If the Rules of Evidence can be visualized as a castle, the keystone in the main arch has to be the hearsay rule. It is at once the most difficult part of the law of evidence and the most important in the conduct of the trial.

A witness, taking the stand during a court trial, can testify about events directly perceived through any of the five senses: The witness can state that s/he saw the defendant leave the bank carrying a black bag; smelled gas on entering a room; ate oysters that had a peculiar taste; felt cold while sitting in a train compartment; or heard a loud explosion. However, if what a witness heard (or read) were the words spoken (or written) by someone else, then such utterances may constitute hearsay and, if so, will not be admissible as testimony. It is the ‘rule against hearsay’ that addresses this question: Which out-of-court statements related by a testifying witness count as inadmissible hearsay, and which ones do not and therefore may be admitted into evidence?

The first section of this paper gives a brief overview of the rationale and the criteria for the hearsay rule. There are three broad types of statements—those falling within the definition of hearsay and consequently inadmissible as evidence; those not regarded as hearsay and therefore admissible; and those, although conforming to the definition of hearsay, nonetheless are admissible as permitted exceptions to the rule. Our interest resides primarily with the first two types. We shall present examples of various out-of-court statements and discuss how they have been traditionally classified as either hearsay or nonhearsay. So far as exceptions go, we shall only consider statements relating to state of mind.

The second section introduces speech act theory, a linguistic approach to meaning that investigates how speakers use their language. Utterances perform specific functions within the communicative process. For example, speakers may report events or happenings, obligate themselves to some future course of action, or bring about new states of affairs. Speech act theory recognizes five general functional categories and most utterances can be assigned to one of them. It is these categories that will provide a novel means for determining which out-of-court statements constitute hearsay and which ones do not.

The third section presents a detailed analysis of hearsay issues from the perspective of speech act theory. We show how various kinds of statements, judged as hearsay or nonhearsay from a legal viewpoint, are to be approached within a speech act framework. Of particular interest will be utterances reflecting state of mind. Although


1 Practical Trial Evidence: A video handbook, Joseph M. McLauglin, Fordham University School of Law, Practising Law Inst., NYC, 1977 (51).
such statements are generally admissible, legal scholars have not always agreed on how to classify them. There are two conflicting views: Are state-of-mind assertions nonhearsay to begin with, or are they hearsay but are allowed as permitted exceptions? Speech act analysis will provide a unique solution to this question.

The fourth section provides a summary of our conclusions. It draws comparisons between the legal approach to hearsay and that advocated by the speech act analysis.

1. Legal Hearsay

Within Anglo-American law the rules pertaining to hearsay deal with some of the criteria governing the admissibility of evidence during a trial. The rules of evidence are intended to uncover the truth. The rationale behind the ‘rule against hearsay’ is to exclude evidence that is not reliable and consequently will not assist the fact-finder in arriving at the truth. What renders hearsay particularly suspect is the inability of the out-of-court declarant to be cross-examined at the time the statement was made. Moreover, the one who produced the statement is most often not present in the courtroom and therefore is not surrounded by the solemnity of the judicial proceeding, is not under oath to tell the truth, and cannot be observed by judge or jury. The judicial system takes the position that a statement offered during testimony should be made by the ‘real’ witness—that is, one who is under oath, whose demeanor can be observed, and most importantly, who is subject to cross examination—and not by a witness who heard it from the purported witness.

Not all utterances made outside the courtroom count as inadmissible hearsay, but only those offered to prove the truth of what is asserted. A statement offered for any other purpose would not be hearsay. For example, consider the utterance, “It’s a beautiful day today.” If it is offered to prove that the weather was especially pleasant on a particular day, the statement would be hearsay. If it is offered instead to show that the person making the statement was being cordial and friendly, it would not be hearsay. Hence, the same statement may be hearsay in regard to one issue, but nonhearsay as to some other one. What this means is that a statement cannot be analyzed in isolation or out of context but must always be evaluated vis-à-vis a particular issue.

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3 “Deciding that a string of words is a ‘statement’ does not mean it is hearsay...[T]he question is whether a statement is offered to prove what it asserts, and that depends on the proponent’s purpose, the declarant’s purpose, and often on the broader factual context in which the statement was made.” Federal Evidence, 2nd ed., Christopher B. Mueller & Laird C. Kirkpatrick, Vol 4, 1994, Lawyer’s Cooperative Pub. Rochester, NY. P. 373, p.44.s. We assume throughout that the issue to which the statement is offered has relevance for how the case will be decided. Only relevant evidence may be admitted. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” (FRE 401).
A perusal of any of the casebooks assigned to evidence classes reveals that hearsay, as a subject of inquiry, occupies a goodly amount of textual space. Professors of law devote several weeks of instruction to the topic, one which law students may find bewildering, arcane, and often confusing. Not only must these neophyte legal practitioners wrestle with how hearsay applies to courtroom testimony, but they have to come to grips as well with myriad exceptions to the hearsay rule. Even trial lawyers and judges on the bench are not immune from the hearsay “thicket—this incredible mishmash of rules”. In the heat of a trial, both lawyer and judge need to react instantaneously to a testifying witness’s out-of-court statement: hearsay or not? How has the law approached this problem?

The following definition of hearsay is found in the Federal Rules of Evidence (FRE 801(c)): “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.” Similar definitions have been adopted by many of the states. A statement will not be hearsay if it used other than to “prove the truth of the matter asserted”. What then are some of these other uses of out-of-court statements that traditionally have not been considered as hearsay? There are four general categories: (1) utterances that count as verbal acts or the verbal parts of accompanying physical acts; (2) utterances offered to show their effects on a hearer or his/her state of mind; (3) utterances that indirectly say something about the mental state of the speaker or about his/her knowledge or awareness; (4) utterances whose interest resides in the fact that they were made qua statements, such as those viewed as defamation or perjury.

Let us begin by looking at some questions about hearsay that appeared (many years ago) on an evidence examination at the Harvard Law School. Here are thirteen questions, each of which pairs an issue with a statement. The reader may wish to test him/herself. An analysis of each statement vis-à-vis the issue in question follows the exam.

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4 Of the approximately 1100 pages of the text, Evidence: Case and Materials (Louisell, Kaplan, and Waltz), nearly 300 pages (more than one-fourth of the book) deal with discussions and cases about hearsay and the various exceptions.
6 The terms ‘statement’ and ‘declarant’ are also defined. FRE 801(a): “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person [such as nodding ‘yes’], if it is intended by him as an assertion.”. FRE 801(b): “A ‘declarant’ is a person who makes a statement.” Throughout the discussion in this section we shall use the terms, ‘utterance’, ‘statement’, and ‘assertion’ interchangeably. We reconsider these choices of vocabulary in Section 3, infra. FRE 802 then states: “Hearsay in not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.”
7 The California Evidence Code (§ 1200) has this definition: (a) “‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (b) Except as provided by law, hearsay evidence in inadmissible.”
8 Morgan, Evidence Exam, Summer Term, 1946, Harvard Law School in Evidence: Cases and Materials, 3d ed., David W. Louisell, John Kaplan, Jon R. Waltz., Foundation Press, Inc., Mineola, N.Y., 1976. pp. 126-130. The exam has 75 questions, many of which deal with exceptions to the hearsay rule. The responses to twelve of the thirteen questions that we have selected are either hearsay or nonhearsay. Only one is a possible exception to the rule against hearsay.
Which of the following items is hearsay?

1. On the issue whether X and D were engaged to be married, D's statement to X, "I promise to marry you on June 1."

2. On the issue whether a transfer of a chattel from D to X was a sale or a gift, D's statement accompanying the transfer, "I am giving you this chattel as a birthday present."

3. On the issue in 2, D's statement the day following the transfer, "I gave you the chattel as a birthday present."

4. On the issue of D's adverse possession of Blackacre, D's assertion, "I am the owner of this farm."

5. On the issue of X's provocation for assaulting Y, D's statement to X, her husband, "Y ravished me."

6. On the issue of the reasonableness of X's conduct, in the shooting of Y by X, D's statement to X, "Y has threatened to kill you on sight."

7. On the issue of X's knowledge of speedily impending death, D's statement to X, "You have only a few minutes to live."

8. On the issue in 7, X's statement, "I realize that I am dying."

9. On the issue of the sanity of D, a woman, D's public statement, "I am the Pope."

10. On the issue of D's ill-feeling toward X, D's statement, "X is a liar and a hypocrite."

11. On the issue of D's consciousness after an attack, D's statement, "X shot me, as he often threatened to do."

12. On the issue of the identity of the shooter, D's statement in 11.


We discuss now, from a legal perspective, the hearsay implications of these statements and issues from the Harvard exam.
1.1. Verbal Act

"I promise to marry you on June 1."

The issue concerns whether X and D were engaged to be married. X’s out-of-court statement is a promise. A promise of marriage is certainly relevant for the issue of whether there is an engagement. Now a promise is the type of statement that the law recognizes as a verbal act, one which may have legal consequences. We assume that the witness that reported this statement personally heard the declarant making this verbal act. Statements having legal effects do not constitute hearsay.

"I am giving you this chattel as a birthday present."

The issue here is whether the chattel that D gave to X was a gift or a sale. We assume that the witness saw X hand over the chattel to D. (Recall that a witness can report whatever s/he has personally observed.) However, this action by itself does not necessarily substantiate whether the transfer was a gift or a sale. But D’s words accompanying the physical act will unambiguously clarify the purpose of the transaction. This type of statement too is considered to be a verbal act, the kind that explains the nature of a physical act, and accordingly, it is not hearsay.

"I gave you the chattel as a birthday present."

Now we consider D’s statement the day following the transfer. Here D is telling X that the chattel given yesterday was a gift. This statement is not a verbal act caught as it was being produced but rather a description by D of an action taken on a previous occasion. It is being offered to "prove the truth of the matter asserted"—i.e. that D gave to X the chattel as a birthday present. Therefore, this statement is hearsay.

"I am the owner of this farm."

The issue concerns D’s adverse possession of Blackacre. One of the criteria for adverse possession of someone else’s property is that the possession must be openly acknowledged by the occupier. D’s going around announcing for all to hear that he is

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9 An example of the legal import of a promise is its role in the formation of a contract. “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” Restatement, 2d, Contracts, §1, 5.

10 “Adverse possession is the acquisition of title to real property by continuous possession for the prescribed period of time.” 5 California Real Estate 2d 629, et seq. (Miller & Starr, 1989).

11 “Possession must be actual, open, and notorious occupation of the property in such a manner as to constitute reasonable notice of that occupation to the record owner.” California Code of Civil Procedure, Sections 318 et seq.
“the owner of this farm” would be in accord with this requirement of a claim of possession. Having legal significance, D’s words constitute a kind of verbal act and so would not be hearsay.

1.2. Hearer’s Reaction and Hearer’s State of Mind

"Y ravished me."

In defense of his assault on Y, X says that he was provoked to engage in this pugnacious act because his wife told him that Y had ravished her. Her out-of-court statement is not being offered to prove whether or not she had indeed been ‘ravished’ (for all we know, she may have lied), but rather to show the effect it had on the husband. Hearing his wife tell him about this incident, whether or not it was true, caused X to turn his wrath toward Y. It is not hearsay when a statement is offered to show its effect on a hearer.

"Y has threatened to kill you on sight."

D told X that Y had threatened to kill X. On hearing this, X shot Y (apparently to defend himself). D’s statement is not hearsay on the issue of the reasonableness of X’s conduct. Like the preceding example, this statement is offered to show its impact on the hearer X. Note, though, that had the statement been offered for the purpose of proving that Y had threatened X, then there would be hearsay.

"You have only a few minutes to live."

The issue here is whether X has knowledge of his speedily impending death. The statement is not presented for its truth, but again for its effect on the hearer. Having heard D’s statement, X now has knowledge (irrespective of whether the information about the impending death sentence is true or not) of what was related to him by D. Not hearsay. The law also considers this type of nonhearsay as indicative of the ‘state of mind of the hearer’.

1.3. Speaker’s Indirect State of Mind

"I am the Pope."

The issue here concerns the sanity of the woman who made this statement. Obviously, one is not trying to prove that she is the Pope. Rather, the statement is being presented as the ranting of a purported disillusioned individual. Her statement is offered for the purpose of inferring something about her mental condition. It is not hearsay when an assertion is used as circumstantial evidence for a particular state of mind of the speaker.
"X is a liar and a hypocrite."

We are concerned here with whether D has expressed ill-feeling toward X. The statement is not offered to prove whether X is really "a liar and a hypocrite", but to show that one who speaks thusly in regard to another harbors ill will. *Not* hearsay.

"I realize that I am dying."

The issue is the same as one considered in a previous example—whether X had knowledge of his speedily impending death. There, the out-of-court statement made by D to X was: “You have only a few minutes to live”. The statement was offered to show not its truth about how long X would live but rather its effect on X, and for that reason it did not constitute hearsay. Here, however, X asserts directly his awareness of his impending death. His statement appears to prove exactly what it asserts and, from that perspective, it should count as *hearsay*. Yet, X’s statement concerns his ‘state of mind’. Thus far, we have taken the stance that statements reflecting state of mind are *not* hearsay. So, is X’s statement hearsay or not? We shall take up this controversial question in 1.5.

1.4. Utterance qua Statement Made

"X shot me, as he often threatened to do."

For the issue of D’s consciousness after an attack, this statement is *not* hearsay as it is offered purely to show that D could speak. His making some kind of utterance provides evidence of the likelihood of his being conscious. However, D’s statement does constitute *hearsay* regarding the other two issues raised in the Harvard exam—the identity of the shooter and X’s threatening behavior. Each clause of the statement is offered to prove what it asserts in regard to one of those issues in question.

1.5. Exceptions to the Hearsay Rule

Suppose that at trial you needed to prove the place and date of your birth. What would be simpler than to produce a birth certificate! But that document would be hearsay as it is an out-of-court *written statement* attesting to that which is to be proved. Instead, you would need to find a witness who could testify that s/he had personal knowledge of the ‘where’ and ‘when’ of your birth. Unfortunately, there might be no such witness still alive or available. Although the hearsay rule has as its raison d’être the exclusion of unreliable evidence, it would exclude also certain valuable evidence that seems quite credible, such as a birth certificate. For this reason, over the years, the courts have recognized various exclusions and exceptions to the rule against hearsay, evidence that, although technically hearsay, nonetheless will be admissible. 12 The exceptions occur

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12 There are some two dozen exceptions to the hearsay rule. Some of these are: records of vital statistics, marriage and baptismal certificates, family records and those of religious organizations, records of regularly conducted business activities, public records and reports, and learned treatises; statements about
either because of the need for the evidence or because of its reliability. ¹³ The Advisory Committee for the Federal Rules of Evidence has noted: “[W]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without.” ¹⁴

One of the exceptions to the rule against hearsay concerns a declarant’s statement about his/her own ‘state of mind’. ¹⁵ Although the reliability of such statements at times may be questionable, the need for the evidence may be overwhelming for often there may be no other way to prove a declarant’s mental state. Previously, we noted that statements from which one infers something about a speaker’s mind set—such as, “I am the Pope” and “X is a liar and a hypocrite”—are not hearsay. The exception discussed here, however, is intended to cover situations where the issue concerns a declarant’s state of mind and where the declarant has directly asserted something about that mental condition—such as, “I am crazy” or “I hate X”, as well as the statement from the Harvard exam, “I realize that I am dying”. Each of these statements is offered to prove the truth of what it asserts—i.e. the questionable sanity of D; D’s ill-feeling toward X; and X’s knowledge of impending death.

Let’s look in more detail at the utterance from the Harvard exam. The introductory words, “I realize”, of the full statement, “I realize that I am dying”, directly assert awareness. Therefore, in regard to the issue of knowledge of impending death this utterance satisfies the definition of hearsay—an out-of-court statement offered to prove what it asserts. However, what if X instead had said, “I am about to die”, a statement with no explicit reference to a state of mind. Yet from this utterance we are able still to infer his awareness of a rapidly impending doom, but because it is an indirect statement about mind set it would no longer be viewed as hearsay. Thus, it is bizarre that slight differences in the wording of an assertion can determine whether there is hearsay in regard to a particular issue. This dilemma may be of little practical importance for, no matter how the statement is worded, it will be admissible simply because ‘state of mind’ is a well-recognized category of exception to the hearsay rule. Nonetheless, this dilemma concerning the vagaries in the phrasing of a statement is of theoretical interest if we wish to arrive at a coherent view of hearsay. In the third section of this essay we shall see that speech act theory offers an interesting solution to this problem. It is time to turn to that approach. We begin by laying out the basic assumptions of speech act theory.

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¹⁴ FED.R.Evid. art VII, advisory committee note.
¹⁵ FRE 803: “Hearsay Exceptions; Availability of Declarant Immaterial. [The following is not hearsay:] (3) A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition...”
2. Speech Act Theory

Speech act theory is an approach to meaning that deals with the way “words relate to the world.” We tend to think of sentences as descriptive statements about events, as assertions that are verifiable: "Henry beats his wife"; "It will rain tomorrow"; "George promised to buy my car"; “The cat looks sick”. However, the philosopher, John Austin, observed that in uttering a sentence, a speaker does not necessarily make a true or false statement, but instead may be engaging in the very act designated by the words—acts, such as making a promise, declaring a new state of affairs, or expressing an emotion about some event. A speaker who says, "I promise you that I will pay back the money I owe”, in uttering these words, performs an act of creating the special type of obligation known as promising. A justice of the peace, who is duly authorized to perform marriage ceremonies, creates the marital status by means of the words, “I now pronounce you husband and wife”. In saying, "I congratulate you on your promotion", the speaker is not asserting the truth or falsity of a proposition (in fact it is presumed to be true that the promotion has taken place), but rather the speaker is performing an act of congratulating. Austin referred to these kinds of utterances as performative (i.e. the speaker performs the action denoted by the verb), in contrast to those utterances that he called constative, where the speaker does describe an event or a state.

John Searle has expanded on Austin’s notion of ‘performative’. Searle’s theory of speech acts provides a comprehensive view of the nature of language and its use by speakers and hearers. His term ‘speech act’ is particularly a propos as it emphasizes that the performance of an act can come about through speech. It is significant that a speech act may be as valid as any corresponding physical act. As an act, it may stand alone or occur along with nonverbal acts. Thus, one may propose to bet on the outcome of a sporting event by uttering the words, “I bet you that the Chargers will beat the Raiders”, or by offering a hand shake, or even by performing both acts (the verbal and the physical) simultaneously. Consider, as another example, the legal act of the swearing in of a witness at trial, where the witness may raise his hand while uttering the words, “I swear to tell the truth”.

There are several interesting grammatical properties of performative utterances. The subject of the sentence must be first person (‘I’ or ‘we’), there is often an expressed or implied second person indirect object (‘you’), and the ‘performative verb’ must occur in the simple present tense—e.g. “I congratulate you on your promotion”. Compare this utterance to a non-first person form, "she congratulates you on your promotion", or to the past tense form, "I congratulated you on your promotion", where the speaker no longer is congratulating, but either is transmitting the congratulations of another or is reporting the occurrence of a previous act of congratulating, both of which are constative statements.

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16 Two influential works on speech act theory are: J. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed. 1962) and J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969). The quotation is from Searle at 3.
17 J. AUSTIN, supra at 8; also Performative-Constatve in THE PHILOSOPHY OF LANGUAGE 13 (J.Searle, ed. 1971).
18 SEARLE, op. cit.
19 Austin, op. cit. (p.56)
that are indeed true or false. It is the simple present tense verb ‘congratulate’, embedded in the appropriate linguistic frame (‘I ___ you’) that brings off the performative act of congratulating. Austin proposed the ‘hereby’ test as a further means of identifying some performative utterances. Verbs that convey performative acts often allow the inclusion of the word ‘hereby’ in their sentences, but the same verbs when they occur in constative utterances do not. Thus, one can say, "I hereby swear to tell the truth", but not, "I hereby swore to tell the truth".

According to Searle, a speech act has four essential attributes: illocutionary, perlocutionary, locutionary, and state of mind. Primary among these components is the illocution, which corresponds to Austin’s performative—i.e. a speaker does something in saying something. Now an illocution may affect a hearer in various ways, and it is the perlocution that refers to the effects resulting from an illocution. Moreover, because an illocution is expressed through language, it must have linguistic properties, and it is the locution that characterizes the language aspects of an illocution. Searle notes further that in uttering an illocution, the speaker, at the same time, tacitly expresses a particular state of mind, so that the illocution becomes an outward expression of the speaker’s belief, intent, desire, or feeling in regard to the content of the illocution. These elements—illocutions, perlocutions, locutions, and states of mind—will constitute the building blocks for our analysis of hearsay. Let us then consider in more detail each of them.

2.1. Illocutions

In what kinds of illocutionary acts may one engage through speech? Searle recognizes five types: assertive, commissive, directive, declarative, and expressive.

2.1.1. Assertives

An assertive illocution is one where the speaker states a proposition that represents some state of affairs that in principle could be true or false—e.g. “I claim that speech act theory provides an elegant account of hearsay”. The event or state of affairs to which the proposition of an assertive refers may occur in the past, present, or future. Some English verbs that function as assertives are: assert, claim, report, maintain, predict, inform, admit, accuse, remind, testify, confess, state, swear. These verbs differ from one another by their illocutionary force or the strength of their asserting. For example, claiming is a stronger mode of asserting than merely informing, and swearing is stronger yet. These verbs constitute different ways of making assertions. We noted that illocutions have an associated state of mind. For assertives, that state of mind is belief. Thus, one who makes an assertion (with no intention of deceiving or lying) believes the

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20 The utterance, "she congratulates you on your promotion," would be acceptable as a performative in a situation where the speaker acts as her agent. However, the interpretation intended in the text is one where the speaker merely is reporting someone else’s promise and not functioning as her agent.

21 Austin, ibid. (57)

22 The terms ‘perlocution’ and ‘locution’ originally are due to Austin. The terms ‘illocution’ and ‘state of mind’ are Searle’s, who also employs ‘perlocution’; his term ‘utterance act’ (which we shall not use) is similar to Austin’s ‘locution’.

23 Searle and Vanderveken (Ch. 9).
proposition asserted, even though it is factually false. Ethical and religious statements may be of this type. Thus, if I sincerely say, “I maintain that the earth is 6000 years old”, then I believe that the earth is 6000 years old, even though scientific evidence belies this assertion.  

2.1.2. Commissives

A commissive illocution is one where the speaker commits him/herself to perform or not to perform some future course of action—e.g. “I promise you that I will pay back the money I owe.”; “I vow that I will not take revenge”. One cannot commit oneself to the performance of a past act. Unlike assertives, commissives are neither true nor false. Thus, you would normally say that I ‘broke’ my promise should I fail to pay back the money I owe, as opposed to saying that the promise was false. Some verbs that function as commissives are: promise, vow, offer, pledge, guarantee, swear (in the legal

24 For an assertion to be a lie (and/or perjury) the speaker must not believe what s/he asserts and must intend to deceive. See P. TIERSMA, The Language of Perjury: “Literal Truth,” Ambiguity, and the False Statement Requirement, SOUTHERN CALIFORNIA LAW REVIEW 63:2 (1990).

25 Although a commissive illocution may not be false, it may misfire in ways described by Austin as ‘unhappy’ or ‘infelicitous’. J. AUSTIN, id., at 14-24. It may fail to work, for instance, because it has been made under inappropriate circumstances or by an individual not qualified to carry it through. Thus, one does not ordinarily accept promises made by persons known to be mentally incompetent or excessively inebriated. There are other ways for a promisor to make a speech act of promising defective—for example, when he does not intend to stick to his promise or when he promises to do something that he was planning to do in any case. According to Austin, id. at 14, the first type of ‘unhappiness’—where the speaker is incompetent to perform the act, yields speech acts that are ‘null and void’; the second type—where the speaker is insincere, leads to ‘abuses’ of the formulæ. Searle, building on the pioneering work of Austin, in his theory also accommodates the various infelicities. J. SEARLE, supra note 3, at 57-62; also What is a Speech Act? 39, THE PHILOSOPHY OF LANGUAGE 46-53 (J. Searle, ed. 1971). As an illustration, he provides a thorough analysis of the speech act of promising. J. SEARLE, supra note 3, at 57-61.

26 The expression ‘false promise’ is used on occasion to refer to a promise that was not kept. “Yet so to speak is not to say that the utterance ‘I promise that…’ is false…[for one] does promise: the promise here is not even void, though it is given in bad faith. [Such an] utterance is perhaps misleading, probably deceitful and doubtless wrong, but it is not a lie or a misstatement Moreover, we do not speak of a false bet or a false christening; and that we do speak of a false promise need commit us no more than the fact that we speak of a false move. ‘False’ is not necessarily used of statements only.” (Austin, 11). Although a promise (as an illocution) has no truth value, there is a sense in which its propositional content does. Consider the truth value of a prediction, a type of assertive—for example, “I predict that there will be an earthquake next week”. If no earthquake should occur the following week, then the propositional content (i.e. “that there will be an earthquake”) will turn out to be false as it does not describe an outside event that was supposed to take place. In an analogous fashion, if I promise that next week I will repay the money I owe, but I fail to do so (i.e. I have broken my promise), then the propositional content of that promise (i.e. “that I will repay the money”) also fails to match an outside event that was supposed to occur. It is in this sense that the propositional content of a promise may be true or false, whereas the promise itself does not have this property. This distinction between an illocution and its propositional content is crucial for our analysis: We shall see that hearsay occurs when the propositional content is extracted from its illocution and is offered as evidence for the occurrence of an external event.
The state of mind that accompanies a commissive is *intent*. Thus, if I promise to pay back the money I owe, then I intend to do so.  

### 2.1.3. Directives

A *directive* illocution is one where the speaker directs the hearer to perform or not to perform some future course of action—e.g. “I *order* you to be present in court promptly at 8 AM tomorrow”; “I *advise* you not to drive after drinking.” As was the case for commissives, here also one cannot perform a past act. Directives too are neither true nor false. Thus, I can say that you ‘disobeyed’ my order should you fail to show up at 8 AM, but I would not say that my order was false. Some verbs that function as directives are: ask, order, command, request, recommend, advise, suggest. The state of mind that accompanies a directive is *want* or *desire*. Thus, if I order you to be in court at 8 AM, it is because I want you to be there at that time.

### 2.1.4. Declaratives

A *declarative* illocution (also called a *declaration*) is one where the speaker brings about, as the very words are being spoken, the state of affairs described in the proposition—e.g. “I now pronounce you husband and wife” (declared by a minister or a justice of the peace at a wedding); “I name this ship the Queen Mary 2” (declared by Queen Elizabeth at the ship’s christening); “The defendant is guilty” (declared by a judge or a jury at trial). As these examples illustrate, not just anyone may engage in a particular declaration. Often only certain persons under specific conditions are authorized to do so. Declarations are neither true nor false, because they do not describe a world view or some state of affairs. Rather, if performed successfully (by the right person under the right circumstances), they actually create a new state of affairs simultaneously with their being uttered. Some verbs that function as declarations are: declare, name, bless, pronounce. Declarations have no accompanying state of mind, other than the speaker’s purpose to bring into fruition the situation being declared.

### 2.1.5. Expressives

An *expressive* illocution is one where the speaker expresses his/her emotion or feeling in regard to a proposition that is generally presumed to be true—e.g. “I

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27 The same performative verb may have more than one illocutionary value. The verb ‘swear’ functions as a commissive in the utterance, “I swear to tell the truth”; but it functions as an assertive in the utterance, “I swear that I was in New York last Tuesday.”  
28 For a speech act analysis of legal promises and consideration, see SCHANE; also for offer and acceptance, TIERSMA.  
29 A declarative illocution should not be confused with a grammatical declarative sentence. With the exception of imperatives and questions (which function as directive illocutions), most illocutions are expressed grammatically as declarative sentences. For this reason I often refer to declarative illocutions as declarations. Note though that some legal treatises use the term ‘declaration’ to mean ‘statement’ (or ‘utterance, in our terminology). Again, this usage should not be confused with the speech act term.  
30 The most spectacular declaration of all time is the one reported in *Genesis* 1:3—“God said: *Let there be light!* And there was light.”
congratulate you on your promotion”; “I apologize for being angry with you”. It is presupposed in the former utterance that you have received a promotion and in the latter that I have been angry with you. Some verbs that function as expressives are: *congratulate, thank, compliment, apologize*, and verbal expressions such as *be happy, be surprised, be angry*, etc.—e.g. “I am surprised that she actually came to the party”. The state of mind that accompanies an expressive is the speaker’s internal subjective *feeling* or *emotion* that elicits the illocution. Thus, one who apologizes sincerely feels an appropriate degree of remorse or regret.

2.2. Perlocutions

When an illocutionary act is performed successfully it will always produce some effect(s) on the hearer(s). The perlocutions are the effects. One consequence of a perlocution is that the hearer is put on notice in regard to the propositional content of the speaker’s illocution. If I inform you about something, then subsequently you know about it. If I promise to do something, then you can count on me to follow through with my carrying out what I have committed myself to do. Persuading or threatening a hearer are other kinds of perlocutionary effects. A perlocution may be manifested as a physical response or as its own illocutionary act. If someone in a crowded theater shouts “Fire!”, a possible perlocutionary effect could be trampling by those trying to escape. In contract law, an offer, which is a type of commissive illocution, can elicit an acceptance, a rejection, or a counteroffer, all of which are illocutions (i.e. the hearer or offeree now becomes a speaker), but these new illocutions still function as perlocutions in response to the original offer. There can be any number of back-and-forth counteroffers emanating from the original offer. Each subsequent counteroffer will function simultaneously as a perlocutionary effect to the immediately preceding offer and as an illocution for a new offer. We shall see that statements that function as perlocutions do not constitute hearsay.

2.3. Locutions

Because illocutionary acts are expressed through language they have linguistic properties, such as sounds or letters, words, grammatical features, and meanings. The ways speakers use their language and what they know about usage also constitute locutionary characteristics. Consider, for example, the accusation: “Jones cheats on his income tax”. Some of the trivial locutions of this illocution are: this is a sentence of English; it is composed of six words; it contains the verb ‘cheats’; the first word begins with a j-sound; etc. The following locutions are perhaps somewhat more interesting: The topic of this sentence concerns Jones and it comments on his behavior; moreover, this kind of statement can be defamatory. We shall see that statements offered for their locutionary properties do not constitute hearsay.

2.4. Explicit and implicit illocutions

Many of the examples of illocutions presented thus far have been expressed explicitly. An explicit illocution is composed of two grammatical clauses: a *performative clause* that contains a first person subject, a performative verb, and an optional second
person object, followed by a *propositional clause* that expresses the content of the illocutionary act—e.g. “[I promise you] [(that) I will pay back the money I owe]”. (In English the propositional clause may begin optionally with the word ‘that’.) There are still other ways of grammatically expressing explicit illocutions. Some propositional clauses begin with an infinitive construction (‘to’ + verb) instead of a *that*-clause. This type of grammatical structure is frequent with directives—e.g. “[I order you] [to be in court at 8 AM tomorrow]”. Commissives also may be expressed in this way—e.g. “[I promise] [to repay the money I owe]”. Although these two infinitive structures look superficially similar, they differ in regard to the person who is *understood* to carry out the act: The understood subject of an infinitive clause is always ‘you’ for a directive illocution, and ‘I’ for a commissive one. Declarations and expressives may allow still other types of grammatical structures after their performative verbs—e.g. “[I congratulate you] [on your promotion]”; “[I name] [this ship the Queen Mary 2]”. In spite of the varying grammatical forms, all of these are examples of explicit illocutions, because they begin with a first-person subject and a performative verb indicating the precise type of illocution.

However, illocutionary acts are not generally rendered in such an exact manner. Often the propositional content alone (or an equivalent wording of it) will suffice for the hearer to deduce the type of illocution intended by the speaker—e.g. “It was raining that day” (an assertive); “I will repay the money I owe” (a commissive); “Be here tomorrow at 8 AM” (a directive). Also questions of all types are considered to be directives. If I inquire, “What time is it?”, my question is equivalent to the explicit directive illocution: “I ask you to tell me the time”. In fact, imperative and interrogative sentences are the most common ways of expressing directive illocutions. Occasionally, even one word may be sufficient for indicating the type of illocution—e.g. “Guilty” (a declaration by a judge); “Out” (a declaration by an umpire). The preceding are examples of *implicit illocutions*.

What enables a hearer to deduce the appropriate type of illocution where it is implicit? Most utterances do not occur as isolated sentences but as part of a social interaction with other utterances in a conversational setting. In a face-to-face encounter, it is evident, at a particular moment, which participant is the speaker and which one is the hearer. The person engaging in an implicit illocutionary act must be the understood ‘I’ of that speech act, and the recipient of those words must be the understood ‘you’. The social situation or the linguistic context as well as the grammatical structure of the speaker’s utterance will generally enable the hearer to deduce the type of illocutionary act meant by the speaker, even though an explicit performative verb may be lacking. Thus, a question or an imperative will typically be taken for a directive, and in a suitable context the words ‘I will’ indicate that the speaker is making a promise or at least engaging in some kind of commissive illocution.  

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31 Some directives can take the subjunctive mood—e.g. “I insist that you be here on time”.

32 The utterance, “I will marry you next year”, could be a promise, a statement of intent, or even a prediction. Hence, in order to resolve this potential ambiguity one would need to know the linguistic or nonlinguistic context where the utterance occurred.
For each of the five illocutionary types, the following table provides examples of: (1) an explicit illocution with its performative verb underlined; (2) a corresponding implicit illocution; and (3) a statement of the accompanying state of mind with its verb italicized. Note that all three versions of an illocutionary type encompass the same propositional content.

<table>
<thead>
<tr>
<th>Types of Illocutionary Acts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assertive</strong></td>
</tr>
<tr>
<td>I affirm that the gray car went through the red light.</td>
</tr>
<tr>
<td>The gray car went through the red light.</td>
</tr>
<tr>
<td>I believe that the gray car went through the red light.</td>
</tr>
</tbody>
</table>

| **Commissive**               |
| I swear that I will tell the truth. |
| I will tell the truth. |
| I intend to tell the truth. |

| **Directive**                |
| I request that you deliver the documents to the Court. |
| Deliver the documents to the Court. |
| I want you to deliver the documents to the Court. |

| **Declaration**              |
| We declare that the defendant is guilty. |
| The defendant is guilty. |
| [No associated state of mind] |

| **Expressive**               |
| I regret that the lawsuit has not been settled. |
| [no implicit form] |
| I feel regret that the lawsuit has not been settled. |

An implicit illocution may not only replace an explicit illocution, but it may also be a way of expressing (implicitly) the corresponding state of mind. Thus, one who says, “The gray car went through the red light”, at the same time asserts and believes that the gray car went through the red light. Thus, from the implicit illocution, “The gray car went through the red light”, one can derive both of the corresponding explicit statements—i.e. “I assert that the gray car went through the red light”, and “I believe that the gray car went through the red light”. In our analyses we shall often find it insightful to convert an implicit illocution into one or both of its explicit correlates. Moreover, the three versions often can be viewed as equivalent expressions of their underlying illocution. Consider, for example, these three variants: “I will repay the money I owe you” (implicit

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33 In an analogous fashion from an explicit illocution one can deduce an implicit illocution and a corresponding statement of state of mind; and from a statement of state of mind one can deduce both types of illocutions.
commissive); “I promise that I will repay the money I owe you” (explicit commissive); and “I intend to repay the money I owe you” (statement of state of mind). Regardless of version, the speaker is making a commitment to repay the money owed. This possible equivalence among the three types of statements will play an important role in our speech act analysis of hearsay, to which we now turn.

3. A Speech Act Analysis of Hearsay

Here is how our speech act analysis of hearsay will work: If an out-of-court statement is offered for its illocutionary value, its perlocutionary effects, its locutionary properties, or its associated state of mind, it will not be hearsay. 34 If an out-of-court statement is offered solely for its propositional content, then it will be hearsay.

3.1. Illocutions

We begin by examining the different kinds of illocutions.

3.1.1. Assertive Illocutions as Hearsay

The Federal Rules of Evidence (FRE) characterize ‘hearsay’ as a statement. 35 A ‘statement’ is further defined as ‘an oral or written assertion’. 36 Note, though, that the FRE term ‘assertion’ is not identical to the speech act term ‘assertive’. All five illocutionary types can qualify as FRE assertions, although without doubt, most assertions will be what we have been calling assertives, if only because the majority of utterances tend to be of this type. Now what differentiates an assertive illocution from the others is its relation to its propositional content: It presents that which is asserted as being true or false. Hence, there will be hearsay whenever the propositional content of an assertive is “offered in evidence to prove the truth of the matter asserted.” 37 Now it should make no difference whether the statement is presented as a full-fledged explicit assertive, as an implicit assertive, or even as a statement about state of mind. For each of these situations there will be hearsay because the propositional content remains the same and it is being offered for its truth value.

34 “It is worthy of note that…in the American law of evidence, a report of what someone else said is admitted as evidence if what he said is an utterance of our performative kind [i.e. an illocution]: because this is regarded as a report not so much of something being said, as which it would be hearsay and not admissible as evidence, but rather as something he did, an action of his.” (Austin, op. cit.,13).
35 FRE 801(c) ‘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.”
36 FRE 801 (a): “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.” (In this analysis we will not be concerned with nonverbal conduct.) The California Evidence Code (Par. 225) defines a ‘statement’ as an “oral or written verbal expression”. The term ‘verbal expression’ is to be understood in the same sense as our term ‘utterance’ (i.e. that which is said (or written) by a speaker (or writer).)
37 FRE 801 (c). In 3.1.5 infra, we extend to some of the other illocutionary types this notion of hearsay as putting forth the propositional content of an illocution.
Consider the case of *State v. Hargrave*.\(^{38}\) The son was looking for a horse stolen from his father. Upon seeing the animal in someone else’s possession, the son was overheard to exclaim: “That’s father’s mare”, which is an implicit assertive. He could just as well have uttered an explicit assertive, “I claim that that’s father’s mare”, or have reported his state of mind, “I believe that’s father’s mare”. It makes no difference! All three utterances contain the same propositional content (i.e. “that’s father’s mare”), which is being offered to prove that the horse identified by the son belonged to his father. Hence, the son’s statement, whether expressed explicitly, implicitly, or as a state of mind, is a paramount example of hearsay and, consequently, cannot be offered for proving the identity of the mare.

Not all assertive illocutions will be hearsay but only those whose *propositional content is presented for its truth value*. There will not be hearsay whenever an assertive is offered for its illocutionary value, its perlocutionary effects, its locutionary properties, or its associated state of mind. We will consider these situations after discussing the other kinds of illocutions.

### 3.1.2. Verbal Acts: Commissive, Directive, and Declarative Illocutions

The law recognizes that statements that give rise to legal consequences do not constitute hearsay. In the law these kinds of statements are known as ‘verbal acts’. They most often correspond to the speech act illocutions of commissives, directives, or declarations.\(^{39}\) From the perspective of speech act theory, a verbal act (i.e. a commissive, directive, or declaration) will not be hearsay when it is offered for its *illocutionary value* and not for its propositional content alone. Thus, in *State v. Hargrave*, if one of the issues had been whether the father had offered to sell the horse to the man who later purportedly stole it and the son had heard the father say to the man, “I offer to sell you my mare for $1000”, that out-of-court statement would not be hearsay as it is being presented purely for its illocutionary value—i.e. to show that the father in producing that utterance was performing the act of making an offer, a commissive illocution.

In a case involving an insurance claim, an employee had taken out an insurance policy on his life.\(^{40}\) After several months of paying the premiums, he told the manager of his company: “I want to discontinue my group life insurance policy”. The manager notified the insurance company and the policy was subsequently rescinded. Shortly thereafter, the employee was killed in an automobile accident and his beneficiary sought payment under the policy. The insurance company refused to pay and there was a law suit. The insurance company introduced the statement that the employee had made to the manager. The employee’s utterance, “I want (you) to discontinue my group life insurance policy”, corresponds to the following explicit illocution: “I request that you discontinue my group life insurance policy”. Because the original statement by the employee

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\(^{38}\) Supreme Court of North Carolina, 1887. 97 N.C. 457, 1 S.E. 774.

\(^{39}\) The legal term ‘verbal act’ is not equivalent to ‘speech act’. The latter covers much more territory, for it includes all types of illocutions (along with their associated states of mind) as well as locutions and perlocutions.

functions as the equivalent of an underlying directive illocution, it was offered for its illocutionary value as a directive; consequently, it was not hearsay and so it was admissible as evidence.

In a case involving Safeway Stores, a customer slipped on ketchup that had spilled on the floor from a broken bottle. 41 She sued the store for injuries. Safeway contended that there was contributory negligence because she had failed to heed a warning. The manager’s wife, who had been shopping in the store when the accident occurred, claimed to hear her husband call out to the customer: “Please, don’t step in the ketchup”’. The manager’s utterance has the grammatical form of an imperative construction (i.e. “don’t step”), which is an implicit directive. Hence, it was not hearsay for the store to offer this utterance for the issue of whether the manager had warned the customer. The act of warning is a directive illocution.

In a different case, the plaintiff, Hanson, owned and leased farm land to a tenant. In return the tenant was to give two fifths of his corn crop to Hanson. 42 The tenant took out a mortgage from a bank for the crops that he owned. The bank subsequently sold at auction all the crops stored on the property. The plaintiff, Hanson, in order to prove that some of the crops belonged to him, testified (over the bank’s objection of hearsay) that when the tenant had finished husking the corn, he pointed to a double and a single crib of corn and said: “Mr. Hanson, here is your corn for the year, this double crib here and this single crib here is your share for this year’s corn; this belongs to you, Mr. Hanson”. The court acknowledged that the tenant’s statement was not hearsay. From the perspective of speech act theory, his utterance functions as a declaration. By pointing to specific cribs of corn while announcing “here is your corn”, those particular cribs become the property of the plaintiff. In other words, ownership was created simultaneously with the uttering of these words. Here is an example where a verbal act (i.e. a declaration) explains the meaning of an associated physical act (i.e. pointing to specific cribs of corn). 43

Note that the utterances in Hanson v. Johnson and in State v. Hargrave have a similar grammatical structure—“here is your corn”, and “that’s father’s mare”, respectively. Although both are implicit illocutions, the former is intended as a declaration, but the latter as an assertive. The tenant, in making his statement while pointing to some cribs of corn, creates the legal ownership of those cribs for Mr. Hanson. The son, in making his statement while pointing to the mare, is not creating legal ownership of the mare for his father, but instead is claiming that the horse is the one belonging to his father. For the respective issues of who owns the corn and who owns the mare, the former utterance is not hearsay, but the latter one is.

It is important to keep in mind that in order for a performative verb to indicate a particular kind of illocution it must occur in the present tense. A past-tense verb can function only as an assertive about a past illocution. Thus, the utterance, “I promise to

42 Hanson v. Johnson et al. Supreme Court of Minnesota, 1924. 161 Minn. 229, 201 N.W. 322.
43 Within the law the words that clarify a physical act are frequently referred to as the “verbal part of an act”.

repay the money I owe”, is a bona fide commitment. On the other hand, the statement, “I promised to repay the money I owe”, does not constitute a present act of commitment, but instead it is an (implicit) assertive reporting a commitment that was made in the past. 44 We can see how this distinction in tense applies to some of the cases cited in this section. If the manager in the Safeway episode had been heard to utter, “Lady, I told you not to step in the ketchup”, that utterance would be hearsay in regard to the issue of whether the manager had warned the customer about the perilous situation. This hypothetical out-of-court utterance is not a directive illocution (i.e. a warning as it is being delivered), but rather it is an assertive about a past act of warning. Or consider the case involving the distribution of the cribs of corn. If the tenant had said, “Mr. Hanson, I pointed out to you yesterday the cribs of corn that are yours”, this utterance would indeed be hearsay concerning the issue of which cribs belonged to Hanson.

3.1.3. Expressive illocutions

For an expressive illocution the speaker states his/her emotion or feeling about a proposition presumed to be true—e.g. “I am happy that Harry got a promotion”; “I am sorry that I caused this horrible accident”. This kind of illocution expresses a particular state of mind of the speaker. Recall that three of the other illocutionary types also have associated states of mind—i.e. ‘belief’ for assertives, ‘intent’ for commissives, ‘want’ for directives. For the moment we postpone a discussion of the hearsay implications of expressive illocutions, and we will take up this topic when we look at the various types of mental states in 3.2.

3.1.4. Assertive Illocutions as Nonhearsay

In 3.1.1, we noted that hearsay occurs whenever the propositional content of an assertive is offered for its truth value. However, there will not be hearsay where an assertive is offered for its illocutionary value—that is, when presented as a statement made by an out-of-court declarant but without regard to whether it is true or not. Within our speech act analysis this kind of illocution is generally offered for one of its associated functions: as perlocution, locution, or state of mind.

3.1.4.1. Perlocutions

A statement may affect a hearer or hearers in various ways. These effects are the perlocutions that arise from a speaker’s illocution. For example, what the speaker has said may cause the hearer to become anxious, to be frightened, to feel threatened, or to be provoked. Reactions of anxiety, fear, feeling threatened, or feeling provoked relate to the hearer’s state of mind, and from a legal perspective statements eliciting such reactions do not constitute hearsay. The speech act analysis is in agreement: A statement offered for its perlocutionary effect(s) is never hearsay. 45 Consider the emotion experienced by a woman who slipped in the lobby of a hotel, severely injuring herself and suffering from a

44 The past-tense statement, “I promised to repay the money I owe”, is an implicit assertive. A corresponding explicit form would be: “I assert that I promised to repay the money I owe.”
45 See discussion in 1.2, supra.
collapsed lung. In a law suit for pain and suffering, she testified that the doctor had “told me that I would have to live with myself and to be careful never to strain myself”. This out-of-court assertive statement by the doctor was not hearsay because it was offered to show its perlocutionary effect on the patient—i.e. on hearing the doctor’s assertion the woman became anxious and afraid.

On the Harvard exam, the two following statements were not hearsay, as they were offered for their perlocutionary effects on hearer X: (1) On the issue of X’s provocation for assaulting Y, D’s statement to X, her husband: “Y ravished me.”; (2) On the issue of the reasonableness of X’s conduct, in the shooting of Y by X, D’s statement to X: “Y has threatened to kill you on sight.” In both instances, it was the speaker’s statement that caused the hearer’s antisocial physical response, the perlocution. Or consider the situation where people rush out of a theater trampling one another as they leave. The issue concerns the event that caused the panic. Various people state that they heard someone in the theater shout, “There’s a fire on the stage”. This implicit assertive illocution is not being offered for its propositional content (i.e. that indeed there was fire on the stage), but for its perlocutionary effect (i.e. that the statement caused the panic). In defamation cases defamatory statements, which tend to be assertive illocutions (e.g. “Jones is a disreputable businessman, who will cheat you”), again are not offered for the truth value of the propositional content (which can be a defense for a charge of defamation), but typically for the resulting perlocutions—i.e. that some of the hearers believed what was said and/or subsequently behaved in a manner detrimental to the plaintiff’s reputation, welfare, or business interests. 47

When a speaker asserts something to a hearer, a hearer (who understands what was said) then knows the information conveyed. This kind of knowledge can be an important perlocutionary effect of an assertive, and accordingly, whenever a statement is offered for that purpose, it too is not hearsay. A question of this type arose on the Harvard exam: On the issue of X’s knowledge of speedily impending death, D’s statement to X: “You have only a few minutes to live”. Assuming that X was conscious and understood D’s statement, D’s utterance would not be hearsay for the issue of X’s knowledge. Or consider a driver who is having his car checked over and is told by the mechanic: “The brakes are bad”. The driver decides to wait a week before having the brakes repaired. That afternoon he gets into an accident. To show negligence (i.e. that the driver continued to drive after learning about the condition of his brakes), the insurance company introduces the mechanic’s out-of-court statement to the driver: “The brakes are bad”. This statement, although an assertive illocution, will not constitute hearsay provided it is not offered for the truth of its propositional content (i.e. that the brakes are indeed bad), but rather for its perlocutionary effect—i.e. for the purpose of showing that the driver had knowledge of that which had been asserted. 48

46 194th St. Hotel Corp. v. Hopf, 383 So. 2d 739 (Fla.App. 1980).
48 If the brakes are indeed bad, this fact will have to be determined in some other way.
3.1.4.2. Locutions

Illocutionary acts are performed through language. Consequently, every illocution has linguistic or grammatical properties. It is not hearsay for a statement to be offered for its locutionary aspects. Consider impeachment. The issue is whether the President had been lying. During an interrogation by the Senate Ethics Committee he admits, “I had sex with M.L.”. To prove impeachment the prosecution brings in a prior out-of-court statement: “I never had sexual relations with that woman, M. L.”. The credibility of the witness is now at stake. The earlier out-of-court statement has been resurrected for the purpose of impeachment—i.e. to show that the witness has made contradictory assertions. A comparison of the two statements reveals that although they have a similar propositional content, one of the utterances asserts that the propositional content matches an outside event (i.e. having sex with M.L.), whereas the other utterance denies such a match. The locutionary interest of these two utterances lies precisely in their grammatical and logical inconsistency.

Defamatory statements may be offered not only for their perlocutionary effects on hearers but also for their locutionary values as tokens of language. Consider again the assertive illocution: “Jones is a disreputable businessman, who will cheat you”. The highly charged words ‘disreputable’ and ‘cheat’ are the kinds of vocabulary items that the law recognizes as possibly defamatory. This kind of language is indicative of an assertive illocution functioning as a defamatory statement.

The Harvard exam provides two additional examples of assertives offered for their locutions: (1) On the issue of the sanity of D, D’s public statement: “I am the Pope.” The claim that one is the Pope, Napoleon, Jesus Christ, or any other famous or historical personage exemplifies the type of linguistic utterance typically ascribed to delusional individuals. Hence, the concern here is with the kind of language (i.e. choice of proper name) occurring in the statement at issue. (2) On the issue of D’s consciousness after being attacked, D’s statement: “X shot me…” D’s statement has the property of an utterance produced in the English language. It is this locutional property that is offered for establishing D’s consciousness. Anything that D might have uttered (whether in English or in another language) would serve just as well for this locutionary purpose.

3.1.5 Summary: Illocutions, Perlocutions, and Locutions versus Propositional Content

Let us summarize our analysis of hearsay up to this point. If a statement is offered for its illocutionary value (i.e. the speaker asserts something, commits him/herself to do

In the common law there was a presumption that certain kinds of statements (i.e. assertive illocutions) were slanderous per se—e.g. accusing a woman of unchastity, stating that one has a loathsome disease, asserting that one has committed a crime. Note the particular kinds of vocabulary items found in these accusations. F. Haiman, Speech and Law in a Free Society, Chapter 3 “Defamation”, University of Chicago Press, 1970.

It is also possible to treat the utterance, “I am the Pope”, as manifesting the speaker’s state of mind. That is, from this assertive one may deduce that the speaker believes that she is the Pope (see 1.3, supra, and 3.2.1, infra).
something, directs the hearer to do something, declares the existence of something), that statement (whether offered as an explicit illocution or as an implicit illocution) is not hearsay. It is hearsay though if offered solely for its propositional content—i.e. to prove that the ‘something’ part of the illocution by itself is true. Assume that a street vendor is prosecuted for selling handbags that purportedly are look-alike Gucci bags but were being sold as the authentic brand. Various passers-by testify that as they walked past the vendor’s cart he pointed to several purses, saying, “These are Gucci handbags.” (This implicit assertive illocution is equivalent to an explicit assertive: “I [assert, claim, maintain] that these are Gucci handbags.”) The testimonial statements by the passers-by would not be hearsay. The statements are being proffered not to prove that the bags in question are Gucci handbags, but solely to show that the vendor had been making such a claim to the public—that he had uttered a particular assertive illocution.51 Now suppose that some of the passers-by actually did buy bags, believing that they were authentic Guccis. The same statement by the vendor would still not be hearsay, for now it is presented for its perlocutionary effect on the hearers—i.e. that they believed what the vendor was asserting. Suppose further that in his defense the vendor states that he belongs to a religious sect where it would be a mortal sin for him to tell a lie. Since he claims only to tell the truth he tenders his out-of-court assertive illocution, “These are Gucci handbooks”, as proof that the bags are authentic. This time the statement is offered neither for its illocutionary value (i.e. that he was uttering certain words), nor for its perlocutionary effects (i.e. that some buyers believed those words), but solely for its propositional content (i.e. that those words reflected reality). Hearsay!

This view about the propositional content of an assertive as the basis for hearsay should hold as well for other kinds of illocutions. Consider, for example, a directive illocution uttered by a woman to her stock broker: “I request that you sell all my shares of ImClone stock,” or the equivalent implicit directive, “Sell all my shares of ImClone stock.” For the issues of whether the woman gave a directive, whether she instructed her broker to unload her shares, or even whether she wanted [state of mind] to divest herself of the shares, the illocution would not constitute hearsay. In 2.2.3, supra, we noted that a directive illocution is neither true nor false. For that reason there can be no question of hearsay. But what if the issue instead concerned whether the broker in fact had sold the shares? Then I contend that the statement, “(I request) that you sell all my shares of ImClone stock”, would count as hearsay because the issue now concerns exclusively the propositional content of the illocution, totally ignoring its directive function or its associated state of mind. In other words, the propositional content here is being presented as though it were the propositional content of an assertive (i.e. for its truth value).

A commissive illocution presents an analogous situation. Consider the explicit commissive, “I promise to repay the money I owe”, or its implicit variant, “I will repay the money I owe”. For the issues of whether a commitment has been made, whether the speaker has promised to repay the money, or whether the speaker intends [state of mind] to repay the money, the illocution would not constitute hearsay. But for the issue of

[51] This example is particularly interesting, as the utterance, “These are Gucci handbags,” is presented purely for its illocutionary value—i.e. as an assertive illocution, and not for its perlocutionary effects or locutionary properties.
whether the speaker had actually repaid the money (which again looks only at the propositional content as though it were an assertive), there would be hearsay. 52

In 2.1.2. and 2.2.3, supra, we noted that commissive and directive illocutions—e.g. promises and commands—are neither true nor false. For that reason they do not raise questions of hearsay. Yet when the propositional content alone of these kinds of illocutions is offered there are hearsay problems. Why this difference? It is only when an illocution (or its associated state of mind) is offered—e.g. the making of a promise or the issuing of an order—that there is no hearsay problem. There will be hearsay though whenever the illocutionary aspect of an utterance (or its associated state of mine) is ignored. 53

3.2. State of Mind

We noted in 3.2, supra, that whenever a statement addresses an issue relating to the hearer’s state of mind, that statement will not be hearsay as it is offered for its perlocutionary effect. In this section we are concerned exclusively with the state of mind of the speaker. 54 Speaker state of mind can be expressed either indirectly or directly. An indirect expression suggests something about the mental condition of the speaker (e.g. “I am the Pope”). A direct expression has two variants: (1) The speaker relates his/her state of mind in regard to some external event (e.g. “I believe that these are Gucci handbags”); or (2) The speaker asserts precisely the nature of his/her current state of mind, emotion, or feeling (e.g. “I am depressed”). We begin with the indirect expression.

3.2.1. Indirect State of Mind

An assertive illocution has ‘belief’ as its accompanying state of mind. Absent deliberate lying, one who asserts something believes it. This belief may then be indicative of other mental conditions, such as fear, anxiety, or delusion. The Harvard exam provides an example of indirect state of mind: “On the issue of the sanity of D, D’s public statement: ‘I am the Pope.’” Here D asserts that she is the Pope; hence, she believes that she is the Pope. Because her belief is at odds with that of the dominant culture, her statement may well be viewed as a reflection of a disoriented condition. It is not hearsay when an assertive is offered as circumstantial evidence for the purpose of indirectly establishing a particular state of mind for the speaker. Previously we noted the

52 We consider in 3.4.4, infra, certain exceptions that have been carved out for statements of intent.
53 This claim about the relation between propositional content and hearsay does not apply to declarations. Consider, for example, a declaration made by an umpire, who has declared a player “out”. (An explicit version of this declaration would be, “I declare that you are out”.) It is the very nature of a declaration to bring to existence the state of affairs declared in the propositional content. That is, the act of declaring and the fulfillment of the propositional content are simultaneous. Hence, the propositional content of a declaration is always an inextricable part of its illocution. For this reason, the propositional content of a declaration could never be hearsay when offered “to prove the truth of the matter [declared]”. Recall the case of Hanson, supra, where the issue was whether the cribs of corn belonged to the plaintiff. His tenant had declared: “Mr. Hanson, here are your cribs of corn.” Note how the content of this declaration speaks directly to the issue.
54 Within speech act theory, ‘state of mind’ refers exclusively to the speaker—i.e. the state of mind associated with his/her illocution; a hearer’s mental state is always the result of a perlocution.
locutionary aspect of the utterance, “I am the Pope”, a statement that is representative of the kind of language often associated with a delusional state. Hence, there may be more than one way of analyzing an utterance. Yet the result is the same. Whether one considers this statement as bizarre language (i.e. locution) or as a reflection of underlying belief (i.e. state of mind), in either case one infers from that statement something about the speaker’s mental condition.

The well-known case of *Betts v. Betts* provides a stunning example of this kind of indirect state of mind. A divorced woman, who had two children, was living with a man named Caporale. He was suspected of killing her son. The other child, a daughter, was in foster care, and her father was trying to obtain custody. The foster mother told the child that she had read in the newspaper that the natural mother had married Caporale. On hearing this news the child said, “He killed my brother and he’ll kill my mommy too.” From this assertive it follows that the young girl believed that Caporale had killed her brother and that he would do the same thing to her mother. This belief was admitted as circumstantial evidence for the state of mind relevant to this case—i.e. that the child was afraid of Caporale, and hence it would be unwise for her to be placed in the custody of her mother.

Now we turn to what is perhaps the most interesting aspect of the application of speech act theory to hearsay: utterances where the speaker directly states his/her state of mind. Are such statements nonhearsay to begin with, or are they technically hearsay but nonetheless will be admissible as permitted exceptions to the rule against hearsay? To answer this question we consider two types of statements: one where the speaker states his/her state of mind in relation to some external event, and the other where the speaker directly asserts his/her state of mind in and of itself.

### 3.2.2. State of Mind about an Outside Event

Recall the three ways of expressing the propositional content that refers to an event: as an explicit illocution, as an implicit illocution, or as a statement about state of mind. For example:

- **Explicit illocution:** “I maintain that these are Gucci handbags.”
- **Implicit illocution:** “These are Gucci handbags.”
- **Statement about state of mind:** “I believe that these are Gucci handbags.”

Given an illocutionary statement (whether explicit or implicit), one can derive a statement about the associated state of mind. Conversely, from a statement about the speaker’s state of mind one can arrive at a corresponding explicit or implicit illocution.

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56 This distinction may not be of practical importance since in any case there will be a state-of-mind exclusion (FRE 8.3), but the distinction is of theoretical interest for an explanatory account of the rule against hearsay. (See also discussion in 1.5, supra.)
57 An explicit illocution requires the presence of a performative verb. Consequently, in order to derive an explicit illocution from an implicit one or from a statement about state of mind, one will need to supply a
Hence, there is a kind of equivalence among these three versions when they concern the same propositional content. What this means is that for any particular issue, the question of hearsay or nonhearsay should be consistently decided, irrespective of which version of a statement is offered. 58

If the issue concerns the state of mind (e.g. the belief) of the speaker in regard to some event and if a statement, regardless of version, is offered for that purpose, then (according to the speech act analysis) there will not be hearsay. To see this claim more clearly let us return to the hypothetical situation involving the Gucci handbags. 59 The prosecution in its case against the vendor conducts a survey. Six fashionable women are shown for the first time some of the allegedly fake purses and are asked to identify the brand. After carefully examining the purses, three of the women state, “These are Gucci handbags”; two say, “I believe that these are Gucci handbags”; and one boldly asserts, “I maintain that these are Gucci handbags”. The prosecution wants to show that these well-dressed women were duped and that all six believed (erroneously, of course) that the purses were authentic.

Now under the traditional view of hearsay (as encompassed in the FRE definition), the statement, “I believe that these are Gucci handbags”, creates an interesting paradox for the issue of belief about the authenticity of the purses. On the one hand, it appears that this statement is being offered precisely “to prove the truth of the matter asserted” (i.e. that the speaker believes that the handbags are Guccis), and therefore, according to the FRE definition of hearsay, the statement should count as hearsay. Yet the corresponding explicit and implicit illocutions—“I maintain that these are Gucci handbags”, or simply, “These are Gucci handbags”—would not be considered hearsay where the statements are offered only to show belief on the part of the speaker (and not to prove the authenticity of the handbags, for which any of the three versions would be hearsay). It is our contention that such differences in interpretation should not at all depend on the vagaries of speakers’ choices in how they state their beliefs (i.e. whether the propositional content of a statement is or is not preceded by the words, “I believe”). 60

performative verb. In such situations one can employ a ‘generic’ performative—e.g. ‘assert’ for assertives, ‘commit (oneself)’ for commissives, ‘direct’ for directives, ‘declare’ for declarations.

58 Recall the discussion of State v. Hargrave, 3.1.1. supra, where it was argued that there was hearsay concerning the issue of the identity of a mare, irrespective of whether the son’s statement had been expressed as an explicit illocution, as an implicit one, or as a state of mind—i.e. “I claim that that’s father’s mare”; “That’s father’s mare”, or “I believe that’s father’s mare”.

59 The hypothetical about the belief concerning the Gucci handbags is based on Zippo Manufacturing Co. v. Rogers Imports Inc. 216 F. Supp (S.D.N.Y. 1963) (purchasers of cigarette lighters thought they were buying authentic Zippos).

60 Rothstein, Raeder, Crump, Evidence: State and Federal Rules, 3rd ed. consider the problem of type of utterance vis-à-vis the FRE definition of hearsay. These authors also reach the conclusion that the form of a variant should not affect the interpretation, a conclusion also reached by Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, 2nd ed., Vol 4, 1994, Lawyer’s Cooperative Pub. Rochester, NY. “Obviously the two statements [‘he tripped, “I think he tripped’] are substantially identical and should be treated the same if the purpose is to prove what she thought or what happened.” p.74, note 6.
Thus we see that the dilemma of inconsistent interpretation does not arise in a speech act analysis where a statement can be expressed by means of one of three variants, all of which can function equivalently in regard to a particular issue. There is no question that for each of the women who reported her state of mind (no matter which version of the statement she happened to utter), it was her intention to express her belief that the purses were authentic. From the perspective of speech act theory, none of the statements would constitute hearsay, as each provides a way of expressing a speaker’s underlying belief. 61

What we have just claimed for the state of mind of ‘belief’ (underlying an assertive illocution) applies also to the states of mind for commissive and directive illocutions. 62 Consider these statements by X to Y:

(a) Explicit illocution: “I promise to marry you.”
   Implicit illocution: “I will marry you.”
   Statement about state of mind: “I intend to marry you.”

(b) Explicit illocution: “I request that you deliver the documents to the Court.”
   Implicit illocution: “Deliver the documents to the Court.”
   Statement about state of mind: “I want you to deliver the documents to the Court.”

For the issue of whether X intended to marry Y none of the versions of (a) would constitute hearsay, nor would there be hearsay for any of the versions of (b) in regard to the issue of whether X wanted Y to deliver the documents. 63

The preceding examples have dealt with situations where the speaker’s state of mind (i.e. ‘belief’, ‘intent’, or ‘want’) corresponds to a particular type of illocution. There are still other kinds of mental conditions. Among these are expressive illocutions, whose role in regard to hearsay we have not yet considered. An expressive illocution reflects a speaker’s attitude, emotional behavior, or feeling about some state of affairs (put forth as the propositional content) that is presupposed to be true—e.g. “I am happy that Harry got

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61 Every explicit or implicit illocution has a corresponding (understood) state of mind. It is this correlation that permits the interchangeability of variants. Just as an explicit illocution does not constitute hearsay when offered for its illocutionary value, in an analogous fashion a statement about state of mind ought not to be hearsay when offered for speaker’s state of mind. The parallelism extends to their formal expressions as well. An explicit illocution begins with a clause having the form: first person + performative verb (in the present tense); a statement of state of mind has an analogous structure. It begins with a clause having the form: first person + state-of-mind verb (in the present tense). Because an implicit illocution does not begin with an introductory clause, it is perhaps easier to see how an implicit illocution (depending on the issue) can function as an illocutionary statement or as one expressing state of mind.

62 Declarations have no accompanying state of mind. The state of mind for expressives corresponds closely to the emotion that is stated as part of the illocution (e.g. “I am sorry that ...”). See the discussion of expressives in 3.4.3, infra.

63 There would be hearsay though for the issues of whether X had in fact subsequently married Y and whether Y had actually delivered the documents to the Court at some later date. These issues no longer concern the state of mind of the speaker but look exclusively at the propositional content (see discussion in 3.1.5, supra; also discussion of intent in 3.4.4, infra.)
a promotion”; “I am so sorry that I caused this horrible accident”. That is, for these utterances there is a presupposition that Harry got promoted and that the speaker caused the accident. Because these events are presumed to be true, it is unlikely that they would ever be at issue. Rather the issues concern respectively the speaker’s positive attitude vis-à-vis Harry’s promotion or his/her expressed remorse about the accident.

Let us make this situation more concrete. Suppose that a defendant has been found guilty of speeding, causing an accident which resulted in the death of a child. During the sentencing phase for this crime the issue arises whether the defendant has shown remorse. A witness reports having heard the defendant say shortly after the accident, “I’m sorry that I caused this horrible accident.” This statement is being offered exclusively for its illocutionary value as an expression of remorse, and as such would not constitute hearsay.

There is another kind of statement that looks grammatically similar to an expressive illocution, but whose content is not presumed to be true. As an example, consider the utterance, “I am afraid that my husband will kill me.” The clause stating the cause of the fear (i.e. “that my husband will kill me”) is not presupposed to be true. Also the relation between the enunciated state of mind and the following described event is different from that of an expressive. For the expressive, “I am happy that Harry will get a promotion”, the speaker expresses his/her feeling about the propositional content. For the utterance, “I am afraid that my husband will kill me”, the speaker states the cause or reason for her fear (i.e. that her husband intends to kill her).

The presupposition in regard to the truth of the propositional content is what distinguishes expressive illocutions from those states of mind associated with other types of illocutions. Compare, for example, the two superficially similar utterances (because of their identical propositional contents): “I am happy that Harry got a promotion”, and “I believe that Harry got a promotion”. Only the former statement, an expressive illocution, carries a presupposition about Harry’s promotion; the latter, a statement about the state of mind that goes with an assertive illocution, does not.

The propositional content (of an expressive) when reported in the past tense refers to an event that is presumed to have already happened. But what about a propositional content reported in the future tense (e.g. “I am happy that Harry will get a promotion next month”)? Suppose that his employer has announced that Harry will be getting a promotion next month. The fact that the promotion has not yet taken place is irrelevant to the nature of expressives. There remains nonetheless the presupposition about Harry’s promotion, and it is the speaker’s emotion vis-à-vis this presupposed event that is at issue, not the event itself. This situation is no different from the relation between illocutionary force (or the associated state of mind) and propositional content for some of the other illocutions. Commissives and directives also have propositional contents referring to future events. Of course, if the issue instead had concerned the occurrence of Harry’s promotion, then the expressive illocution would constitute hearsay as its propositional content would be offered exclusively for the purpose of proving the truth of the event described.

The utterance, “I am afraid that my husband will kill me”, is discussed by Fenner (175-76) along with two related sentences: “I am afraid because my husband has threatened to kill me”, and “I am afraid of my husband because he has threatened to kill me.”

The state of mind that accompanies an expressive illocution reflects the speaker’s internal subjective feeling or emotion in regard to the propositional content. Thus, one who is happy about an event or who apologizes for something sincerely feels, respectively, an appropriate degree of elation or of remorse. It is possible, in fact, to express this ‘feeling’ linguistically. Thus, the expressive illocution, “I am happy that Harry will get a promotion next month”, can be rendered as: “I feel happy that Harry will get a promotion next month”. Notice, however, that for the sentence, “I am afraid that my husband will kill me”, a
subtle is significant. From a legal perspective, the significance concerns those aspects of the utterance that will be admissible for state of mind (as an exception under FRE 803(3)). Fenner notes that, according to a traditional analysis of hearsay, the first part of the statement (i.e. “I am afraid”) would be admissible, but the second part (i.e. “that my husband will kill me”) would not be. We agree partially with this observation. The speech act explanation relies on how the propositional content will be put to use. If it is being offered for its truth value—i.e. that the husband does intend to kill his wife, then that part of the statement would be inadmissible hearsay. On the other hand, if the issue had been whether the wife was afraid that her husband might kill her (and not that she was afraid and the reason for her fear being that her husband might kill her, a subtle difference to be sure), then the complete utterance, “I am afraid that my husband will kill me”, can be argued as an admissible statement about state of mind.

3.2.3. State of Mind for Itself

What happens where the issue concerns solely the declarant’s mental state or condition per se and the declarant’s out-of-court statement is a direct assertion of that mind set? Assume, for example, that the issue is whether X is depressed and X’s out-of-court statement is: “I am depressed”. Because this statement precisely asserts what is at issue, again it ought to be hearsay according to the traditional definition. Even though it would be admissible as a permitted exception under FRE 803(3), our interest here is to determine whether such a statement constitutes hearsay under a speech act analysis.

From the perspective of speech act theory, direct statements about a current state of mind feeling, or emotion (e.g. “I am depressed”, “I feel ill”, “I hate my husband”) function as assertive illocutions. Hence, their explicit illocutionary correlates would be: “I assert that [I am depressed, I feel ill, I hate my husband]”. As assertives they have ‘belief’ as the corresponding state of mind, which can be rendered, respectively, as: “I believe that [I am depressed, I feel ill, I hate my husband]”. Expressed in this way, we substitution of the word ‘feel’ is much less felicitous and even quite odd: “I feel afraid that my husband will kill me (?)”. There are some other linguistic differences between the two utterances. In the sentence, “I am happy that Harry will get a promotion next month”, ‘will’ denotes exclusively a future event presumed to take place. In the sentence, “I am afraid that my husband will kill me”, ‘will’ indicates intent of a future act (i.e. “I am afraid that my husband intends to kill me”). Also negating the first clause of a sentence with a presupposition does not negate the presupposition. For the sentence, “I am not happy that Harry will get a promotion next month”, there is still a presupposition that Harry will get promoted. However, for the sentence, “I am not afraid that my husband will kill me”, the speaker no longer necessarily holds the belief that her husband intends to kill her. For a discussion of some of the linguistic differences between sentences with presuppositions and those without them, see Kiparsky, Paul, and Carol Kiparky (1970). Fact. In M. Bierwisch and K. E. Heidolph (eds.), Recent Advances in Linguistics. The Hague, Mouton. Fenner (176) notes that there are two reasons for the exclusion of the part of the statement that explains the nature of the fear (i.e. “that my husband will kill me”). First, it is in violation of the ‘no-elaboration rule’, which permits “an out-of-court statement of a state of mind,...but not an accompanying statement of the underlying reasons for that state of mind....” (175), and second, it “is a statement of someone else’s intention to do something in the future” (176), and a statement of another’s intention is not admissible as an exception to the hearsay rule. We discuss the issue of intention in 3.4.4, supra.

68 Fenner (ibid., 176) in fact concedes this point: “It may well be that the ‘elaboration’ part of [the statement] will be admissible. Depending on the facts, there may be an argument that the elaboration is not hearsay in the first place or that it fits under some other exception....”
now have a statement of state of mind (i.e. belief) about some other state of mind, feeling, or emotion (i.e. being depressed, feeling ill, disliking).

As noted at the outset of this section, belief statements dealing with state of mind per se differ in an important respect from the indirect type and from state of mind about an external event: The difference resides in the nature of their propositional contents. Let us look more closely at the three types.

1) Indirect state of mind: “I believe that [I am the Pope]”
2) State of mind about an external event: “I believe that [these are Gucci handbags]”
3) State of mind for itself: “I believe that [I am depressed]”

Recall that statements 1) and 2) do not constitute hearsay for the issue of the declarant’s sanity and for the issue of the declarant’s belief that the handbags are authentic Guccis. The utterances are offered as statements of belief, and not for the truth of their propositional contents. For statement 3), however, the propositional content does speak directly to the issue, and we have maintained that it is this correspondence that comprises hearsay within a speech act analysis. Yet the propositional content of 3) is embedded within the larger statement about ‘belief’. Because statements of belief such as 1) and 2) do not constitute hearsay, might not this view about ‘belief’ be extended to a statement like 3), such that it too would not constitute hearsay?

In pursuit of this endeavor, we present three possible analyses: The first solution draws an analogy between statements such as 3) and those like 1), treating the former as similar to an indirect state of mind. The second analysis claims that the nature of the propositional content of a statement such as 3) is diametrically different from that of a statement like 2), and for that reason the former would be formally excluded from the definition of hearsay. The third proposal argues that a statement such as 3) and its ‘belief’ counterpart are more or less equivalent, and therefore such statements should not constitute hearsay at all.

3.2.3.1. First Analysis: State of Mind as an Indirect Type

One treats the category of state of mind per se analogously to that of indirect state of mind. The statement, “I am the Pope”, was offered as circumstantial evidence for the issue of the declarant’s sanity. In an analogous fashion, the statement “I am depressed” is to be offered as circumstantial evidence for the issue concerning the declarant’s state of depression. Just as the fact of one’s believing oneself to be the Pope is relevant to the issue of one’s sanity, the idea of one’s believing oneself to be depressed is relevant to the issue of one’s depression. Under this analysis we are not concerned with the truth of what is asserted—that is, whether the declarant is truly depressed. Rather, we are concerned solely with the relevance of declarant’s belief about his asserted state of mind. 70

70 Graham C. Lily, An Introduction to the Law of Evidence, 2d ed. 1987, West Publ. suggests the possibility of analyzing state of mind per se as circumstantial evidence. “These [kinds of] declarations appear to fall clearly within the hearsay rule…It could be argued, however, that these statements, even if
3.2.3.2. Second Analysis: State of Mind as an Internal Event

One treats the propositional content of a statement about state of mind per se as completely different ontologically from that about state of mind regarding an external event. The former type of propositional content refers to the ‘subjective’ inner world of an individual’s thoughts, beliefs, emotions, and feelings, whereas the latter type refers to the ‘objective’ outer world of people, things, and happenings. Such a distinction would become critical for interpreting the meaning of the term ‘matter’ within the FRE definition of hearsay (i.e. a statement “offered in evidence to prove the truth of the matter asserted.”) A revised definition then would have the term ‘matter’ referring uniquely to entities and events of the external world. This restricted sense then would exclude any statements about internal states of mind, and consequently, these kinds of statements would no longer fall within the purview of hearsay. Such an analysis actually is not so farfetched from the traditional view concerning state-of-mind statements. The law has long recognized that individuals have a special privity with their own internal mental workings, and generally statements about current states of mind are deemed to have a sufficient degree of trustworthiness. Perhaps it is for this reason that within the traditional view of hearsay state-of-mind statements have always constituted well-accepted exceptions to the ‘rule against hearsay’.

3.2.3.3. Third Analysis: Equivalence of Internal State of Mind and Belief

A direct assertion about a state of mind is equivalent to a statement of belief about that state of mind. Consider again a speaker who asserts, “I am depressed”. We assume that he has uttered this assertion because he is experiencing some kind of inner mental condition associated with a feeling of depression. His implicit assertive statement, “I am depressed”, has as its corresponding statement of state of mind, “I believe that I am depressed”. But one who believes that he is depressed must perforce feel depressed. That is, it would be a contradiction for one to believe that one is depressed but yet not experience any of the angst of depression. Hence, either a statement of belief about one’s depression or a direct assertion of one’s internal emotion of depression serves to describe the same inner state of mind—i.e. depression. Yet, in spite of this equivalence, the assertion, “I am depressed”, still creates an interesting paradox for our speech act analysis. Because the propositional content speaks directly to the issue, according to this criterion, there ought to be hearsay. But if an assertion about some underlying state of mind is deemed equivalent to a statement about the belief of that mind set, then by that criterion, there should not be hearsay. It is this latter interpretation of the paradox that untrue, have some circumstantial probative force,…a probative value quite aside from the literal truth of the statement[s]: the use of the words gives rise to an inference of an underlying state of mind consistent with the statement, even though the statement may not be literally true.” (p.192). Because of the subtleties of this analysis, Lily defers to classify such statements as hearsay and to admit them into evidence as Rule 403(3) exceptions.

Paul F. Rothstein, Myrna S. Raeder, David Crump, Evidence: State and Federal Rules, 3d ed.,1997, West Publ., note that “[c]ourts vary on the definition of ‘matter’ under the FRE.”, and the authors suggest that “[t]here is some reason to define ‘matter’ as ‘external matter’ or ‘external fact’, because then the covered situation is most like a witness giving testimony in court…..” p. 432.
would ultimately allow a direct assertion of state of mind to be admissible as nonhearsay.

3.2.4. Independent State of Mind: Intent

We noted the correlation between some of the illocutions and particular states of mind—i.e. assertives with ‘belief’, commissives with ‘intent’, directives with ‘want’. For example, the commissive illocution from the Harvard exam, “I promise to marry you on June 1”, has as its corresponding statement of state of mind: “I intend to marry you on June 1”. The employee’s statement of state of mind discussed in 3.1.2, supra, “I want (you) to discontinue my group life insurance policy” corresponds to an explicit directive illocution, such as: “I request that you discontinue my group life insurance policy”. However, statements about ‘intent’ or ‘want’ do not always entail corresponding ‘commissive’ or ‘directive’ illocutions. For example, the utterance, “I intend to go to New York next week”, does not imply a commitment to the hearer, unlike the statement, “I intend to marry you on June 1”, which does. By the same token, “I want to go to New York next week”, is not necessarily directing the hearer to do anything, for such a statement may be uttered purely as an expression of the speaker’s inner desire. Contrast this utterance with: “I want you to go to New York next week”, which indeed would have a clear directive correlate.

Within hearsay law, the independent state of mind of ‘intent’ has evolved in an interesting fashion. The celebrated case of Mutual Life Insurance Co. v. Hillmon provides a fascinating example of this development. The story begins in Kansas in 1879 and involves three men: Hillmon, Walters, and Brown. Two of them head westward on horseback. One of the men is Brown, but it is not known who the other one is. After several days of travel they reach the town of Crooked Creek in Colorado. The man who is not Brown dies from a gunshot incident and is buried by Brown. The interesting twist to this tale is that both Hillmon and Walters have disappeared. Subsequently, Hillmon’s wife comes forward claiming that the fellow who died at Crooked Creek is her husband and that she is the beneficiary of his insurance policies. The insurance companies deny payment contending that the dead man is not Hillmon, but rather Walters. At trial, the insurers, to prove their claim that the body was Walters’, introduce a letter written by Walters to his fiancée. In the letter he says in effect, “I plan to go to Crooked Creek with Hillmon”. The insurance companies’ argument proceeds as follows: Walters told his

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72 Utterances of state of mind per se do not comprise the only kinds of possible paradoxical statements. Consider, for example, the issue of whether X knows some English. X’s statement, “I know some English”, would be hearsay if offered for the truth of its propositional content; however, it would not be hearsay as a locution—i.e. as an utterance whose words are of the English language. It is up to its proponent to argue for its locutionary function if the statement is to be admitted into evidence.


74 The utterance, “I want to go to New York next week”, could correspond to a directive illocution in particular situations. Consider a young adult making this statement to a parent. The statement then might be understood as equivalent to the directive illocution, “I request that you allow me to go to New York next week”.

fiancée of his intention to go to Crooked Creek. If he told her this, then he really did intend to go there. If he truly intended to go there, then he probably did go there. And if he was there, then he was the one shot and buried by Brown. Hence, the dead man is Walters, and not Hillmon.

Walters’ written statement to his fiancée shows his state of mind—i.e. his intent to go to Crooked Creek, and it would be admissible as evidence, either as a permitted exception to the hearsay rule (according to FRE 803(3)) or as nonhearsay (according to our speech act analysis). Although it is relevant, Walters’ state of mind is not the issue in contention between the two parties. The real issue concerns his actual presence at Crooked Creek. From a statement of intention can one conclusively deduce the occurrence of that which is intended? For example, from a prior statement, “I intend to marry you on June 1”, are we to conclude that a marriage actually took place on that date? I believe we must say no. No matter how sincere one’s intention may be, its fruition may be thwarted by an unexpected event occurring during the time between the statement of intention and its projected fulfillment. Consequently, a statement of an intention as evidence for the occurrence of the intended event should unequivocally be inadmissible hearsay. Yet, in the Hillmon case, the Supreme Court decided that this kind of statement, even though admittedly hearsay, was admissible evidence. By allowing it, the Court in essence carved out a new exception to the hearsay rule: state of mind merely relevant. 76

76 Courts are divided whether the declarant’s statement of intent to engage in some activity with another party can serve as evidence that the other party also engaged in that activity (see the comment of Fenner in note 68, supra). Thus, can Walters’ statement, “I intend to go to Crooked Creek with Hillmon,” be offered as circumstantial evidence that Hillmon went to Crooked Creek? Generally the courts require independent corroborative evidence that the other individual participated in the event. A crucial case addressing this issue is U.S. v. Pheaster, 544 F. 2d 353 (9th Cir. 1976) (a sixteen-year-old boy tells friends that he plans to go out to the parking lot of a restaurant to meet Angelo for a free pound of marijuana; the teenager never returns and Angelo is charged with kidnapping).

How is Walter’s statement treated in a speech act analysis? The statement itself has two components: a clause directly indicating state of mind and an infinitive clause expressing the object of intention—i.e. I plan (intend) [to go to Crooked Creek with Hillmon], where the bracketed clause depicts the propositional content part of the statement. Now for the issue of Walters’ intention to go to Crooked Creek there would not be hearsay, because within a speech act analysis statements about state of mind do not to count as hearsay. However, for the issue of Walters’ actually having gone to Crooked Creek there indeed would be hearsay, as the propositional content of the intent statement is being offered for its truth value. 77 Consequently, in regard to the latter issue such a statement becomes admissible only if regarded as some kind of exception. This is precisely what the Supreme Court has done. The exception is embodied within FRE 803(3). 78 It permits a statement of a ‘forward-looking’ state of mind (i.e. intent) to prove

77 See also discussion in 3.1.5, supra.
78 FRE 803(3) states that the following is not excluded by the hearsay rule: “A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact
the fact intended, but not (with the exception of wills) a statement of a ‘backward-looking’ state of mind (i.e. belief) to prove the fact believed.

The pivotal case for this distinction is *Shepard*. Dr. Shepard was charged with poisoning his wife. At the murder trial, her nurse testified that Mrs. Shepard, after drinking some whiskey, told her that “it tasted strange” and then said: “Dr. Shepard has poisoned me.” The Court drew a distinction between permissible statements pointing to the future (as in *Hillmon*) and impermissible ones looking to the past (as in *Shepard*). Justice Cardozo wrote: “There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.” This distinction makes sense from a speech act perspective. Mrs. Shepard’s assertion, when rendered as a statement of state of mind (i.e. “I believe that Dr. Shepard has poisoned me”), is a typical example of the propositional content of an assertive being presented for its truth value.

4. Summary

The so-called ‘hearsay problem’ bears on the correspondence between an out-of-court utterance and the event to which it refers: It questions the veracity of such a statement when made by a declarant not subject to in-court contemporaneous cross examination. We have presented this problem from two perspectives: a traditional legal approach and a speech act analysis. We conclude with a summary of these respective positions.

4.1. The Legal Approach: Tribe’s Testimonial Triangle

Lawrence Tribe, in an article giving an account of hearsay from a legal perspective, views the hearsay problem as a “chain of inferences” that begins with a declarant’s statement. The first link proceeds from the statement to an underlying belief, and the second link from the speaker’s belief to the conclusion that there is an actual external event that triggered the belief. Tribe depicts this chain as a triangular configuration, where each path along a leg of the triangle is indicative of the kind of inference that a fact-finder must make in determining whether there is a hearsay problem.

\[
\begin{align*}
\text{B} & \quad (\text{declarant’s belief responsible for A}) \\
(1) \text{ambiguity} & \quad (3) \text{erroneous memory} \\
(2) \text{sincerity} & \quad (4) \text{faulty perception}
\end{align*}
\]

remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.”

80 290 U.S. at 105-106.
81 The traditional legal approach to hearsay was summarized in section 1 and the speech-act analysis was presented in section 3.
83 *Ibid*, 958. We have modified slightly Tribe’s descriptions of the three vertices. He labels A (action or utterance); B (belief of actor responsible for A); and C (conclusion to which B points).
Diagram 1
Tribe’s testimonial triangle

One begins the triangular odyssey at the lower left vertex of the triangle (A), which represents the declarant’s out-of-court statement. The path proceeds to the upper vertex (B), which corresponds to the declarant’s belief underlying his/her statement. The path continues to the lower right vertex (C), which represents an external reality that purportedly is responsible for the declarant’s belief. A traditional hearsay problem arises whenever ‘A’ is used to prove ‘C’ along the path through ‘B’. A hearsay issue does not exist with either of the following two routes: a path from ‘A’ to ‘B’ (without a continuation to ‘C’), or a direct path from ‘A’ to ‘C’ (without a detour through ‘B’).  

As illustrations of these various routes, consider the utterance from the Harvard exam, “I am the Pope.” One begins the trip around the testimonial triangle with the utterance situated at point A. At point B one enters the head of the speaker of this utterance, who having said, “I am the Pope,” believes herself to be the Pope. That belief is supposed to emanate from a true outside event (located at point C), and if that state of affairs is the issue (i.e. is she the Pope?), one has a real hearsay problem. Assume instead that the issue is whether the woman is delusional (i.e. does she think she is the Pope?). In this situation one need only proceed from point A to point B. One does not continue to point C as one is not trying to establish a connection between her belief and the outside event of being the Pope. As a third scenario, assume that the issue is whether the woman was ever conscious after having been struck on the head. Here one can go from point A—her having said something (albeit bizarre)—directly to point C, as her belief (obviously erroneous) has nothing to do with the issue of her state of consciousness.

The path from A to B, without continuing to C, appropriately characterizes as nonhearsay instances of indirect state of mind. The other nonhearsay path—from A to C without passing through B—has to cover all of the remaining types of nonhearsay: verbal acts, hearer’s state of mind, hearer’s reactions, and utterances qua statements, such as those that are defamatory or are offered for the purpose of impeachment. These disparate categories have in common instances where the words by themselves (regardless of the veracity of a statement) are relevant to the issue. Within a speech act analysis these various categories are sharply delineated.

84 Most of Tribe’s article, ibid, contains an extensive discussion of what he calls the four testimonial infirmities of (1) ambiguity, (2) insincerity, (3) erroneous memory, and (4) faulty perception. These infirmities represent inaccuracies that can occur along the inferential chain. They are listed along the left and right legs of the triangle. The left-leg dangers address whether the declarant really holds the belief in question, whereas the right-leg dangers are concerned with whether that belief truly reflects reality. There is hearsay when both legs of the triangle are problematic, but not when only one of them is.
5.2. The Speech Act Analysis

The following diagram represents the speech act treatment of hearsay.

![Diagram 2: Hearsay as a Speech Act]

This diagram contains three levels. The box on the top level represents a declarant’s out-of-court statement. Because it is a speech act it constitutes one of five possible illocutions (shown on the middle level). Every illocution has locutionary and perlocutionary aspects (the arrows to the middle-level boxes on the left) and, for four of them, an associated state of mind (the line to the middle-level box on the right). There will not be a hearsay issue whenever an out-of-court statement is offered for one of the purposes depicted within any middle-level box. However, if a statement, whether rendered as an explicit illocution, an implicit illocution, or a statement of state of mind, is offered solely for its propositional content, then there will be hearsay (as noted by the arrows pointing to the bottom-level box).

Comparing the speech act diagram to the triangular one, we see that the middle level of the former is much more detailed in regard to the types of utterances that count as nonhearsay. Categories that are distinguished in the speech act diagram have been lumped together in the triangular one. In particular, the commissive, directive, and declarative illocutions, the locutions, and the perlocutions have as their correlate the single A to C path of the triangle. Although both diagrams explicitly acknowledge the state of mind of the speaker, the range of utterances covered by that classification differs in the two systems. The traditional view recognizes, what we have called ‘indirect state of mind’—that is, statements such as “I am the Pope,” that can be proffered as circumstantial evidence for the mind set of the speaker. But utterances that directly assert
state of mind—such as “I believe that those are Gucci handbags,” or “I am depressed,” have been controversial within a traditional view of hearsay. Although they have to do with state of mind, nonetheless they directly assert the matter to be proven. In our analysis based on speech act theory, all statements pertaining to state of mind—whether indirect, concerning an external event, or about state of mind for itself, do not constitute hearsay. This approach also eliminates the paradox of different statements, although having an identical purpose, nonetheless not being treated uniformly. For the issue of one’s belief whether certain handbags are authentic Guccis, the statement, “Those are Gucci handbags,” would typically be treated as nonhearsay. Yet the direct statement, “I believe that those are Gucci handbags,” should technically count as hearsay; it is deemed admissible only because ‘state of mind’ is one of the permitted exceptions to the rule against hearsay.

Speech act theory was not conceived with the intention of explaining legal concepts. It is a theory about human language—how utterances are constructed and how they are put to use by speakers. Yet, it is remarkable that this theory provides a novel and elegant account of hearsay, which albeit a legal topic, nonetheless has much to do with the nature of language. The various components of speech acts—illocutions (both explicit and implicit), locutions, perlocutions, states of mind, as well as the grammatical dichotomy between an illocutionary clause and its propositional content—all have a place in determining, for a specific issue, whether an out-of-court statement is hearsay or is not. It has been my intention to show how speech act theory is able to give a new spin to an old topic. This theory can serve as a valuable tool for legal interpretation and, in return, the law provides a rich source of interesting data for testing it.85

85 Other speech act contributions to legal topics.