first assign the definitions of hearsay in *McCormick*¹ and in the Federal Rules of Evidence,² and the portions of *McCormick* on utterances that are not hearsay because they are offered to show their effect on the hearer or reader.³ This assignment would give students an opportunity to apply the *McCormick* definition of hearsay to situations in which it provides useful guidance. For example, the assertion-oriented definition in *McCormick* would guide a student to the conclusion that an utterance such as “I am going to kill you” is not hearsay when offered to show that the person being addressed had reason to fear the declarant.

Students do sometimes have difficulty when an utterance offered to show its effect upon the hearer or reader also asserts a proposition that the proponent must prove independently in order to prevail on the overall claim. For example, an utterance warning a physician that his or her patient is allergic to penicillin is hearsay if used to show the existence of the allergy, but not hearsay if used to show that the doctor had notice of the allergy. If both issues are in dispute and no hearsay exception is applicable, then the utterance should be admitted with instructions limiting its use to the second purpose.⁴ When an utterance has this sort of double relevancy, students sometimes have trouble understanding how it can be admitted for any pur-

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¹ *McCormick*, supra note 1, § 246. My initial assignment would also include *McCormick’s* discussion of the history and purpose of the hearsay rule. See id. §§ 244-245.

² FED. R. EVID. 801(a)-(c). Rule 801(c) is a typical assertion-oriented definition: an utterance is hearsay when “offered in evidence to prove the truth of the matter asserted.” Rule 801(d) provides that certain prior statements of witnesses and admissions of parties are not hearsay even when offered for their truth. I would delay coverage of Rule 801(d) until after the assignments described in text accompanying notes 81-114 infra.

³ See FED. R. EVID. 105; *McCormick*, supra note 1, § 249, at 589-90.

⁴ *McCormick*, supra note 1, § 59, at 135-36.
pose. If the utterance is not true, then the proponent's case fails; hence, how can one say that an utterance is relevant without regard to the truth of its assertion? There are no doubt many satisfactory answers to this question, but I prefer simply to tell students that when an utterance can be used for a purpose that does not require reliance on the credibility of the declarant, they need not be concerned with whether the truthfulness of what it asserts is an essential element of the proponent's case. When used to show notice, the declarant's credibility is irrelevant; the circumstance that the proposition asserted in the utterance must be established by other evidence does not prevent it from being admitted on the issue of notice.

To help students distinguish utterances that rest on the declarant's credibility from those that do not, I would use Tribe's ingenious triangle as an illustrative aid. (Students should be warned, however, that when analysis with the triangle shows reliance on credibility the utterance might nevertheless be deemed nonhearsay under the assertion-oriented definition; Tribe's declarant-oriented definition of hearsay is not consistent with majority doctrine.) Using the triangle, students could be asked whether the girl's statement in Bridges and the utterance "I know the brakes are bad" can, as McCormick asserts, be used without reliance on the declarant's veracity.

My next topic would be utterances used as direct or circumstantial evidence of the declarant's state of mind. As a pre-

85. I am assuming that the existence of the allergy is an essential element of plaintiff's case.
86. See Tribe, supra note 5, at 958-61.
87. Tribe's definition is inconsistent with the many cases that state that circumstantial evidence of the declarant's state of mind is nonhearsay. See McCormick, supra note 1, § 249, at 590-96; 6 J. Wigmore, supra note 4, § 1790; text accompanying notes 25-32 supra. Tribe's definition is also inconsistent with the judicial tendency to designate utterances that explain certain types of conduct (such as the transfer of money) as nonhearsay "verbal acts" even when the legal effect of the conduct varies with the subjective state of mind of the actor. See text accompanying notes 57-60 supra. The Federal Rules of Evidence reflect this tendency by adopting an assertion-oriented definition, thereby encouraging use of the concept of circumstantial evidence, and by mentioning the concept of "verbal act" approvingly in the Advisory Committee's Note. See Fed. R. Evd. 801(a)-(c) & Advisory Comm. Note. The Federal Rules also differ with Tribe as to the proper classification of admissions and of nonverbal conduct, but there is no need to warn students about this because the difference is simply set forth by Tribe himself. See Tribe, supra note 5, at 973.
88. See text accompanying notes 44-47 supra.
89. McCormick, supra note 1, § 249, at 592; First Edition, supra note 3, § 228, at 466; see text accompanying notes 39-43 supra.
90. McCormick, supra note 1, § 249, at 592.
liminary matter, I would assign McCormick's definition of circumstantial evidence\(^91\) so that students could realize that to say an assertion is not offered for its truth because it is being used circumstantially is to reason in circles. The class should be cautioned about McCormick's question-begging use of the term "circumstantial" as an escape from hearsay.\(^92\) The main focus of discussion, however, should be on the utility of the distinction between circumstantial and direct use of utterances.

As preparation for this discussion, students should read the portions of McCormick\(^93\) and the Federal Rules\(^94\) that deal with the use of utterances for inferences about the declarant's state of mind. This assignment would include readings on the hearsay exception for declarations of then-existing state of mind,\(^95\) and hence would be a break with tradition because it introduces a hearsay exception prior to finishing the distinction between hearsay and nonhearsay. My rationale for the breach is that the same considerations of necessity and reliability support the admission of such utterances, whether they are offered directly to show present state of mind or indirectly for the same purpose. The utterances are necessary evidence because it is difficult and foolish to try to prove a declarant's state of mind without using his or her utterances. They are relatively reliable because the hearsay dangers of bad memory and misperception are insignificant when an utterance is offered to show the declarant's then-existing mental state. For example, when an utterance is offered for the inference that the declarant disliked Jim, the direct use of "I dislike Jim" and the indirect use of "Jim ought to be shot" are both subject to the dangers of insincerity and misnarration, but the dangers of defective memory and perception are virtually absent.\(^96\)

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91. Id. § 185, at 435-36.
92. See id. § 249, at 592; First Edition, supra note 3, § 228, at 466.
93. McCormick, supra note 1, §§ 249, 289, 294-296, at 590-95, 687-88, 694-704.
94. Fed. R. Evid. 801(a)-(c), 803(3).
95. Fed. R. Evid. 803(3); McCormick, supra note 1, § 294.
96. See, e.g., Tribe, supra note 5, at 964-65. There are, however, some conceivable dangers of faulty memory or perception. For example, a declarant who said "I dislike Jim" might be mistaken about the identity of Jim. The mistake could be due either to bad memory or to misperception at the time Jim was introduced. The declarant might really mean that he or she dislikes Tom, whom he or she has confused with Jim. Normally, however, utterances used solely to show present state of mind do not rely heavily on memory or external perception.

McCormick's rationale for the state of mind exception is that the utterances are likely to be reliable because of "their spontaneity and probable sincerity." McCormick, supra note 1, § 294, at 695. Maintaining that the utterances are reliable because they do not rest substantially on memory and per-
Early assignment of the state of mind exception will also help students realize that when an utterance is offered to show then-existing state of mind, the distinction between circumstantial and direct use makes no difference because of the availability of a hearsay exception. Students should be aware that whether an utterance such as "I believe that I am Henry the Eighth" is hearsay is an academic question when the evidence is used to show insanity.97

Clever distinctions on which nothing turns are not much help in predicting what courts will do when calling an utterance hearsay would cause it to be excluded. For this reason, I would use examples in which classification as hearsay could result in exclusion, and would ask students whether it makes sense to treat utterances used circumstantially differently from those used directly. A good starting place would be utterances offered as falsehoods. Suppose that a declarant attempted to set up a false alibi for a friend accused of a crime. The prosecution can demonstrate the falsity of the alibi, and offers the declarant's story as evidence of the friend's guilt. Direct use of "he's guilty" would be impermissible, but circumstantial use of the falsehood "he couldn't be guilty because he was here with me" would be permissible under the assertion-oriented definition.98 Additional examples from Wright v. Tatham99 could also be discussed. The issue in Wright v. Tatham was the competence of a testator to make a will. The beneficiary of the will offered in evidence letters that had been written to the testator. The letters were written as if the authors were addressing a person of ordinary understanding, and they were offered to show that the writers believed that the testator was competent, as the basis for the further inference that the testator was in fact competent. To draw these inferences the trier would not be required to rely upon the truth of assertions in the letters, but a good argument can be made that an utterance directly asserting that the testator was competent would be better evidence than indirect use of the letters.100

97. See text accompanying note 21 supra.
98. See notes 9-11 supra and accompanying text.
100. One of the letters to the testator in Wright was from the local vicar, who advised the testator to have his lawyer do something about a pending dis-
At this point, the hearsay status of nonverbal conduct could also be discussed. The use of nonassertive nonverbal conduct to evidence the actor's belief raises many of the same issues as the circumstantial use of verbal assertions. There is a similar danger that the trier will draw an incorrect inference about the actor's beliefs, or that a correct inference about these beliefs will lead to an erroneous conclusion because of defects in the actor's memory and perception. On the other hand, an actor's nonverbal conduct often suggests reliance by the actor upon a certain belief, and in such cases the actor may have exercised special care in ascertaining the foundation for his or her belief. Moreover, since lawyers seldom recognize that nonassertive nonverbal conduct raises hearsay problems, rules excluding evidence of such conduct would operate sporadically and unequally.

After this discussion, I would ask students to read the portions of *McCormick* that deal with verbal acts and verbal parts of acts. My goal would be to acquaint students with this terminology while suggesting to them the limited usefulness of
the concepts of "verbal acts" and "verbal parts of acts." These concepts probably do more harm than good. Without any instruction in the law of evidence at all students would probably surmise that utterances creating contracts, gifts, loans, and the like must be admissible. Otherwise, it would be impossible to vindicate the substantive rights they have learned about in other courses such as contracts, torts, and property. All that the course in evidence teaches is that such utterances are nonhearsay, as opposed to being hearsay admissible under an exception. Students will not need to know this in practice, since admissibility does not turn upon it; nor does this bit of knowledge illuminate anything else in the evidence course—quite the contrary.105 Nonetheless, evidence teachers have long insisted that students learn it for the examination, so students set about doing so.

I suspect that students learn this nonhearsay category largely by repetition of examples. The list is not long: contracts, gifts, loans, words offered to show defamation or deceit, bets, bribes, and other words characterizing a transfer of property. The assertion-oriented definition is of no help in deciding how to treat such utterances, and may even be harmful,106 the utility of the declarant-oriented definition depends upon whether the student has the misfortune of perceiving that some of the utterances in this group require reliance on the declarant's credibility.107 Students are probably helped more by an ability to see analogies between examples on the list than they are by hearsay exceptions or by the concept of "verbal acts." Admittedly, once students have learned the list, some of them may find "verbal act" to be a handy label for its contents, though perhaps an arbitrary word would be better, since both hearsay students and hearsay experts are likely to attribute independent meaning to "verbal act" and place all sorts of utterances that are not legally operative in this category.108

When dealing with McCormick's examples of "verbal acts"

105. The amorphous category of "verbal acts," like "res gestae" before it, probably obfuscates more than it explains. See text accompanying notes 57-80 supra. Even if this phrase were discarded, thoughtful students would still be puzzled by the nonhearsay status of certain utterances that both state the proposition to be proved and rest for value on the declarant's credibility. See text accompanying notes 61-62 supra. 106. The assertion-oriented definition sometimes confuses students when the utterance states the proposition to be proved, such as "This is a binding contract" or "This is a gift." See text accompanying notes 58-62 supra. 107. See text accompanying notes 61-62 supra. 108. See note 80 supra and accompanying text.
and "verbal parts of acts," I would remind students that they need not worry about whether an utterance is offered for its truth if the use of it will not require reliance on credibility; hence, in a jurisdiction following an objective theory of contracts, "I want to buy 500 widgets" and "This is a contract" receive similar treatment. I would then ask whether McCormick's examples require reliance on credibility. At some point in the continuum from contract to gift to bribe to declarations of intent to defraud creditors, I would expect students to say that hearsay dangers are involved in the trier's use of the utterance. For example, use of "This is a bribe" to show that the declarant committed bribery requires reliance on his or her sincerity and narrative ability, and hence two (but only two) hearsay dangers are present. These two dangers are also encountered when an utterance is offered as direct evidence of present state of mind. Such utterances are, of course, admissible under the modern version of the state of mind exception, which students would have studied in the earlier assignment. I would tell the class that utterances creating contracts, gifts, loans, and the like should be considered admissible either because such statements do not require reliance on the declarant's credibility at all, or because they can be used to show the declarant's then-existing state of mind, and hence would be admissible under the state of mind exception. Finally, I would tell students that, so far as my course is concerned, they need not try to sort the utterances into categories labeled "nonhearsay" and "hearsay-but-admissible"; it is sufficient that they know the utterances would be admissible either as nonhearsay or as declarations of present state of mind.

After addressing utterances that accompany the transfer of money, I would turn to utterances indicative of gambling. I would probably distribute State v. Tolisano, one of the cases cited in McCormick as involving a "verbal part of an act," to

109. All of these utterances are listed as "verbal acts" or "verbal parts of acts" in McCormick. See McCormick, supra note 1, § 249, at 588-89, 589 n.80.
110. See notes 61-62 supra and accompanying text.
111. 136 Conn. 210, 70 A.2d 118 (1949).
112. McCormick, supra note 1, § 249, at 589 n.81. Tolisano dealt with the admissibility of telephone calls answered by police while they were raiding the apartment of a suspected bookmaker. The unidentified callers made utterances such as "This is Al, Charlie; the Doc wants a $10.00 number hitch on eight races at Saratoga." 136 Conn. at 214, 70 A.2d at 119. All four hearsay dangers are at least theoretically present when such utterances are used to show that the intended addressee was guilty of illegal gambling. The caller might have a wrong number, might be mistaken about the nature of the establishment because of bad memory or perception, might be joking or deliberately attempting to in-
demonstrate the hearsay dangers that accompany the use of such utterances. I would introduce the residual exceptions in the Federal Rules of Evidence as a possible alternative basis for admission. Finally, I would present a case that used the “verbal act” label to admit utterances of questionable reliability to illustrate how a concept such as “verbal act” can become another res gestae.

In the foregoing pages, I have described both a lesson plan and a set of objectives. The latter is clearly more important than the former. There are many good arguments for using a different sequence of assignments or for covering some matters by lecture instead of dialogue. Whatever the lesson plan, however, a teacher should seek to give students more guidance than McCormick does about the relationship of assertion-oriented and declarant-oriented definitions of hearsay, and about the meaning and utility of hypnotic terms such as “circumstantial evidence” and “verbal acts.”

III. CONCLUSION

McCormick’s discussion of certain nonhearsay categories is confusing and misleading. The book classifies some utterances as “circumstantial evidence” even when, applying its own definition of the difference between circumstantial and direct evidence, they do not. One theory of admission that is superior to “verbal act” is that they are offered as circumstantial evidence of state of mind. See note 71 supra.  

113. FED. R. EVID. 803(24), 804(b)(5). See note 34 supra.  

114. See cases cited in note 80 supra.  

115. For example, the possibility that close textual analysis of McCormick will sharpen students’ understanding of hearsay must be weighed against the danger that these classes will be relatively dry in comparison with those that, for example, use the stimulating problems in the booklet by K. Broun & R. Meisenholder, see note 2 supra. Although many of the points made in this Article can be raised in class during discussion of the booklet’s problems, e.g., K. BROUN & R. MEISENHOLDER, supra note 2, Problem 12-I, at 96 (problem involving utterance offered as falsehood, similar to example described at text accompanying notes 10-11 supra), this problem could be used to show that an utterance that is hearsay under a declarant-oriented definition can be nonhearsay under an assertion-oriented definition); id. Problem 12-M, at 96 (problem involving statements offered to show insanity; could be used as prelude to discussion of “I believe I am Henry the Eighth,” see text accompanying notes 15-24 supra), a decision to cover the points raised by dialogue (as opposed to lecture or reading assignment) would necessarily involve a sacrifice of time that could be devoted to discussion of other problems from the booklet.
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dence, they would be direct evidence. It asserts that other utterances do not depend for value upon the declarant's "veracity," even when the value of these utterances would be decreased by negative information about the declarant's memory, perception, sincerity, or narrative ability. It applies the label "verbal part of an act" to utterances that are not legally operative and that involve hearsay dangers, without explaining why these utterances belong in the same category as legally operative language, or why the category itself falls outside the book's assertion-oriented definition of hearsay. In general, McCormick's treatment of the concept of hearsay is tainted by unexplained assertions and obscure generalities.

With one exception,116 the perplexities in the treatment of hearsay found in McCormick originated in Dean McCormick's first edition. The obtuse quality of these sections on hearsay can hardly be attributed to dullness of intellect. Dean McCormick had the ability and diligence to provide clearer analysis, but he may have had mixed feelings about undertaking this endeavor.117 As a supporter of radical change118 who was writing

116. The exception is the book's passages on "verbal acts" and "verbal parts of acts," which were added by the revisors in place of the first edition's paragraph entitled "Writings and utterances proved as operative acts." FIRST EDITION, supra note 3, § 288, at 463-64; see text accompanying notes 76-80 supra.

117. Dean McCormick's mixed feelings are suggested in his reluctant farewell to res gestae:

The writers and, less frequently, the courts have criticized the use of the phrase, res gestae . . . . [However,] in the last century the preponderant need has been for the expansion of the scope of admissibility. Predominantly the use of the phrase res gestae has been as a reason for admitting, not for excluding evidence. Manifestly, too, the very vagueness of the term has been beneficial, as making it easier to widen the application of the doctrine into new fields. Perhaps the time has now come when this policy of widening admissibility will be even better served by striving for a clearer analysis . . . . If so, we could well jettison the ancient phrase, with due acknowledgement that it has well served its era in the evolution of evidence law. FIRST EDITION, supra note 3, § 274, at 587 (footnotes omitted). Dean McCormick's attitude can also be inferred from his casual approval of the inference from assertion to belief and back to the fact asserted in the instance of retrospective declarations about wills. See text accompanying notes 25-31 supra. At the time the first edition was published in 1954, Dean McCormick must have known about Wigmore's discussion of the same example and about his demonstration that use of this pretended double inference could lead to demolition of the hearsay rule. See note 28 supra.

118. Throughout his treatment of hearsay, Dean McCormick consistently favored broader admissibility, and after writing approvingly about the radical reform proposed in the Model Code, he offered an even broader exception of his own: hearsay should be admissible "if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances." FIRST EDITION, supra note 3, § 305, at 634. He predicted that "further beyond the horizon" the rule against hearsay would "disappear," to be
in the aftermath of the utter failure of the Model Code reform effort,\textsuperscript{119} he may have thought that tangles in hearsay doctrine should be left undisturbed because they provided cover under which reliable utterances could find their way into evidence. If this was the case, Dean McCormick's goal was laudable, but a straightforward discussion of why the utterances should be admissible might have been a better way of achieving it.

Even with its faults, however, the current version of \textit{McCormick} can still be a useful casebook substitute for law school evidence courses. The book's discussion of other topics is usually clear and enlightening. Moreover, the passages in \textit{McCormick} that this Article has criticized can be used to advantage if enough class time is allocated to analysis and discussion. Students can be encouraged to examine critically the ideas in \textit{McCormick} and to develop their own notions about the concept of hearsay. In doing so, they may realize that concepts like "verbal act" and "circumstantial evidence" can be manipulated at a judge's pleasure. Perhaps as lawyers they will come to favor the proposals to simplify hearsay doctrine that have long been advocated by scholars.

\footnotesize{\textsuperscript{119} When the first edition of \textit{McCormick} was published in 1954, not a single jurisdiction had adopted the liberalizing hearsay provisions of the American Law Institute's 1942 Model Code of Evidence. \textit{See First Edition, supra} note 3, § 304, at 632.}