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Moving towards an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina

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MOVING TOWARDS AN EVIDENCE LAW OF GENERAL PRINCIPLES: SEVERAL SUGGESTIONS CONCERNING AN EVIDENCE CODE FOR NORTH CAROLINA

WALKER J. BLAKEY*

But "general principle" and "rule of thumb" to my mind are different creatures. They abide in the same formula only when the general principle has given birth to the rule of thumb, and this has happened less often in the law of evidence than one might wish. Does the *nisi prius* judge do most of his thinking in terms of general principle or of rule of thumb? . . . [M]y own recollections are predominantly of a great many rules of thumb applied without bothering much to look for principle. This was not because the judges were ignorant of the law of evidence, or because they were too lazy or in too much of a hurry or too independent of appellate restraint to enlighten themselves. It was because the law of evidence is like that: too much rule and too little principle; and so, I think, ought future lawyers be made to see it. Then, seeing it as it is, they ought to do something about it.

Dale F. Stansbury¹

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1. Stansbury, Book Review, 25 N.C.L. REV. 528, 531 (1947).

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I. INTRODUCTION—NORTH CAROLINA MUST DECIDE WHETHER TO ADOPT AN EVIDENCE CODE	

Twenty-four states,² the federal courts, the federal military courts,³ and Puerto Rico⁴ have adopted modern evidence codes, and adoption of an evidence code is being considered in several additional states.⁵ North Carolina must now decide if it should also adopt an evidence code.

A Study Committee of the North Carolina Legislative Research Commission⁶ undertook an examination of both the question of whether North Carolina should adopt an evidence code and additional questions concerning what rules such a code should contain. The Committee postponed a decision on whether or not to recommend an

2. See notes 48, 49, & 51 *infra*.

3. Exec. Order No. 12,198, 3 C.F.R. 151 (1980).

4. I J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE at T-1 (1980).

5. See *id.* at T-3.

6. Study Committee on the Laws of Evidence and Comparative Negligence. Senator Henson P. Barnes and Representative Ralph M. Stockton, Jr., served as Cochairmen of the Committee. Representative H. Parks Helms was the Legislative Research Commission Member in Charge. Members of the committee included: Judge Charles Becton, Dr. James Black, Justice Walter Brock, Dean Kenneth Broun, Professor Robert Byrd, Patricia S. Conner, Senator William G. Hancock, Mr. Herbert Lamson, Jr., Judge John C. Martin, Mr. McNeill Smith, Senator R.C. Soles, Senator Robert S. Swain, Mr. John D. Warlick, and Judge (then Senator) Willis Whichard. Donald B. Hunt and A.W. Turner served as Committee Counsel, assisted by Dennis W. Bryan.

evidence code until it could prepare a draft of what it considered to be the best possible code. The Committee took as its model the Federal Rules of Evidence. Although the Committee found that "for the most part . . . the Federal Rules were consistent with North Carolina practice"⁷ the Committee did redraft many of the Federal Rules as "tentatively approved" proposed North Carolina Rules. Changes were usually made to retain a current North Carolina practice⁸ which the Committee found to be preferable to the corresponding Federal Rule,⁹ but in some cases the Committee created Rules that improved upon both existing practice and the Federal Rules.¹⁰ The work of the Committee required large amounts of both time and thought. When the Committee submitted a Report in December of 1980, it had been working for a full year and had given "tentative approval" to only six of the ten articles which it planned to consider.¹¹ The Committee therefore recommended further study.¹²

This article makes a number of suggestions that may assist discussion of a possible North Carolina Evidence Code. These suggestions range from general considerations concerning the effects of an evidence code to the specific language of particular rules. The general suggestions set forth in this article are as follows. North Carolina should adopt an evidence code, but the most important goal for such an evidence code would not be to substantially change our existing evidence law, but rather to make the evidence law that we already have more accessible and useful. A North Carolina Evidence Code that merely restated our existing law in general principles would make that law far easier to find and to use. The Federal Rules of Evidence should be used as a model because they are already widely known, and they are, by and large, a restatement in general principles of existing North Carolina evidence law. Some of the Federal Rules of Evidence would change North Carolina law, but North Carolina can decide whether or not it wishes to adopt those changes as part of a North Carolina Evidence Code. Indeed, it may be necessary to adopt a North Carolina Evidence Code in order to prevent adoption by the North Carolina common law of unde-

7. Report of the Legislative Research Commission's Study Committee on the Laws of Evidence and Comparative Negligence at 3 (Dec. 16, 1980) (limited circulation through Legislative Library) [hereinafter cited as Committee Report].

8. Thus "tentatively approved" proposed North Carolina Evidence Rule 611(b) rejects the federal rule limiting cross-examination to matters testified to by the witness during direct examination, see P. ROTHSTEIN, RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 224-224.1 (1980), in favor of the North Carolina rule permitting generally "wide open" cross-examination with respect to "any matter relevant to the issues in the case." 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 35, at 105-07 (Brandis rev. 1973).

9. Committee Report, *supra* note 7, at 3.

10. *E.g.*, "tentatively approved" proposed North Carolina Evidence Rule 609.

11. See Committee Report, *supra* note 7, at 4.

12. *Id.*

sirable ideas from the Federal Rules of Evidence, such as the hearsay exception for nonassertive conduct adopted by Federal Evidence Rule 801(a).¹³

North Carolina can, of course, adopt any of the provisions of the Federal Rules of Evidence that are superior to present North Carolina practice,¹⁴ but there are some situations in which North Carolina practices are superior and should be retained. This article makes specific suggestions concerning the wording of two rules. North Carolina should reject those portions of the federal hearsay rule, Federal Evidence Rule 801, that create hearsay "exceptions by definition" in favor of a broader and clearer distinction between hearsay and nonhearsay. This article sets forth a suggested North Carolina Evidence Rule 801 that would draw a clearer distinction between hearsay and nonhearsay.¹⁵ On the other hand, North Carolina should follow Federal Evidence Rule 601 and abolish arbitrary restrictions such as the Deadman's Act on testimony by otherwise competent witnesses.¹⁶

II. TWO GOALS FOR AN EVIDENCE CODE: ACCESSIBILITY AND REFORM

It is important to recognize how similar the provisions of a North Carolina evidence code would be to existing North Carolina practices. Even if North Carolina were to adopt the Federal Rules of Evidence as they stand, North Carolina lawyers would find that the new rules were very similar to the ones they have been accustomed to follow in North Carolina state courts. The Federal Rules of Evidence are largely a restatement of the national general law of evidence¹⁷ that has grown up everywhere in this country—including North Carolina. As Dean Brandis points out, the law of evidence consists largely of "generally accepted rules, most of which are enforced in North Carolina as in other jurisdictions."¹⁸ There are some differences between North Carolina evidence law and the national general law of evidence. Dean Brandis goes on to point out, "Some important changes for the better have been made in North Carolina by statute or judicial decisions, while in a very few instances an objectionable rule of purely local recognition has accidentally developed here."¹⁹ However, the most im-

13. See text accompanying notes 55-108 *infra*.

14. See Patrick, *Towards a Codification of the Law of Evidence in North Carolina*, 16 WAKE FOREST L. REV. 669, at 682-83, 687-89, 691, 696-98, 704-05, & 707 (1980).

15. See text accompanying notes 124-213 *infra*.

16. See text accompanying notes 110-23 *infra*.

17. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE at v, 108 (1977).

18. See D. STANSBURY, *supra* note 8, § 2, at 4.

19. *Id.* (footnotes omitted).

portant features of North Carolina evidence law and the national general law of evidence are almost identical.

The creation and adoption of an evidence code for North Carolina would offer an opportunity for reform of many features of existing evidence law that badly need reform.²⁰ However, that is not the most important goal for an evidence code, and a North Carolina evidence code would be of great value even if it did not attempt to reform existing evidence law. The most important goal for an evidence code is to make the evidence law that we already have accessible and usable.

The evidence law of North Carolina is a complex and confusing mixture of common law and narrow statutes. It is no worse than the evidence law of other states without evidence codes, and in some respects it is superior to the evidence law of such states because for twenty-five years North Carolina has enjoyed the benefits of the labors of Professor Stansbury and Dean Brandis on *Stansbury's North Carolina Evidence*.²¹ That treatise has helped both to improve the quality of the evidence decisions made by the North Carolina courts and to make those decisions available to North Carolina lawyers and judges.

Nevertheless, it is true in North Carolina, just as it is true elsewhere in this nation, that there is too much evidence law. Even able lawyers and judges cannot know all of the evidence law that applies to the cases they are trying. Part of the difficulty is the number of problems with which the law of evidence must deal. Trial courts must decide evidence questions which involve almost every possible problem of human knowledge, and they must decide most of those questions in a few seconds.²² Furthermore, as Professor Stansbury pointed out in the statement quoted at the beginning of this article,²³ the relevant rules of evidence are all too often stated as "a great many rules of thumb" not grounded upon readily discernable principle.²⁴ These "rules of thumb" are difficult to find, to remember, to apply, and to discuss.

One issue that arose during the discussions of the Study Committee²⁵ illustrates the problems that even able and experienced North Carolina attorneys may have in finding the proper "rules of thumb." This point also suggests some of the difficulties that the draftsmen of an evidence code will encounter in attempting to solve such problems. The use of

20. See D. STANSBURY, *supra* note 8 *passim*. See generally text accompanying notes 110-23 *infra*.

21. D. STANSBURY, *THE NORTH CAROLINA LAW OF EVIDENCE* (1st ed. 1946 & 2d ed. 1963); D. STANSBURY, *NORTH CAROLINA EVIDENCE* (Brandis rev. 1973).

22. Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion, and Expert Witnesses*, 14 *TULSA L.J.* 227, 233 (1978).

23. See note 1 and accompanying text *supra*.

24. Stansbury, *supra* note 1, at 531.

25. See text accompanying note 6 *supra*.

character evidence is restricted both under North Carolina law²⁶ and the national general law of evidence²⁷ by a great number of "rules of thumb" that are intended to reduce the amount of time consumed by such evidence and to avoid prejudicial effects which such evidence might have.²⁸ These rules restrict not only the situations in which evidence of character may be used but also the methods that may be used to prove character.²⁹ Federal Evidence Rules 404 and 405 are largely a restatement of the national general law.³⁰ Under both North Carolina law³¹ and the national general law,³² witnesses called to testify concerning the character of some person as circumstantial evidence of that person's behavior are not allowed during their direct examinations to describe any specific acts by the person whose character is to be proven. Instead, during their direct examination such "character witnesses" are restricted to generalized descriptions of character. Under both North Carolina law³³ and the national general law,³⁴ those generalized statements are required to be reports on the reputation of the person whose character is to be proven. Federal Rule 405(a) also permits a second form of generalized description—a statement of the character witness' own opinion, but this is not a meaningful difference because most reputation evidence from lay³⁵ character witnesses is probably, at best, "opinion in disguise."³⁶

Under both the national general law and Federal Evidence Rule 405, parties who call character witnesses must pay a potentially high price. Although the party who calls a character witness is restricted on direct examination of that witness to testimony that gives only a generalized description of character, the opposing party may use its cross-examination to inquire about specific acts inconsistent with the generalized

26. 1 D. STANSBURY, *supra* note 8, §§ 102-116; Sizemore, *Character Evidence in Criminal Cases in North Carolina*, 7 WAKE FOREST L. REV. 17 (1970).

27. C. MCCORMICK, *LAW OF EVIDENCE* §§ 186-194 (2d ed. 1972); 1 J. WIGMORE, *EVIDENCE* §§ 52-81 (3d ed. 1940).

28. 1 D. STANSBURY, *supra* note 8, § 102; C. MCCORMICK, *supra* note 27, §§ 186 & 188; 1 J. WIGMORE, *supra* note 27, §§ 55-57.

29. 1 D. STANSBURY, *supra* note 8, §§ 112-115; C. MCCORMICK, *supra* note 27, § 186.

30. 22 C. WRIGHT & K. GRAHAM, *supra* note 17, § 5232 at 347; S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 129 (2d ed. 1977).

31. 1 D. STANSBURY, *supra* note 8, § 110.

32. C. MCCORMICK, *supra* note 27, § 186.

33. 1 D. STANSBURY, *supra* note 8, § 110.

34. C. MCCORMICK, *supra* note 27, § 186.

35. For discussions of the possibility of expert character testimony, see 22 C. WRIGHT & K. GRAHAM, *supra* note 17, § 5265, 2 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 149 (1972), and 2 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 405[03].

36. "It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise." Advisory Comm. Note, FED. R. EVID. 405, (proposed) Rules of Evidence For United States Courts and Magistrates, 56 F.R.D. 183, 222 (1972) [hereinafter cited as Fed. Advisory Comm. Notes].

description.³⁷ If a criminal defendant calls character witnesses³⁸ to prove that he is not the sort of person who would have committed the crime for which he is being tried, the prosecutor may bring out on cross-examination of the character witnesses any criminal or other specific bad acts by the defendant that tend to disprove the kind of character being claimed.³⁹ Such an examination is likely to be devastating.

In contrast to the national general law and the Federal Rules, North Carolina law does not permit such cross-examination of character witnesses about specific acts.⁴⁰ North Carolina courts will permit questions concerning specific bad acts only during the cross-examination of the very person whose character is being proven.⁴¹ All witnesses are subject to such questions because their own bad character can be used to suggest that they are not trustworthy witnesses,⁴² but, since 1830⁴³ North Carolina has forbidden cross-examination of character witnesses about specific bad acts of the person whose character they were supporting⁴⁴ and the North Carolina Supreme Court has recently reaffirmed this special North Carolina rule.⁴⁵

It appeared that the cross-examination of character witnesses was an area in which the Federal Rules of Evidence should be rewritten to retain the current North Carolina practice.⁴⁶ Discussion in the Committee disclosed, however, that most North Carolina lawyers do not know and do not follow the special North Carolina rule. Apparently the reason why the North Carolina appellate courts have found it necessary to reaffirm the rule in recent cases⁴⁷ was that the lawyers and trial judges in those cases had mistakenly followed the national rule instead of the special North Carolina rule. The Committee decided

37. See generally C. McCORMICK, *supra* note 27, § 186.

38. See generally 2 J. WIGMORE, EVIDENCE § 56 (3d ed. 1940); 1 D. STANSBURY, *supra* note 8, § 104.

39. C. McCORMICK, *supra* note 27, § 191.

40. 1 D. STANSBURY, *supra* note 8, § 115.

41. *Id.* § 111. See, e.g., *State v. Cole*, 31 N.C. App. 673, 230 S.E.2d 588 (1976).

42. 1 D. STANSBURY, *supra* note 8, §§ 107-108.

43. *Barton v. Morphey*, 13 N.C. (2 Dev.) 520 (1830).

44. 1 D. STANSBURY, *supra* note 8, § 115; Sizemore, *supra* note 26, at 25-27.

45. *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978); *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978); *State v. Hunt*, 287 N.C. 360, 215 S.E.2d 40 (1975). See also *State v. Johnson*, 41 N.C. App. 423, 255 S.E.2d 275 (1979); *State v. Cole*, 31 N.C. App. 673, 230 S.E.2d 588 (1976); *State v. Smith*, 5 N.C. App. 635, 169 S.E.2d 4 (1969).

46. Patrick argues:

North Carolina should retain its practice of barring cross-examination of character witnesses through inquiring into specific instances of conduct. Other jurisdictions justify the rule as a means of impeaching the character witness, but it would severely undermine the policy prohibiting the admission of specific instances of conduct as circumstantial proof of wrongdoing. The probative value of such evidence to impeach a character witness seldom outweighs the prejudice suffered by the opponent.

Patrick, *supra* note 14, at 685-86 (footnote omitted).

47. See cases cited note 45 *supra*.

that keeping the official North Carolina rule would be a greater change in existing practice than adopting the apparent change contained in Federal Evidence Rule 405(a) and gave "tentative approval" to a rule following the Federal Rule.

All of this suggests that it is not enough to decide what the best evidence rule on a point should be unless the rule can be stated in a way that makes it possible for the rule to be remembered and followed. This means that the truly important reforms will be ones that can be stated as general principles. The Federal Rules of Evidence are most effective and serve best as models for an evidence code when they manage to find such general principles. Federal Rules 401, 402, and 403 (general rules of relevancy) and Federal Rules 701 and 702 (lay and expert opinion) are examples of successful expression of general principles. On the other hand, Federal Evidence Rules 609 (impeachment by evidence of conviction of crime) and 801 (definition of hearsay) are rules full of confusion and conflict.

III. NORTH CAROLINA SHOULD ADOPT AN EVIDENCE CODE BASED UPON THE FEDERAL RULES OF EVIDENCE

Twenty-four states have now adopted modern evidence codes. Four of these states⁴⁸ had evidence codes before the Federal Rules of Evidence were proposed and three⁴⁹ adopted evidence codes based upon drafts of the Federal Rules.⁵⁰ Since the Federal Rules of Evidence were adopted in 1975, seventeen additional states have adopted evidence codes based upon the Federal Rules.⁵¹

The fact that so many other states have adopted evidence codes based upon the Federal Rules of Evidence does not mean that North Carolina must do the same, but that fact does mean that an evidence code based upon the Federal Rules can be learned and followed by practicing lawyers far more easily than one that is not. An evidence code must become well enough known to be understood and fol-

48. CAL. EVID. CODE (West 1966); KAN. STAT. ANN. §§ 60-401 to -470 (1976); N.J. STAT. ANN. §§ 2A: 84A-1 to -49 (West 1976); UTAH CODE ANN. R. EVID. (1977).

49. NEV. REV. STAT. tit. 4, §§ 47.020 to 52.295 (1973); 84 N.M. xi (1973) (*superseded* by N.M. STAT. ANN. RULES OF EVID. (1978)); WIS. STAT. ANN. §§ 901.01-911.02 (West 1975).

50. (Proposed) Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972).

51. ALASKA RULES OF EVIDENCE (1979); ARIZ. REV. STAT. ANN., ARIZ. RULES OF EVIDENCE (1977); ARK. STAT. ANN. § 28-1001 (1979); COLO. REV. STAT. of 1973, COLO. RULES OF EVIDENCE (1980); DEL. RULES OF EVIDENCE (1980); FLA. STAT. ANN. §§ 90.101-.958 (West 1979); ME. REV. STAT. ANN., ME. RULES OF EVIDENCE (Supp. 1980); MICH. RULES OF EVIDENCE (1978); MINN. STAT. ANN., RULES OF EVIDENCE (West 1980); MONT. REV. CODES ANN. tit. 26-10, MONT. RULES OF EVIDENCE (1979); NEB. REV. STAT. §§ 27-101 to -1103 (1975); N.D. CENT. CODE, RULES OF EVIDENCE, (Supp. 1979); OHIO RULES OF EVIDENCE, (Page 1980); OKLA. STAT. ANN. tit. 12, §§ 2101-3103 (West 1980); S.D. COMP. LAWS ANN. §§ 19-9-1 to -18-8 (1979); WASH. RULES OF EVIDENCE (1979); WYO. RULES OF EVIDENCE (1979).

lowed.⁵² The Federal Rules of Evidence and the state evidence codes based upon them have gained an enormous head start towards overcoming that major problem. Classroom evidence teachers started using the Federal Rules as models for teaching the general law of evidence long before they were adopted in even the federal courts, and their use as models for teaching is now extremely widespread. Authors of national treatises, articles, and other writings tend more and more to talk in terms of the Federal Rules. This is true not only of books written specifically to explain those Rules,⁵³ but also of general writings that would formerly have used the national general law.⁵⁴

This is not to say that the Federal Rules of Evidence are perfect and must be adopted as they stand. They can be, and should be, improved. Ideally, however, the improvements should be limited in number so that North Carolina lawyers will be able to keep in mind the differences between the Federal Rules of Evidence and the North Carolina evidence code.

IV. AN EVIDENCE CODE WILL BE NEEDED IN ORDER TO PREVENT UNWELCOME CHANGES IN EXISTING NORTH CAROLINA LAW (SUCH AS HEARSAY USE OF NONASSERTIVE CONDUCT)

The fact that many North Carolina lawyers follow the national rule concerning cross-examination of character witnesses rather than the special North Carolina rule illustrates one fact that should be considered in deciding whether a North Carolina evidence code should be adopted. It is impossible to keep similar legal systems separated from each other. Ideas flow back and forth between similar systems, and two similar systems will gradually become more and more alike. If North Carolina does not adopt an evidence code it will nevertheless gradually adopt several of the ideas in the Federal Rules and similar evidence codes. Many of the ideas that might be adopted through this process are desirable improvements, but the process might also lead to the adoption by North Carolina of some ideas that are harmful rather than helpful. It therefore may be necessary to create a North Carolina evidence code that clearly excludes those undesirable changes in order to prevent their gradual adoption. The following discussion illustrates how easily such an undesirable change might become part of the law of North Carolina.

52. See generally, 21 C. WRIGHT & K. GRAHAM, *supra* note 17, § 5005, at 72-74.

53. E.g., J. WEINSTEIN & M. BERGER, *supra* note 4; P. ROTHSTEIN, *supra* note 8; C. WRIGHT & K. GRAHAM, *supra* note 17; S. SALTZBURG & K. REDDEN, *supra* note 30; D. LOUISELL & C. MUELLER, *supra* note 35.

54. E.g., Annot. 1 A.L.R. 4th 316 (1980) (*Business Records: Authentication and Verification of Bills and Invoices Under Rule 803(6) of the Uniform Rules of Evidence*).

One of the most confusing subjects in the law of evidence is the relationship between the rule against hearsay and nonassertive conduct.⁵⁵ The idea of hearsay may best be understood if we recognize that hearsay is a particular way of using evidence of out-of-court conduct in a trial.⁵⁶ Evidence of out-of-court conduct may be used either for a testimonial purpose or for a nontestimonial purpose. If we use the evidence for a purpose which treats the out-of-court actor as a witness to something we are trying to prove, we are using the evidence for a testimonial purpose, and we have a hearsay problem. In such a situation it would be useful to be able to cross-examine the out-of-court actor about matters that are probably unknown to the in-court witness who reports that he saw or heard the out-of-court conduct. Conversely, if evidence of out-of-court conduct is offered for a nontestimonial purpose that does not treat the out-of-court actor as a witness at all, there is no hearsay problem. In such a situation the only questions that are proper on cross-examination concern whether or not the conduct occurred, and any witness who claims to have seen or heard the conduct can be subjected to a full cross-examination with respect to those points.

Nonassertive conduct is any conduct by a person that was not intended to assert the truth or falsity of anything. "At times conduct which was not intended to assert the existence of a fact nevertheless tends to show that the actor believed that the fact existed."⁵⁷ When evidence of such nonassertive conduct is offered for the purpose of proving the truth of the fact which the actor apparently believed, the out-of-court actor is being treated as a witness, and there is a hearsay problem. It has frequently been argued, however, that nonassertive conduct either is not hearsay at all,⁵⁸ or that it is relatively trustworthy hearsay which should be admitted as an exception to the rule against hearsay.⁵⁹ Federal Evidence Rule 801(a)(2) adopts a combination of these two arguments.⁶⁰ The Federal Rule creates a hearsay "exception by definition"⁶¹ for nonassertive conduct by excluding nonassertive

55. See C. McCORMICK, *supra* note 27, § 250; 2 J. WIGMORE, EVIDENCE § 267 (3d ed. 1940); Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MT. L. REV. 133 (1961); Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682 (1962); Blakey, *You Can Say That If You Want—The Redefinition of Hearsay in Rule 801 of the Proposed Federal Rules of Evidence*, 35 OHIO ST. L.J. 601, 610-16 (1974) [hereinafter cited as Blakey, *Redefinition*].

56. See C. McCORMICK, *supra* note 27, §§ 245-246; 1 D. STANSBURY, *supra* note 8, §§ 138-139 & 142.

57. 1 D. STANSBURY, *supra* note 8, § 142, at 472.

58. C. McCORMICK, *supra* note 27, § 250; Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 769 (1961); Falknor, *supra* note 55, at 137-38.

59. Finman, *supra* note 55, at 691.

60. Fed. Advisory Comm. Notes, *supra* note 36, at 293-94.

61. See text accompanying notes 124-213 *infra* (discussion of hearsay "exceptions by definition").

conduct from the definition of "statement" in Rule 801(a). That has the effect of excluding nonassertive conduct from the definition of hearsay in Rule 801(c) because Rule 801(c) requires "hearsay" to be a "statement."⁶²

Of course, Federal Evidence Rule 801 also restates the standard national rule that a statement or other conduct is not hearsay, regardless of whether it was originally made or done as an assertion, if the purpose for which it is offered as evidence at the trial is to prove something other than "the truth of the matter asserted."⁶³ Therefore, under this portion of the Federal Rule⁶⁴ a statement or other conduct is admissible as "not hearsay" either if it is not being used for a testimonial purpose or, even though it is being used for a testimonial purpose, if it was not originally intended as an assertion. The Federal Rule, in effect, recognizes that assertive conduct can be used in evidence for a nonassertive purpose but refuses to recognize that nonassertive conduct can be used in evidence for an assertive purpose.

Prior to the adoption of the Federal Rules of Evidence, the law of North Carolina did not recognize an exception to the hearsay rule for nonassertive conduct used to prove a belief of the actor. There had been a few North Carolina cases in which evidence of conduct had been introduced which could have been used to prove the actor's beliefs,⁶⁵ but in none of these cases did the court decide that nonassertive conduct was not hearsay. In several of these cases the court did not decide a hearsay issue at all, either because no hearsay issue had been raised,⁶⁶ or because the hearsay issue concerned evidence which the court considered unimportant.⁶⁷ In those cases in which the court did permit the use of conduct to prove beliefs, the conduct proven was as likely to be assertive⁶⁸ as nonassertive.⁶⁹ In each case in which the

62. Fed. Advisory Comm. Notes, *supra* note 36, at 293; 1 D. STANSBURY, *supra* note 8, § 142 n.49.

63. See C. MCCORMICK, *supra* note 27, § 246.

64. Federal Evidence Rule 801(d) creates four additional "exceptions by definition." See text accompanying notes 124-213 *infra*.

65. Brandis cites ten pre-1975 cases in which evidence of conduct "has been admitted, either as non-hearsay or without noticing its possible hearsay nature." 1 D. STANSBURY, *supra* note 8, § 142 & 474 n.48. However, he points out "[w]hether all of the cases cited in this . . . note involved purely nonassertive conduct may be a debatable question." *Id.* The ten cases are discussed in notes 66-68 and accompanying text *infra*.

66. *State v. Wade*, 169 N.C. 306, 84 S.E. 768 (1915); *Andrews v. Grimes*, 148 N.C. 437, 62 S.E. 519 (1908).

67. *Peck v. Manning*, 99 N.C. 157, 160-61, 5 S.E. 743, 745 (1888). See *State v. Wallace*, 162 N.C. 623, 631, 78 S.E. 1, 4 (1913).

68. In *Ellis v. Harris*, 106 N.C. 395, 11 S.E. 248 (1890), and *Austin v. King*, 97 N.C. 339, 2 S.E. 678 (1887), the conduct was listing or not listing real estate for taxes. *Forbes v. Burgess*, 158 N.C. 131, 73 S.E. 792 (1912), permitted evidence of assertive conduct, nonassertive conduct, and reputation to be used to prove that a man and woman were married. Similarly, in *Pool v. Anderson*, 150 N.C. 624, 64 S.E. 593 (1909), a combination of assertive and nonassertive conduct by a

Supreme Court of North Carolina did permit the use of evidence of conduct to prove belief, the reason for the court's decision was that the particular conduct involved appeared to be trustworthy evidence, which is, of course, the usual basis for the admission of evidence that is hearsay under a hearsay exception.⁷⁰ In other cases the court rejected the use of other kinds of conduct,⁷¹ including silence,⁷² as proof of the actor's beliefs.

Therefore, at the time the Federal Rules of Evidence were adopted in 1975 the law of North Carolina with respect to hearsay treatment of nonassertive conduct was essentially the same as the law throughout this nation:

And by many cases (probably in most of those where the hearsay question has been identified and raised) evidence of extra-judicial conduct, relevant only as an "implied assertion" of the fact the evidence is offered to prove, is within the hearsay ban. Put otherwise, where evidence of non-verbal conduct is relevant only as supporting inferences from the conduct to the belief of the actor and thence to the truth of his belief, prevailing doctrine stigmatizes the evidence as hearsay, inadmissible unless accommodated within one of the exceptions to the rule.⁷³

In 1977 the North Carolina Court of Appeals decided a case which demonstrates how the Federal Rules of Evidence can influence the de-

deceased person was admitted as circumstantial evidence that he had paid for real property. In *Peck v. Manning*, 99 N.C. 157, 160-61, 5 S.E. 743, 745 (1888), the bank had sent notices that interest was due. Professor Powers lists *Maynard v. Holder*, 219 N.C. 470, 14 S.E.2d 415 (1941), as a case in which nonassertive conduct was admitted. Powers, *The North Carolina Hearsay Rule and the Uniform Rules of Evidence*, 34 N.C.L. REV. 171, 179 n.40 (1956). But in *Maynard*, if evidence of conduct was admitted for the purpose of proving a belief of the actor, it was clearly assertive conduct. Evidence concerning the existence of a boundary stone had been introduced during the trial. It is not clear whether proof of the existence of the stone was relevant for any true nonhearsay purpose, but even if we assume that the only purpose for which evidence of the existence of the stone could be used would be to prove the belief of the person or persons who set up the stone that it marked the line between the different tracts of land, we would be dealing with assertive conduct rather than nonassertive conduct.

Similarly, in one other North Carolina case in which conduct was admitted for a hearsay use as if it were not hearsay, the conduct in question, the date stated on an ancient note, was clearly assertive. *Blair v. Miller*, 14 N.C. (3 Dev.) 261 (1831).

69. *State v. Wallace*, 162 N.C. 623, 78 S.E. 1 (1913) (that a missing defendant was advertised for to prove that he had fled); *Forbes v. Burgess*, 158 N.C. 131, 71 S.E. 792 (1912) (for discussion see note 68 *supra*); *Pool v. Anderson*, 150 N.C. 624, 64 S.E. 593 (1909) (for discussion see note 68 *supra*); *Hopkins v. Bowers*, 111 N.C. 175, 16 S.E. 1 (1892) (associations as proof of a person's race).

70. See 1 D. STANSBURY, *supra* note 8, § 144; 5 J. WIGMORE, EVIDENCE §§ 1420-1422 (J. Chadbourn 1974).

71. *Carolina Power & Light Co. v. Smith*, 264 N.C. 581, 142 S.E.2d 140 (1965); *In re Crabtree*, 200 N.C. 4, 156 S.E. 98 (1930); *Ray v. Ray*, 98 N.C. 566, 4 S.E. 527 (1887).

72. See, e.g., *Hinson v. Morgan*, 225 N.C. 740, 36 S.E.2d 266 (1945). See also 1 D. STANSBURY, *supra* note 8, § 142; Note, *Evidence-Negative Testimony-Silence as Hearsay*, 24 N.C.L. REV. 274 (1946).

73. *Falknor*, *supra* note 55, at 133-34.

velopment of North Carolina law. In *State v. Garner*⁷⁴ the defendant had raised a hearsay objection to the use of nonassertive conduct to prove a belief of the actor.⁷⁵ The court of appeals upheld the admission of that evidence in an opinion that appeared to assume that it was well established North Carolina law that nonassertive conduct was not hearsay.

The opinion did not cite Federal Evidence Rule 801 or any federal cases and did not even use the term "nonassertive conduct," but the state's brief had relied heavily upon Federal Evidence Rule 801⁷⁶ and the opinion followed the pattern of thought set out in that Rule. Thus the question of whether nonassertive conduct is hearsay was approached as purely a matter of definition and not as a question of the purpose for which the evidence was to be used nor as a question of the trustworthiness of the evidence for that purpose.

The opinion turned to section 138 of *Stansbury's North Carolina Evidence*⁷⁷ for several general definitions of hearsay but ignored the extensive discussion of the hearsay aspects of nonassertive conduct in section 142 of that same work. None of the North Carolina cases which had involved nonassertive conduct⁷⁸ were cited or discussed. Instead, the opinion proceeded as if the North Carolina definitions of hearsay drew the same sharp distinction between "hearsay" and "nonassertive conduct" that is drawn in Federal Evidence Rule 801. None of the North Carolina definitions of hearsay quoted in the opinion⁷⁹ do draw that distinction but the opinion treated them as if they did.⁸⁰

Frequently in cases in which either assertive conduct or nonassertive conduct is introduced for a hearsay purpose, both the parties and the judge fail to see the hearsay problem.⁸¹ Even when the party who is injured by the hearsay use of the conduct does recognize the problem and raises the issue, the courts may fail to see the basis for the objection.⁸² In *Garner*, however, the court of appeals did see the problem.

74. 34 N.C. App. 498, 238 S.E.2d 653 (1977) cert. denied 294 N.C. 184, 241 S.E.2d 519 (1978).

75. 34 N.C. App. at 499, 238 S.E.2d at 654; Defendant Appellant's Brief at 4-5, 34 N.C. App. 498, 238 S.E.2d 653 (1977).

76. Brief for the State at 3, 34 N.C. App. 498, 238 S.E.2d 653 (1977).

77. 1 D. STANSBURY, *supra* note 8.

78. Cases cited notes 69 & 71-72 *supra*.

79. 34 N.C. App. at 499-500, 238 S.E.2d at 654.

80. The first definition quoted in the opinion, *id.* at 499, 238 S.E.2d at 654, was amended by the insertion of the bracketed words "[or assertive conduct]." No explanation or justification was given for this amendment. See *King v. Bynum*, 137 N.C. 491, 495, 49 S.E. 955, 956 (1905); 1 D. STANSBURY, *supra* note 8, § 138. The new definition created by the amendment is very similar to Federal Rule of Evidence 801.

81. Falknor, *supra* note 55, at 135; C. McCORMICK, *supra* note 27, § 250, at 599.

82. See, e.g. *State v. Locklear*, 291 N.C. 598, 600-01, 231 S.E.2d 256, 258 (1977) in which the Supreme Court rejected a hearsay objection to testimony by a locksmith concerning the making of an automobile key for a girl. The Court overlooked the fact that the locksmith's story described

The defendant in that case was appealing a finding that he was the father of an illegitimate child.⁸³ Part of the evidence presented by the prosecution was testimony by the prosecutrix and her mother that the defendant's own mother came to their home and gave the prosecutrix a check.⁸⁴ The effect of this evidence was to suggest that the defendant's mother believed that the defendant was the father of the child. The court of appeals recognized the testimonial use that could be made of that evidence, but refused to deal with that as a hearsay problem because of the narrow definitional approach which it took to hearsay. The court stated, "While the mother's conduct may raise implications of family responsibility, at no point do the State's witnesses testify to that conclusion."⁸⁵

The pattern of thought created by Federal Evidence Rule 801 had an even greater effect upon a student survey⁸⁶ in the North Carolina Law Review which praised⁸⁷ the admission of nonassertive conduct for a testimonial purpose in *Garner* and mistakenly described⁸⁸ two 1977 decisions by the North Carolina Supreme Court⁸⁹ as cases which permitted the use of evidence of nonassertive conduct to prove the actor's beliefs. The discussion in the student survey assumes the correctness of the theory adopted by Federal Evidence Rule 801 with respect to testimonial use of nonassertive conduct and interprets all other authority in the light of that theory. Therefore, a section of the McCormick hornbook which advocates that theory⁹⁰ is cited as unquestionable authority,⁹¹ and the prior North Carolina decisions with respect to testimonial use of nonassertive conduct are described as having "vacillated"⁹² in their use of a theory which none of those cases ever adopted or even discussed.⁹³ The authors of the survey simply refuse to recognize that

assertive conduct by the girl which indicated the key was being made for a particular person who was a co-defendant of the appellant.

83. The defendant had been acquitted of willful failure to support the child, 34 N.C. App. at 499, 238 S.E.2d at 654, but under North Carolina law the finding in that trial that he was the parent of the child would be binding upon him in any subsequent prosecution. *State v. Ellis*, 262 N.C. 446, 449, 137 S.E.2d 840, 843 (1964). The defendant appealed the finding.

84. 34 N.C. App. at 499, 238 S.E.2d at 654.

85. *Id.*

86. *Evidence, 1977, Survey of Developments in North Carolina*, 56 N.C.L. REV. 843, 1060 (1978).

87. *See id.* at 1063-65.

88. *Id.* at 1064 n.32 & 1065-66.

89. *State v. Tilley*, 292 N.C. 132, 232 S.E.2d 433 (1977); *State v. Locklear*, 291 N.C. 598, 231 S.E.2d 256 (1977).

90. C. MCCORMICK, *supra* note 27, § 250.

91. 56 N.C.L. REV., *supra* note 86, at 1064-66.

92. *Id.* at 1064.

93. *See* notes 65-73 and accompanying text *supra*. The student survey cites to Brandis' summary of the prior North Carolina case, 1 D. STANSBURY, *supra* note 8, § 142, rather than to the cases themselves, 56 N.C.L. REV., *supra* note 86, at 1064 n.31, but the misreading of the cases is a product of the student writers' fixed ideas about nonassertive conduct. Dean Brandis simply sum-

the admission of evidence of particular items of conduct that might be used for a hearsay purpose is different from the adoption of the theory that all nonassertive conduct should be admissible for hearsay purposes.

The discussion in the student survey illustrates three problems with a hearsay "exception by definition" for nonassertive conduct that will reappear again and again if use of this hearsay exception becomes widespread. One of these problems, confusion about the hearsay nature of evidence admitted through this exception, is a product of the definitional method used by Federal Evidence Rule 801 to describe this hearsay exception. If the description were rewritten to make it clear that this is an exception under which hearsay evidence is admitted, much or all of this confusion could be eliminated. Such a change would not eliminate the other two problems, however. These problems, confusion as to what is nonassertive conduct and the danger that weak but prejudicial evidence will be admitted under this exception, cannot be eliminated unless the whole exception is eliminated.

In order for the courts to apply this exception it is necessary for them to decide whether the out-of-court conduct was in fact nonassertive when it occurred,⁹⁴ and the courts have had difficulty with that question. The first two federal cases to apply the exception in Federal Evidence Rule 801 applied it to conduct that was clearly assertive.⁹⁵ Similarly, the authors of the survey described as cases in which nonassertive conduct was admitted to prove belief⁹⁶ a case in which the North Carolina Supreme Court had overlooked the admission of assertive conduct⁹⁷ and a case in which nonassertive conduct was not used to prove a belief of the actor.⁹⁸

The most important problem with the exception for nonassertive conduct is the danger that weak but prejudicial evidence will be admitted under this exception. Advocates of the exception argue that the courts can avoid that danger by excluding weak but prejudicial nonassertive conduct as irrelevant.⁹⁹ Unfortunately, it is difficult for a court to weigh the probative value of hearsay, and the difficulty becomes

marizes the North Carolina cases in which evidence of conduct has been admitted or excluded. 1 D. STANSBURY, *supra* note 8, § 142 at 473 nn. 47-48 & 50, § 143 at 475 nn.54-55. See note 65 *supra*.

94. See Fed. Advisory Comm. Notes, *supra* note 36, at 294. But see Blakey, *An Introduction to the Oklahoma Evidence Code: Hearsay*, 14 TULSA L.J. 635, 685 (1979).

95. *United States v. Snow*, 517 F.2d 441, 443-44 (9th Cir. 1975) (a name tag on a briefcase); *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1181 n.6 (5th Cir. 1975) (recommended landing procedures).

96. 56 N.C.L. REV., *supra* note 86, at 1064 n.32 & 1065-66.

97. *State v. Locklear*, 291 N.C. 598, 600-01, 231 S.E.2d 256, 258 (1977). See note 82 *supra*.

98. *State v. Tilley*, 292 N.C. 132, 137-40, 232 S.E.2d 433, 438-40 (1977).

99. Falknor, *supra* note 55, at 138; 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 801(a)[02].

even greater with respect to evidence as vague as nonassertive conduct. *Garner* itself was a case in which the evidence of nonassertive conduct should have been excluded on relevancy grounds. In that case evidence was introduced that the mother of the defendant had given the prosecutrix a check.¹⁰⁰ The obvious purpose for which that evidence was offered was to prove that the defendant's mother believed that the defendant was the father of the child. However, the mother's opinion would not have been admissible if she had been a witness on the witness stand at the trial itself.¹⁰¹

Part of the reason that the authors of the student review failed to recognize the weakness of the evidence about the mother's conduct was that they were misled by the way in which they used the word "hearsay." They attempted to evaluate the evidence in terms of the hearsay dangers which it presented,¹⁰² but they evaluated only the testimony of the prosecutrix that she saw the defendant's mother deliver the check.¹⁰³ They totally failed to evaluate the risks involved in using the mother's conduct to prove something about her son's responsibility for the child.¹⁰⁴ The court of appeals had made the same mistake in *Garner* for the same reason.¹⁰⁵ That court apparently reasoned that if nonassertive conduct was defined as nonhearsay then there could be no question of its "credibility"¹⁰⁶ even though it could be used for a testimonial purpose.¹⁰⁷

Both the court and the student authors allowed their definition of hearsay to cut off consideration of the actual nature of the evidence with which they were dealing. The way to avoid such defective analysis is either to redescribe any hearsay exception for nonassertive conduct as an exception for the admission of evidence that is hearsay or to reject such an exception altogether. In either event North Carolina may need to adopt an express evidence rule on the point in order to make it clear that the Federal Rule is not the law of North Carolina. In a later portion of this article,¹⁰⁸ I suggest a North Carolina Rule¹⁰⁹ that

100. 34 N.C. App. at 499, 238 S.E.2d at 654.

101. If the mother had been a witness at the trial, she could have been asked whether her son had made any statements to her in which he admitted responsibility for the child. One possible explanation for the mother's conduct is that her son may have made such statements to her, but this merely illustrates one of the problems with non-assertive conduct. It is very easy to assume the likely existence of whatever facts are needed in order to make the evidence prove anything whatsoever.

102. 56 N.C.L. REV., *supra* note 86, at 1064-65.

103. *Id.* at 1065.

104. *Id.* at 1064-65. See also *id.* at 1065 n.41.

105. 34 N.C. App. at 499-500, 238 S.E.2d at 653.

106. *Id.* at 500, 238 S.E.2d at 654.

107. *Id.* at 499, 238 S.E.2d at 654.

108. See text accompanying notes 124-213 *infra*.

109. See text accompanying note 138 *infra*.

completely rejects any hearsay exception for nonassertive conduct used for a testimonial purpose.

V. A THREATENED PRINCIPLE: NORTH CAROLINA SHOULD ABOLISH THE DEAD MAN'S ACT

North Carolina need not adopt all the Federal Rules of Evidence exactly as they stand in order to gain the benefits of a widely known evidence code if the changes which it makes in adopting its own code are few enough and clear enough that people working with the evidence code can easily learn them. However, one change which the Study Committee adopted in a tentatively approved North Carolina Rule should be reconsidered. Adoption of a North Carolina Rule based upon Federal Evidence Rule 601 would abolish¹¹⁰ the North Carolina Dead Man's Act.¹¹¹ The Federal Rule provides that, with a few exceptions,¹¹² "[e]very person is competent to be a witness." This is a general principle towards which the law of evidence has moved,¹¹³ slowly but steadily,¹¹⁴ as the cases have demonstrated¹¹⁵ the soundness of the Federal Advisory Committee's conclusion that "a witness wholly without capacity is difficult to imagine."¹¹⁶ Weinstein and Berger describe the working out of this general principle in the Federal Rule:

Rule 601 completes the restructuring of the judge's and jury's functions that began when courts and legislatures commenced abrogating rules of disqualification. . . . [T]he evidence bearing on the witness' deficiencies is now heard by the trier of fact. The jury's sphere is thus greater than it was at common law when much of the testimony it must now consider and evaluate would have been inadmissible.¹¹⁷

The Study Committee decided, however, to retain the major existing exception¹¹⁸ to the principle of general competency and gave "tentative approval" to a version of Rule 601 that would retain the Dead Man's Act.

North Carolina scholars have sought the abolition of the Dead Man's Act for many years,¹¹⁹ and it should be abolished by any North

110. Fed. Advisory Comm. Notes, *supra* note 36, at 262; 3 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 601[03].

111. N.C. GEN. STAT. § 8-51 (1981).

112. The major exception in Federal Evidence Rule 601 is a "Mini-Erie Rule" that permits state competency law to apply "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision."

113. 1 D. STANSBURY, *supra* note 8, § 53.

114. C. MCCORMICK, *supra* note 27, §§ 61-66 & 71; 2 J. WIGMORE, EVIDENCE §§ 492, 501, 505, 509, 515, & 575 (3d ed. 1940).

115. 3 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 601[05].

116. Fed. Advisory Comm. Notes, *supra* note 36, at 262.

117. 3 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 601[05] at 601-36.

118. *Id.* ¶ 601[03]; C. MCCORMICK, *supra* note 27, § 65.

119. See *Proposals for Legislation in North Carolina*, 11 N.C.L. REV. 51, 61-63 (1932); D.

Carolina Evidence Code. The Act is not needed to protect the dead and insane against fraud by the parties who have dealt with them,¹²⁰ and it is instead itself a source of injustice to persons who have dealt with the dead and the insane. Dean Brandis states: "[T]he statute has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel. The situation calls for more than legislative tinkering. What is needed is repeal of the statute."¹²¹

Concern that a deceased person is being cheated is probably misplaced¹²² in a contest involving the Dead Man's Act, but a more appropriate response to such a concern would be to create a hearsay exception for statements about the matter in dispute made by the deceased or insane person. In 1932 members of the University of North Carolina Law Faculty proposed such a statute:

No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

In actions, suits or proceedings by or against the representatives of deceased persons, or the committee of a lunatic, including proceedings for the probate of wills, no statement of the deceased, or lunatic, whether oral or written, shall be excluded as hearsay provided that the trial judge shall find as a fact that the statement was made, and that it was made in good faith and on the declarant's personal knowledge.¹²³

VI. A NEED FOR A CLEARER PRINCIPLE: NORTH CAROLINA SHOULD ADOPT A SIMPLER AND BETTER HEARSAY RULE THAN FEDERAL EVIDENCE RULE 801

A. *Federal Evidence Rule 801 Complicates its Definition of Hearsay by Adopting Five "Exceptions by Definition"*

Federal Evidence Rule 801 is a very complicated rule. It is complicated because it tries to use the term "hearsay" in several different ways in order to deal with several different problems. The Rule is difficult to read and easy to misunderstand. In order to understand the Rule a reader must approach the Rule as if it were a section of the Federal Internal Revenue Code. The Rule has adopted the Tax Code theory that a term can be made to mean whatever the draftsmen want it to

STANSBURY, NORTH CAROLINA EVIDENCE § 66 n.33 (1st ed. 1946); 1 D. STANSBURY, *supra* note 8, § 66 n.16; Patrick, *supra* note 14, at 691.

120. Callaghan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*: 2, 47 YALE L.J. 194, 199 (1937).

121. 1 D. STANSBURY, *supra* note 8, § 66 n.16.

122. *Id.*

123. *Proposals for Legislation in North Carolina*, *supra* note 119, at 63. See also OHIO R. EVID. 804(b)(5) (Page 1980).

mean. In Federal Evidence Rule 801 the terms "hearsay" and "not hearsay" mean exactly what the Rule says and nothing more. Persons who already know something about hearsay, such as experienced lawyers, are unlikely, however, to approach the Rule as if they knew nothing about hearsay. In many situations this will not matter because the central portion of the Rule is familiar law,¹²⁴ but there are many provisions of the Rule that are very likely to be misread by persons who expect the term "hearsay" to be used with its familiar meaning.

It will be helpful if we treat Rule 801 as being designed to perform two different functions. First, it does draw the traditional distinction between the testimonial and nontestimonial use of out-of-court statements and conduct. It adopts the traditional doctrine that testimonial use is hearsay and nontestimonial use is not hearsay.¹²⁵ Second, however, the Rule creates five hearsay "exceptions by definition" by providing that certain categories of out-of-court statements and conduct that are being used for testimonial purposes are "not hearsay."

These five "exceptions by definition," include one for admissions of a party-opponent,¹²⁶ three for prior statements by a witness,¹²⁷ and one for non-assertive conduct.¹²⁸ It is important to recognize that the purpose of these exceptions is to permit the testimonial use of the kinds of evidence to which they apply. They function in exactly the same fashion as ordinary hearsay exceptions even though they are described as "not hearsay." No one is likely to become confused on this point with respect to the treatment of admissions of party-opponents because they have always been admitted for testimonial purposes,¹²⁹ but the exceptions by definition for prior statements by witnesses are confusing precisely because they involve statements that always have been admissible for the nontestimonial purposes of impeaching¹³⁰ and rehabilitating witnesses.¹³¹ Under the Federal Rule these prior statements are also admissible for the testimonial purpose of proving the truth of what they say,¹³² although this is unlikely to be important¹³³ except in

124. 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 801(c)[01].

125. See 5 J. WIGMORE, EVIDENCE §§ 1361-1362 (J. Chadbourn 1974); C. MCCORMICK, *supra* note 27, § 246; 1 D. STANSBURY, *supra* note 8, §§ 138-139.

126. FED. R. EVID. 801(d)(2).

127. FED. R. EVID. 801(d)(1)(A)-(C).

128. FED. R. EVID. 801(a).

129. E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 241 (5th ed. J. Weinstein 1976); C. MCCORMICK, *supra* note 27, § 262.

130. 3A J. WIGMORE, EVIDENCE § 1018, at 998 n.3 (J. Chadbourn 1970).

131. 4 J. WIGMORE, EVIDENCE §§ 1128-1129 & 1132 (J. Chadbourn 1972); 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 801(d)(1)(c)[01].

132. Fed. Advisory Comm. Notes, *supra* note 36, at 296-97.

133. See Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L.J. 3, 26-28 (1975) [hereinafter cited as Blakey, *Substantive Use*].

the case of prior inconsistent statements.¹³⁴ The "exception by definition" for nonassertive conduct used to prove the actors' beliefs, discussed elsewhere in this article,¹³⁵ also involves testimonial use of that evidence.

B. *A Proposal for a Simpler Definition of Hearsay*

North Carolina should rewrite Federal Evidence Rule 801 to remove the five "exceptions by definition." There are two reasons why this should be done. First, all of these provisions except the one for admissions of a party-opponent are either harmful or unnecessary. Second, if those provisions which North Carolina does want to adopt were restated as ordinary hearsay exceptions, the definition of hearsay would be reduced to a workable general principle—that clearly marked the distinction between out-of-court statements and conduct used for a testimonial purpose and statements and conduct used for a nontestimonial purpose. Describing evidence which is admitted for a testimonial purpose as "not hearsay" confuses that distinction. The Federal Rule does adopt the general principle that hearsay is a testimonial use of out-of-court statements and conduct, but the "exceptions by definition"¹³⁶ undermine understanding of that general principle.¹³⁷ Students who learn the five "exceptions by definition" as rules of thumb have difficulty understanding and applying the general principle even in the classroom. Once they are outside the classroom, their confusion and uncertainty about the meaning of the hearsay rule will grow even greater.

The following proposed definition of hearsay is a revision of the Federal Evidence Rule 801.¹³⁸ In order to make it convenient to substitute

134. FED. R. EVID. 801(d)(1)(A).

135. See text accompanying notes 55-109 *supra* and 156-213 *infra*.

136. Fed. Advisory Comm. Notes, *supra* note 36, at 294-95.

137. See 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 412 (1980); 4 WEINSTEIN & BERGER, *supra* note 4, ¶ 801(c)[01].

138. This article contends that the proposed North Carolina Evidence Rule should be substituted for the Federal Rule of Evidence 801 because the proposed Rule states a simpler, clearer, and better general principle. It should be acknowledged, however, that the proposed Rule is the beneficiary of substantial clarifications of ideas about hearsay achieved by the draftsmen of Federal Rule of Evidence 801 itself. Under the common law, the definition of hearsay was complicated by the efforts of many lawyers and scholars to establish that various kinds of out-of-court conduct, although offered in evidence for a testimonial purpose, should be considered to be nonhearsay. See C. MCCORMICK, *supra* note 27, §§ 249-250; articles cited note 55 *supra*; Maguire, *supra* note 58; McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Morgan, *Hearsay and Nonhearsay*, 48 HARV. L. REV. 1138 (1935); Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers*, 65 MINN. L. REV. 423 (1981); R. LEMPET & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 338-51 (1977); Fed. Advisory Comm. Notes, *supra* note 36, at 293-97.

The Federal Rule of Evidence reduced all the common law confusion over whether such "testimonial nonhearsay" could exist to its five "exceptions by definition." That made it possible for the proposed North Carolina Evidence Rule 801 to adopt the simpler general principle that there is no such thing as "testimonial nonhearsay" by rejecting the five "exceptions by definition."

this proposal for the Federal Rule, the exception for admissions of a party-opponent is included in this version of Rule 801, but this exception is described as a hearsay exception rather than as "not hearsay."

SUGGESTED NORTH CAROLINA EVIDENCE RULE 801,
DEFINITION OF HEARSAY AND EXCEPTION FOR ADMIS-
SIONS BY A PARTY-OPPONENT

(a) *Statement.* The term "statement" includes both written or spoken words and nonverbal conduct by a person when such words or conduct make an assertion either directly or by implication.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Exception for Admissions by a Party-Opponent.* A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of such party during the course and in furtherance of the conspiracy.

C. North Carolina Should Refuse to Adopt Any Hearsay Exception for Prior Inconsistent Statements by Witnesses

Federal Evidence Rule 801(d)(1) creates three hearsay "exceptions by definition" for prior statements by witnesses. The effect of these provisions might easily be misunderstood because these three kinds of prior statements have traditionally been admissible for the true nonhearsay purposes of either impeaching¹³⁹ or rehabilitating¹⁴⁰ the witnesses who made the prior statements. The effect of the three exceptions by definition, however, is to permit those three kinds of prior statements to be used for testimonial purposes.¹⁴¹

Testimonial use of prior consistent statements by a witness is unimportant,¹⁴² but testimonial use of prior inconsistent statements is extremely important. Indeed, it is so important that North Carolina should refuse to adopt those portions of the Federal Rule that permit

139. 3A J. WIGMORE, EVIDENCE § 1018, at 998 n.3 (J. Chadbourn 1970).

140. 4 J. WIGMORE, EVIDENCE §§ 1128-1129 & 1132 (J. Chadbourn 1972); 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 801(d)(1)[01].

141. Fed. Advisory Comm. Notes, *supra* note 36, at 296-97.

142. Blakey, *Substantive Use*, *supra* note 133, at 26-28.

testimonial use of prior inconsistent statements. Advocates of testimonial use of prior inconsistent statements argue that the hearsay dangers of such evidence are eliminated because the witness is available to be "cross-examined" about his own prior statements.¹⁴³ It is true that an opportunity to question the witness about a statement is worth something, but it certainly does not eliminate the hearsay dangers involved in the testimonial use of such evidence.¹⁴⁴ Congress attempted to reduce those dangers by allowing testimonial use of a prior inconsistent statement under Federal Evidence Rule 801(d)(1)(A) only if the prior inconsistent statement had been "given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition."¹⁴⁵ One effect of that amendment is to greatly limit the number of situations in which prior inconsistent statements can be used in the federal courts for testimonial purposes. Nevertheless, the Federal Rule raises the possibility of a criminal conviction or a civil judgment based largely, or even entirely,¹⁴⁶ upon a reputed prior statement by a witness. North Carolina should retain its present law which provides that such evidence could not be used for testimonial purposes.¹⁴⁷

Use of prior inconsistent statements for the true nonhearsay purpose of impeachment is not controlled by the hearsay "exceptions by definition."¹⁴⁸ Impeachment use of prior inconsistent statements will continue as under present North Carolina law¹⁴⁹ regardless of whether North Carolina adopts or rejects the "exceptions by definition" for testimonial use, although the number of situations in which impeachment will be permitted will increase if North Carolina adopts a rule similar to Federal Rule Evidence 607 under which a party is allowed to impeach his own witness¹⁵⁰ in both civil¹⁵¹ and criminal¹⁵² cases.

143. C. MCCORMICK, *supra* note 27, § 251; 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 801(d)(1) [01].

144. Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 801(24)*, 26 U.C.L.A. L. REV. 976 (1979); Blakey, *supra* note 22, at 38-47; Fed. Advisory Comm. Notes, *supra* note 36, at 295-96.

145. 11 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE § 801.01 4.1 (2d ed. 1976).

146. See Blakey, *Substantive Use*, *supra* note 133, at 20-24; *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 50-52 (1974) (testimony of Professor Edward W. Cleary and responses of Senator Sam J. Ervin, Jr.).

147. 1 D. STANSBURY, *supra* note 8, § 46.

148. H.R. REP. NO. 1597, 93 Cong., 2d Sess. 10 reprinted in 1974 U.S. CODE & AD. NEWS, 7098, 7104; C. MCCORMICK, *supra* note 27, § 34 (Supp. 1978).

149. See 1 D. STANSBURY, *supra* note 8, § 46.

150. 3 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 607[01].

151. The North Carolina Rules of Civil Procedure permit a party to impeach his own witness "as if he had been called by the adverse party" if the witness is "unwilling or hostile" or connected to the adverse party. N.C. GEN. STAT. § 1A-1, Rule 43(b) (1969). See 1 D. STANSBURY, *supra* note 8, § 40.

152. The Supreme Court of North Carolina has held that neither the state nor a defendant in a criminal trial may impeach their own witness unless "the party calling the witness has been misled and surprised or entrapped to his prejudice." *State v. Austin*, 299 N.C. 537, 263 S.E.2d 574 (1980);

D. *North Carolina Should Refuse to Adopt Hearsay Exceptions for Prior Consistent Statements and Statements of Identification by Witnesses*

The hearsay exceptions for some prior consistent statements and statements of identification created by Federal Evidence Rules 801(d)(1)(B) and 801(d)(1)(C) are largely meaningless.¹⁵³ Only in the unlikely event that a witness has repudiated a prior identification does it matter whether prior statements covered by these rules are admitted for testimonial purposes. In that unusual case all of the arguments against testimonial use of prior inconsistent statements apply with even greater force because there is no requirement in the Federal Rule that a repudiated identification must have been given under oath in order to be admissible as substantive evidence.¹⁵⁴ In all other cases the only problem with these federal "exceptions by definition" is that they undermine the general principle that testimonial use is hearsay.¹⁵⁵ These "exceptions by definition" should be rejected.

E. *The Hearsay Exception for Admissions of a Party-Opponent Should be Described as a Hearsay Exception*

The use which we make of admissions of a party-opponent is not affected by what we call them. They will be used for testimonial purposes¹⁵⁶ regardless of whether they are described as an exception to the rule against hearsay or whether they are described as "not hearsay." Nevertheless, the description of admissions of a party-opponent as "not hearsay" in Federal Evidence Rule 801 does create two problems which can be avoided by describing them as an exception to the rule against hearsay. These problems are the confusion which the "not hearsay" description creates, first, about the fact that admissions of a party are testimonial evidence, and, second, about the general principle that hearsay is the testimonial use of out-of-court statements and conduct.

In the Rule proposed in this article admission of a party-opponent are described as a hearsay exception, but that exception is made part of the proposed Rule 801 itself in order to make the fewest possible changes in both that Rule and the other Rules to which the exception might be moved. This avoidance of change in the organization of the Rules is desirable because it will permit easy comparison of North Car-

State v. Pope, 287 N.C. 505, 512, 215 S.E.2d 139, 145 (1975). But see 1 D. STANSBURY, *supra* note 8, § 40.

153. See Blakey, *Substantive Use*, *supra* note 133, at 26-28.

154. See 4 WEINSTEIN & BERGER, *supra* note 4, ¶ 801(d)(1)(C)[01].

155. See note 137.

156. 2 D. STANSBURY, *supra* note 8, § 167 at 6 n.14.

olina Rules and Federal Rules.¹⁵⁷

F. *North Carolina Should Refuse to Adopt a Hearsay Exception for Nonassertive Conduct*

Nonassertive conduct used to prove a belief of the actor presents all the problems and dangers of other forms of hearsay.¹⁵⁸ It can easily be dealt with as hearsay under the definition of "statement" in the suggested North Carolina Evidence Rule proposed in this article. A Rule that treats nonassertive conduct as hearsay whenever it is offered to prove a belief of the actor would be far simpler than the Federal Rule, and it could be more easily taught, learned, and applied.¹⁵⁹

The hearsay objection to nonassertive conduct is sometimes overlooked (especially in situations in which the objection to similar assertive hearsay might also be overlooked or waived), but that is no reason to overrule the objection when a party does recognize the hearsay problem and decides that the evidence is important enough to justify raising the objection.¹⁶⁰ Nonassertive conduct offered for hearsay purposes should be excluded as hearsay whenever the objection is raised unless the conduct qualifies for admission under one of the ordinary exceptions to the rule against hearsay such as declarations against interest or excited utterances.

A weak argument can be made that all nonassertive conduct is trustworthy enough¹⁶¹ to justify the creation of a new hearsay exception for all nonassertive conduct.¹⁶² This is a highly theoretical argument that nonassertive conduct is trustworthy because there can be no question about the sincerity of the person whose behavior is being proven.¹⁶³ Professor Falknor put this argument most strongly: "On this assumption, it is clear that evidence of conduct must be taken as freed from at least one of the hearsay dangers, i.e., mendacity. A man does not lie to himself."¹⁶⁴ The Federal Advisory Committee on Rules of Evidence

157. However, if North Carolina should reject the hearsay exception for "present sense impressions" contained in Federal Evidence Rule 803(1), the hearsay exception for admissions of a party-opponent could be incorporated in a North Carolina Rule 803 as 803(1), and that arrangement would also permit easy comparison of North Carolina Rules and Federal Rules.

158. Finman, *supra* note 55, at 684-91; Blakey, *Redefinition*, *supra* note 55, at 611-16.

159. See Park, *supra* note 138 (discussion of the use of a "declarant-oriented" definition of hearsay).

160. But see, Falknor, *supra* note 55, at 137; C. McCORMICK, *supra* note 27, § 250; Park, *supra* note 138, at 453; 56 N.C.L. REV., *supra* note 86, at 1060, 1065 n.44.

161. The normal justification for the creation of exceptions to the rule against hearsay are trustworthiness and, sometimes, unavailability of witnesses. 5 J. WIGMORE, EVIDENCE §§ 1420-1423 (J. Chadbourne 1974); 1 D. STANSBURY, *supra* note 8, § 144.

162. See authorities cited notes 55 & 58 *supra*.

163. See C. McCORMICK, *supra* note 27, § 250; Falknor, *supra* note 55; Maguire, *supra* note 58, at 748-49.

164. Falknor, *supra* note 55, at 136.

based its defense of the "exception by definition" for nonassertive conduct in Federal Evidence Rule 801 on the sincerity argument.

Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity.¹⁶⁵

The sincerity argument does not in fact justify the creation of a hearsay exception for nonassertive conduct. There are two practical problems with the argument: first, it greatly overstates the evidentiary value of knowing what beliefs underlay a person's out-of-court conduct, and, second, it greatly underestimates the difficulty of determining a person's beliefs from such conduct.

With respect to the first problem, the evidentiary value of knowing the beliefs that underlay conduct, it should be noted that the effect of a hearsay exception for nonassertive conduct would be to admit evidence of conduct to prove belief in situations in which a direct statement by the same person of the same belief would be excluded as inadmissible hearsay.¹⁶⁶ Therefore, even if we could eliminate the possibility that the person who acted intended to make a false statement, all of the other dangers involved in the use of hearsay would be present.¹⁶⁷ Professor Falknor's argument that "a man does not lie to himself"¹⁶⁸ overstates the value of such evidence. Even if a man does not intend to do so, he frequently does lie to himself because he believes things that are not true. The nonassertive conduct theory deals, at best, only with the question of whether a person honestly believes something and not with any questions concerning whether he is in a position to know the truth. As the Federal Advisory Committee frankly conceded: "Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor"¹⁶⁹ Even if we assume that there will be cases in which all the circumstances surrounding particular acts of nonassertive conduct will make

165. Fed. Advisory Comm. Notes, *supra* note 36, at 294.

166. Thus in the "putative grandmother" case, *State v. Garner*, 34 N.C. App. 498, 238 S.E.2d 653 (1977), *cert. denied*, 294 N.C. 184, 241 S.E.2d 519 (1978), *discussed* at text accompanying notes 74-108 *supra*, an actual out-of-court statement by the defendant's mother that the child was her grandchild would have been excluded as hearsay.

167. See Finnman, *supra* note 55, at 684-86.

168. See text accompanying note 164 *supra*.

169. Fed. Advisory Comm. Notes, *supra* note 36, at 294. See text accompanying note 165 *supra*.

those particular examples appear trustworthy,¹⁷⁰ those cases would only justify a hearsay exception for hearsay statements accompanied by "circumstantial guarantees of trustworthiness"¹⁷¹ and not a general exception for all nonassertive conduct.¹⁷²

Furthermore, even in situations in which lack of intent to make an assertion might be considered to be of some evidentiary value, the actual evidentiary value of nonassertive conduct will usually be less than that of ordinary inadmissible hearsay evidence because of the second practical problem with the sincerity argument. We cannot expect to determine the beliefs of an out-of-court actor from his actions as easily, as frequently, or as accurately as the sincerity argument assumes.¹⁷³ Conduct is usually ambiguous evidence of belief. It will frequently be difficult to determine even whether conduct that hints at belief was nonassertive. The fact that the first two federal cases to apply the nonassertive conduct provision of Federal Evidence Rule 801 applied it to conduct that was clearly assertive¹⁷⁴ illustrates how difficult it will be to determine when the nonassertive conduct provision ought to apply.¹⁷⁵

The difficulties involved in drawing reasonably accurate conclusions about the beliefs of out-of-court actors from nonassertive conduct have sometimes been overlooked because so much of the theoretical discussion of the admission of nonassertive conduct for hearsay purposes has been based upon a few isolated hypothetical examples of nonassertive conduct¹⁷⁶ such as Professor Falknor's crowd of "passers-by with their umbrellas up" (offered to prove that it was raining)¹⁷⁷ or the hypothetical discussed by Baron Parke in his opinion in *Wright v. Doe d. Tatham*¹⁷⁸ about a sea captain who inspects a ship and then sails upon it with his family (offered to prove that the ship was seaworthy).¹⁷⁹ These

170. The "would-be-better" cases are frequently cited as examples of trustworthy nonassertive conduct. See Maguire, *supra* note 58, at 764-65 & 767; Finman, *supra* note 55, at 698-99 n.44; Park, *supra* note 55, at 445-56 & 455-56 n.112; 4 WEINSTEIN & BERGER, *supra* note 4, ¶ 801(a)[02] at 801-62 to -63; Blakey, *Redefinition*, *supra* note 55, at 616 n.88.

171. See FED. R. EVID. 803(24), 804(b)(5); Park, *supra* note 138, at 456.

172. See text accompanying notes 187-91 *infra*.

173. See Finman, *supra* note 55, at 688-89; Blakey, *Redefinition*, *supra* note 55, at 612.

174. See cases cited note 95 *supra*.

175. The draftsmen of Federal Evidence Rule 801 did suggest that a burden of proof would be used so that "ambiguous and doubtful cases will be resolved . . . in favor of admissibility," Fed. Advisory Comm. Notes, *supra* note 36, at 294, but that approach merely ignores the question while admitting the evidence. See also Finman, *supra* note 55, at 695-97.

176. See Falknor, *supra* note 55; Finman, *supra* note 55; Maguire, *supra* note 58 at 772-73; C. McCORMICK, *supra* 27, § 250; 4 WEINSTEIN & BERGER, *supra* note 4, ¶ 801(a)[01] & 801(a)[02] at 801-53 to -57; 4 D. LOUISELL & C. MUELLER, *supra* note 35, § 414 at 83-93; Blakey, *Redefinition*, *supra* note 55, at 612-16).

177. Falknor, *supra* note 55, at 133.

178. 7 Adolph. & E. 313, 112 Eng. Rep. 488 (Ex. 1837).

179. *Id.* at 388, 112 Eng. Rep. at 516.

famous examples are not very much help in evaluating the general trustworthiness of nonassertive conduct evidence. The umbrellas example is too trivial and the sea captain hypothetical too strong to tell us anything about actual cases. The apparent reliance by the sea captain upon the seaworthiness of the ship upon which he sails with his family would appear to be strong evidence of belief,¹⁸⁰ but it is stronger evidence than can be found in any reported case involving the nonassertive conduct issue.¹⁸¹

Actual cases are likely to involve much weaker evidence of belief. The three letters actually offered as evidence in *Wright v. Doe d. Tatham*¹⁸² are probably representative. The case involved an issue as to whether a testator had been competent to make a will. Three letters written to the testator were offered to prove that the persons who wrote the letters considered the testator to be a competent person. Professor McGuire has demonstrated that the letterwriters were in fact in a position to know if the testator was a competent person,¹⁸³ but it is not at all clear that the letters reveal anything at all about the writers' actual beliefs about the testator's competency.¹⁸⁴ Thus, I argued in an earlier article with respect to one of the letters in which the Vicar of the Parish asked the testator to have his attorney take some action.¹⁸⁵

The argument is that the Vicar must have believed the testator to be competent or he would not have written such a letter, but this is only the possibility that suited the party offering the letter. Two other reasonable possibilities are (1) that the Vicar considered the testator incompetent but since the testator went on managing his affairs the Vicar had to try to deal with him as politely as he could, or (2) that the incompetent testator's affairs were being quietly managed by the attorney whose action the letter requested and although the letter was in form addressed to the testator the Vicar did not expect him to read it. If we acknowledge those possibilities we will see that the Vicar's reliance upon his belief tells us less than we thought, for until we know what he really believed we cannot know in what way he was relying upon that belief.¹⁸⁶

Another actual case which demonstrates the danger that nonassertive conduct will frequently not be trustworthy evidence of beliefs is *People v. Clark*.¹⁸⁷ In that case the wife of a murder suspect fainted when the

180. But see Finman, *supra* note 55, 689 nn.18 & 19.

181. See cases cited in Falknor, *supra* note 55, at 133-37; 4 WEINSTEIN & BERGER, *supra* note 4, ¶ 801(a)[02] at 801-57 to -59.

182. 7 Adolph & E. 313, 317-20, 112 Eng. Rep. 488, 490-91 (Ex. 1837).

183. Maguire, *supra* note 58, at 751-59.

184. See Blakey, *Redefinition*, *supra* note 55, at 612; Park, *supra* note 138, at 452-53 n.100. But see Maguire, *supra* note 58, at 759-60.

185. 7 Adolph & E. at 318-19, 112 Eng. Rep. at 491.

186. Blakey, *Redefinition*, *supra* note 55, at 612.

187. 6 Cal. App. 3d 658, 86 Cal. Rptr. 106 (5th Dist. Ct. App., 1970).

suspect asked her to support his statement to a police officer that he did not own a certain kind of coat, and a California appellate court upheld the admission of evidence that the wife had fainted¹⁸⁸ under California provisions admitting nonassertive conduct.¹⁸⁹ The court stated that his evidence "was relevant to prove that defendant owned [that kind of coat] and that he had worn it on the night of the murder; and because it was non-assertive conduct it was not objectionable hearsay."¹⁹⁰ The problem with this ruling is that the wife's conduct is extremely ambiguous. Her fainting *could* indicate that she did believe that her husband owned such a coat, but it could also indicate that she knew someone else who had such a coat, that she found a murder investigation in her own house upsetting, or that she fainted for some physical reason unrelated to her husband's question.

Because nonassertive conduct evidence is subject to so many weaknesses much of it will be far less trustworthy than ordinary hearsay. Many of the writers who have discussed the admission of nonassertive conduct have recognized that fact and attempted to suggest ways in which a hearsay exception for such evidence could be restricted to trustworthy evidence.¹⁹¹ However, their suggestions would be difficult to follow, and Federal Evidence Rule 801 does not incorporate any of them. Evidence of nonassertive conduct is not trustworthy enough to qualify for treatment as an exception to the rule against hearsay.

At this point it would be logical to ask: Why, if nonassertive conduct is actually even weaker evidence than ordinary hearsay, did the draftsmen of the Federal Rules of Evidence adopt a hearsay "exception by definition" for nonassertive conduct? The explanation which those draftsmen gave was that they did believe that nonassertive conduct was trustworthy enough to justify admission,¹⁹² but it may be useful to ask if the assertion-based definition of hearsay adopted by parts (a) and (c) of Federal Rule 801 might best be explained as a misplaced "rule of thumb."

Statements and rules such as "hearsay is an assertion offered to prove the truth of the matter asserted"¹⁹³ can be useful "rules of thumb." In many situations they can be used as tools with which to identify hearsay and to explain hearsay changes. There need not be any conflict between such assertion-based "rules of thumb" and broader declarant-

188. *Id.* at 668, 86 Cal. Rptr. at 112.

189. CAL. EVID. CODE §§ 225, 1200 (West 1966).

190. 6 Cal. App. 3d at 668, 86 Cal. Rptr. at 112.

191. See McCormick, *supra* note 138, at 504; Morgan, *supra* note 138, at 1158-60; Maguire, *supra* note 58, at 768-73; Finman, *supra* note 55, at 707-09; Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 216-17 (1940).

192. See Fed. Advisory Comm. Notes, *supra* note 36, at 294.

193. See 1 D. STANSBURY, *supra* note 8, § 138; C. McCORMICK, *supra* note 27, § 246; Park, *supra* note 138, at 424. See also FED. R. EVID. 801(c).

based¹⁹⁴ (such as the Rule proposed in this article¹⁹⁵) that make it clear that all out-of-court conduct offered for testimonial purposes¹⁹⁶ is hearsay.¹⁹⁷ The assertion-based rules can either be regarded as limited examples that do not cover the entire definition of hearsay, or they can be interpreted as full definitions of hearsay that say the same thing as the apparently broader declarant-based definitions. The latter will be true if the word "assertion" is interpreted (in keeping with the purposes of the hearsay rule) as including any out-of-court conduct offered in evidence as if it had been an assertion.¹⁹⁸ In North Carolina¹⁹⁹ and throughout the country²⁰⁰ assertion-based and declarant-based definitions of hearsay have generally been regarded as consistent rather than inconsistent. Thus, Dean Brandis treats various assertion-based definitions²⁰¹ as merely different expressions²⁰² of the declarant-based definition which he describes as "the definition that has been generally accepted by the North Carolina Court."²⁰³ "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it."²⁰⁴

In Federal Evidence Rule 801, however, the adoption of a familiar assertion-based definition of hearsay is treated as a rejection of declarant-based definitions. Part (c) of Federal Rule 801 states a familiar assertion-based definition of hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." This is very familiar and traditional language,²⁰⁵ and its familiarity has undoubtedly assisted its widespread acceptance. There is nothing in part (c) that indicates or requires the rejection of all the equally traditional²⁰⁶ declarant-based definitions, but that is the effect of the definition²⁰⁷ of "statement" in part (a) of Rule 801, which gives the familiar

194. See Park, *supra* note 138, at 424, for a discussion of declarant-oriented definitions of hearsay.

195. See text accompanying note 138 *supra*.

196. See text accompanying note 56 *supra*.

197. See authorities cited note 193 *supra*. But see Park, *supra* note 138, at 426.

198. See C. McCORMICK, *supra* note 27, § 246 at 584 n.47.

199. See 1 D. STANSBURY, *supra* note 8, § 138.

200. See C. McCORMICK, *supra* note 27, § 246; *id.* at 584 n.47. But see Park, *supra* note 138, at 426.

201. 1 D. STANSBURY, *supra* note 8, § 138 at 459-60.

202. *Id.* at 459.

203. *Id.* at 458-59.

204. *Id.* at 458.

205. See authorities cited notes 193 & 197 *supra*.

206. *Id.*

207. See MODEL CODE OF EVIDENCE rule 501(a); UNIFORM RULE OF EVIDENCE 62(1); CAL. EVID. CODE §§ 225, 1200 (West 1966); KAN. STAT. ANN. § 60-459(a) (1976), and N.J. STAT. ANN.

language of part (c) an unfamiliar effect.²⁰⁸ As the federal draftsmen explained their work, "[t]he key to the definition is that nothing is an assertion unless intended to be one."²⁰⁹

The federal definition makes the idea of assertion the master rather than the servant of the rule against hearsay. A useful tool becomes an illogical limitation. The most that can be said in defense of this portion of Federal Rule 801 is that when that Rule was drafted²¹⁰ it may not have appeared that this illogical twist in the definition of hearsay would do enough harm to justify more careful treatment. Nonassertive conduct was only one of a number of potential hearsay problems, and it was one that was not being litigated in very many cases.²¹¹ However, the adoption by Federal Rule 801 of a hearsay "exception by definition" for nonassertive conduct ensured that the prior situation would change²¹² and that nonassertive conduct would become an important hearsay exception.

The reason why nonassertive conduct is destined to become an important exception is the same as the reason why this article opposes the adoption of any hearsay exception for nonassertive conduct: this is an exception that can be used to introduce ordinary hearsay without any showing that it is trustworthy. That is exactly what every trial lawyer would like to have whenever he wants to introduce hearsay evidence that cannot satisfy the trustworthiness requirements of any of the other hearsay exceptions. Lawyers seeking to avoid the hearsay rule will discover larger and larger numbers of examples of out-of-court conduct that might be called²¹³ nonassertive. North Carolina can, and should, avoid such problems by adopting the general principle that all out-of-court conduct offered for a testimonial purpose is hearsay.

VII. CONCLUSION—USE OF AN EVIDENCE CODE AS AN INSTRUMENT OF EVIDENCE REFORM

I have argued in this article that the need for reform of various parts of the law of evidence is not the primary reason why North Carolina should adopt an evidence code.²¹⁴ Instead, the most important service

§ 2A: 84A-1, Rule 62A (West 1976) for other examples of this sort of limiting definition adopted by evidence code draftsmen.

208. *But see* the similar prior definitions note 207 *supra*.

209. Fed. Advisory Comm. Notes, *supra* note 36, at 293.

210. See Rule 8-01(a) of the first draft of the Federal Rules of Evidence, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States, Preliminary Draft of Proposed Rules on Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 331 (1969).

211. See authorities cited notes 55 & 56 *supra*.

212. See cases cited in 4 LOUISELL & MUELLER, *supra* note 35, § 414 at 89-91.

213. See notes 173-74 and accompanying text *supra*.

214. See text accompanying notes 17-46 *supra*.

which an evidence code could perform would be to make the law of evidence more accessible and useful.²¹⁵ Professor Saltzburg draws the following conclusions from his experience with evidence codes such as the Federal Rules of Evidence:

With the adoption of rule of evidence, trial judges and litigating attorneys now have a common body of authority to which to refer when an evidence question is raised at or before trial. No longer is it necessary to argue about such things as which definition of hearsay is best. The Rules provide a definition of basic terms and give everyone an identical starting point for analysis. In many instances a quick reference to the Rules provides guidance on an evidence question that would be far more difficult to obtain by reading a series of appellate opinions.

. . . .
 . . . [I]t is increasingly apparent that continuing education in evidence has been enhanced by having a clear body of authority with which to begin all analysis of evidence problems. Traveling around the country to do workshops for federal district judges and federal magistrates, held under the auspices of the Federal Judicial Center, the body responsible for the continuing education and training of the federal judiciary. I have seen an increased judicial interest in evidence problems since the Federal Rules were adopted. Judges, who before could not agree on where to begin to talk, have a common body of law to guide them. They are talking to each other more about evidence questions and they are learning from each other. I think that, as a result, the judiciary feels more comfortable with evidence questions and handles them better than it has before.²¹⁶

We should not postpone the benefits of an accessible and usable evidence code in order to attempt to create an evidence code that will resolve all of the disputes and correct all of the mistakes in the law of evidence. There will, after all, continue to be opportunities to reform and improve the law of evidence even after a code is adopted. Nevertheless, the adoption of an evidence code would offer an unusual opportunity to adopt broad reforms consisting of general principles rather than the limited, piecemeal²¹⁷ reforms of evidence law usually adopted by both the courts and legislatures.

The nature of both the legislative and the judicial process encourages the adoption of limited solutions that deal with only a part of a problem and leave the rest of the problem untouched. A striking example of the limitations of piecemeal reform is the history of the North Caro-

215. *Id.*

216. Saltzburg, *The Federal Rules of Evidence and the Continuing Education of Judges and Lawyers*, 5 VA. L. SCH. REP. 6, 6, 8 (1981). See also Crowley, *Illinois Evidence—The Question of Codification*, 10 LOY. CHI. L.J. 297 (1979).

217. See Ayscue, *More Evidence*, BARNOTES, July-August 1981, 7, 12.

lina rule restricting testimony by one spouse against the other in a criminal prosecution. Between 1857 and 1971 the legislature adopted eleven acts establishing or changing the circumstances in which one spouse would be permitted to testify against the other in prosecutions for crimes against the witness spouse, their children, or marital propriety.²¹⁸ Nevertheless, in *State v. Freeman*²¹⁹ the Supreme Court of North Carolina found it necessary to entirely abolish the right of a criminal defendant to prevent adverse testimony by his or her spouse except with respect to confidential marital communications²²⁰ in order to permit a wife to testify that her husband had shot her brother in her presence.²²¹ Although the actual crime involved in *Freeman* was against a relative of the spouse, she would also have been prevented by the legislative scheme²²² from testifying about a large number of possible crimes even if they had been committed against her herself because the legislature had adopted exceptions only for particular crimes or kinds of crimes and not for the general idea of crimes against the spouse.²²³

218. See N.C. GEN. STAT. § 8-57 (1981). That statute is derived from An Act of March 12, 1866, ch. 43, 1866 N.C. Laws Spec. Sess. 112 (1866) which provided that "[nothing in this act] shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife . . . for or against her husband." An earlier statute, An Act of February 2, 1857, ch. 23, 1856-1857 N.C. Laws 22 (1857), had provided for competency of the wife in a prosecution of the husband for assault and battery upon the wife. In 1869 an exception was added for testimony in criminal proceedings for abandonment or neglect of the wife and/or children. An Act of April 12, 1869, ch. 20, 1868-1869 N.C. Laws 557 (1866). When these statutes were enacted as N.C. CONSOL. STAT. § 1802 (1919), an exception was provided "to prove the fact of marriage in case of bigamy," but the exception for abandonment and neglect was limited to offenses against the wife. Thereafter, An Act of January 26, 1933, ch. 13, § 1, 1933 N.C. Laws 11 (1933) provided an exception for abandonment of children, and An Act of May 4, 1933, ch. 209, 1933 N.C. Laws 557 (1933) provided an exception for the neglect of support for children. In An Act of March 20, 1951, ch. 296, 1951 N.C. Laws 245 (1951), proof of marriage was excepted "in case of criminal cohabitation in violation of the provisions of G.S. 14-183." In 1957 the bigamy exception was expanded to include "facts tending to show the absence of divorce or annulment proceedings wherein the husband and wife were parties." An Act of June 5, 1957, ch. 1036, 1957 N.C. Laws 972 (1957). An Act of March 30, 1967, ch. 116, 1967 N.C. Laws 177 (1967) provided an exception for "any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse." In 1971, an exception was provided "in any criminal prosecution of a spouse for trespass in or upon the separate residence of the other spouse when living separate or apart . . . by mutual consent or court order." An Act of July 8, 1971, ch. 800, 1971 N.C. Laws 1052 (1971). Finally, an Act of April 11, 1973, ch. 1286, 911(d) 1973 N.C. Laws 554 (1973) inserted an exception for "all criminal prosecutions of a spouse for communicating a threat to the other spouse."

219. 302 N.C. 591, 276 S.E.2d 450 (1981).

220. *Id.* at 596, 276 S.E.2d at 453.

221. *Id.* at 592-93, 276 S.E.2d at 451.

222. See N.C. GEN. STAT. § 8-57 (1981).

223. See proposed FED. R. EVID. 505 and 1974 UNIFORM RULE 504 for examples of language creating exceptions for all crimes against the witness spouse. Both of these would probably also permit testimony such as that involved in *Freeman* on the grounds that the killing of the brother was a crime against a third person "committed in the course of committing a crime against" the witness spouse. 302 N.C. at 592-93, 276 S.E.2d at 451.

The decision by the Supreme Court of North Carolina in *Freeman* was also, however, an example of the limitations of piecemeal reform of evidence law. The apparent effect of the decision in *Freeman* is to abolish all marital privileges in criminal cases except for one for confidential communications "between the marriage partners made during the duration of their marriage."²²⁴ This would mean that spouses could be compelled to testify against each other even when they did not want to do so. Since the witness spouse in *Freeman* did want to testify against her husband²²⁵ the court did not have to consider whether a witness spouse should be given a privilege to refuse to testify against the defendant spouse in a criminal case. The Supreme Court of the United States has recently adopted such a privilege for witness spouses²²⁶ and there is no language in *Freeman* that would be inconsistent with the adoption of such a privilege for North Carolina. Nevertheless, it is unlikely that any North Carolina court will recognize such a privilege until the Supreme Court of North Carolina does decide a case involving such a claim of privilege.

A marital privilege for confidential communications only is not broad enough to deal fairly with all of the problems that arise when one spouse is called as a witness against the other in a criminal trial.²²⁷ If we are unwilling to force the witness spouse to choose among testimony against the defendant spouse, contempt, or perjury,²²⁸ North Carolina should adopt a broader privilege for all spouses who do not want to testify against their husbands or wives in criminal cases.

Several recent examples of piecemeal change in North Carolina evidence law involve the adoption of portions of the Federal Rules of Evidence themselves by the courts²²⁹ or the legislature. One small portion of the Federal Rules has been statutory law in North Carolina since 1977.²³⁰ Section 8-40.1 of the North Carolina General Statutes is an almost word-for-word copy of Federal Rule 803(18). Dean Brandis points out that the piecemeal manner in which this provision was adopted creates some doubt as to whether these words will have the same effect as they do as part of the Federal Rules.

However, since its statutory setting differs from that of the Federal Rule, and even though it states that "the hearsay rule shall not exclude," only the courts can say whether such evidence, when admitted,

224. 302 N.C. at 596, 276 S.E.2d at 453.

225. *Id.* at 593, 276 S.E.2d at 451.

226. *Trammel v. United States*, 445 U.S. 40 (1980).

227. See 2 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 505[02] for a discussion of these problems.

228. See Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 Nw. U.L. REV. 208 (1961).

229. See, e.g., text accompanying notes 74-85 *supra*.

230. N.C. GEN. STAT. § 8-40.1 (1981).

is substantive, as distinguished from impeachment or (since the statute allows the evidence to come from either side) corroboration.²³¹

Similar problems are created by the adoption in 1981 of sections 8-58.12, 8-58.13, and 8-58.14 of the North Carolina General Statutes under the slightly misleading title of "An Act to Eliminate the Hypothetical Question."²³² These statutes incorporate large portions of Federal Rules 702 and 705, but the legislature added changes which give an examining party an absolute right to examine an expert witness without using a hypothetical question²³³ and the opposing party an absolute right to require prior disclosure of the facts or data underlying the expert's opinion.²³⁴ These changes from the new federal system of expert witness examination are probably, on balance, unwise,²³⁵ but a more important problem with this legislation is that it adopts language from only two of the four Federal Evidence Rules that made up the new federal system. The language of Federal Rule 705 that has been incorporated into section 8-58.14 is difficult to interpret even when read in context with Federal Rules 703 and 704,²³⁶ but it will be even more difficult to interpret without that context.²³⁷

The adoption of an evidence code for North Carolina would offer an opportunity to put both new reforms and old established rules in a clearer and more accessible form. The great value of an evidence code set forth in clear and accessible general principles does not depend upon the discovery of any new general principles, but the process of creating an evidence code will offer an unusual opportunity for thoughtful examination and careful incorporation of new general principles.

231. 1 D. STANSBURY, *supra* note 8, § 136 at 251 (Supp. 1979).

232. House Bill 394, chapter 543, 1981 N.C. Sess. Laws.

233. N.C. GEN. STAT. § 8-58.12 (1981). E. Osborne Ayscue, Jr. describes this provision as the "most unfortunate part of" the act because it "absolutely deprives the court of one traditional alternative for eliciting expert opinions." Ayscue, *supra* note 217, at 12.

234. N.C. GEN. STAT. § 8-58.14 (1981).

235. See note 233, *supra*. See also Blakey, *supra* note 22, at 315-19.

236. See *id.*; McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463 (1977); Blakey, *An Introduction to the Oklahoma Evidence Code: The Thirty-Fourth Hearsay Exception, Information Relied Upon as a Basis for Admissible Expert Opinion*, 16 TULSA L.J. 1, 4-11 (1980).

237. See Ayscue, *supra* note 217, at 12.