

THE HEARSAY RULE AS A RULE OF ADMISSION REVISITED

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Twenty-four years ago I noted that the transmutation of the rule of hearsay from a rule of exclusion into a rule of admission presaged its death, and I did not mourn its passing:

[I]t is only a marginal overstatement to say that today, at least in civil cases, the hearsay rule applies in any robust fashion only to available nonparty witnesses within the subpoena power of the court. And it does not apply to them very rigorously. There are numerous exclusions from the definition of hearsay, twenty-seven formal exceptions, and two provisions explicitly encouraging the ad hoc creation of exceptions, an encouragement, it should be noted, of which much has been made. Moreover, hearsay exceptions, once formed, remain. To my knowledge, there are virtually no examples of hearsay exceptions being eliminated; the dynamic is one of ever-increasing scope for the exceptions The Federal Rules, in concert with modern discovery principles, are quite clearly the harbinger of [the rule's] demise. My instinct is that it is a death well-deserved, and after a burial suitable to its station, the hearsay rule should be allowed to lie quietly, undisturbed, for eternity.¹

Like the report of Mark Twain's death, my announcement of the passing of hearsay was exaggerated. It (and I refer here to the federal hearsay rule) remains more or less as it was twenty-four years ago, having undergone only slight expansion.²

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1. Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 799–800 (1992). This was not all that idiosyncratic of a view. See Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1120 (1985) (“Another prime example of the philosophical reversal of which I speak is in article VIII, which on its face seems to continue the process of refining and elaborating the rule against hearsay but which, in ultimate effect, almost does away with it.”).

2. See, e.g., FED. R. EVID. 801(d)(1)(B)(ii). And the Advisory Committee on Rules of Evidence is actually thinking the unthinkable of proposing eliminating an exception—the ancient documents exception in particular. ADVISORY COMM. ON EVIDENCE RULES, AGENDA FOR COMMITTEE MEETING 13 (2015), <http://www.uscourts.gov/file/17945/download> [perma.cc/N68L-KERF].

And then along comes the rather mundane case of *United States v. Boyce*³ dealing with present sense impressions and excited utterances that by itself is of no note except for the fact that a distinguished judge, Richard Posner, took it as the occasion to write a concurrence calling for the essential elimination of the hearsay rule.⁴ That stirred things up. It prompted the Advisory Committee on Federal Rules of Evidence (“the Advisory Committee” or “the Committee”) to hold a conference using Posner’s concurrence to focus on what to do about the hearsay rule, and this brief Article contains my advice.

However, the focus here is not on Posner’s opinion; nor should it be the focus of the Advisory Committee. He is not an expert in this field, and his statements in his concurrence and at the conference were problematic to say the least.⁵ When pertinent, I will refer in passing to his opinion, and I will discuss more carefully a recent empirical study that he found through his own research that he believed demonstrated how ill-considered the Federal Rules of Evidence (FRE) 803(1) and (2) are. Had an advocate presented this argument to him as a judge in a case, with the opposing party exploring the matter fully, I have no doubt that Judge Posner would add a forty-fourth opinion, to the extent forty-three of his opinions label the arguments of parties preposterous.⁶ There is empirical evidence that should be attended to, but what he cites is not it, and it cuts in exactly the opposite direction.

How should the Committee think about the hearsay rule? I begin with two cautions. First, the Committee should focus exclusively on the hearsay rule and ignore the Confrontation Clause problem. Although the Supreme Court has made a mess of confrontation jurisprudence,⁷ that jurisprudence exists to handle the problem of confrontation, and that is where the matter should lie. That it is a mess also indicates it is unstable, as the development

3. 742 F.3d 792 (7th Cir. 2014).

4. *Id.* at 799–802 (Posner, J., concurring).

5. For example, in his opinion, after he criticized the justifications for Federal Rules of Evidence (FRE) 803(1)–(2), he said: “[I do not] want to leave the impression that in questioning the present sense and excited utterance exceptions to the hearsay rule I want to reduce the amount of hearsay evidence admissible in federal trials.” *Id.* at 802. I have no idea what this could possibly mean. FRE 803 (1)–(2) are large conduits for the admissibility of evidence; to eliminate them would “reduce the amount of hearsay evidence admissible in federal trials.” *Id.* at 799–802. Other examples of problematic aspects of his opinion and comments are discussed below. After finishing this Article, I had the opportunity to read Judge Posner’s contribution to this series, and he has shifted his ground yet again. To some extent he seems to have learned from the criticism at the conference, and perhaps from some of the pertinent literature, even though he does not so acknowledge. In any event, this consistent inconsistency is yet another reason not to pay too much attention to his most recent utterances, and I largely ignore them here.

6. A Westlaw search for Judge Posner’s opinions and the word “preposterous” returns forty-three hits. I did not read them all.

7. See, e.g., Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1865 (2012) (“Sharp turns in the Supreme Court’s recent Confrontation Clause jurisprudence have left scholars reeling from conflicting emotions: exhilaration, despair, denial, and soon, perhaps, cynical acceptance. While most commentators celebrated the demise of the incoherent *Ohio v. Roberts* framework, their excitement largely faded as the Court’s decisions in *Davis v. Washington* and *Bryant v. Michigan* revealed nascent flaws in the evolving doctrine and sharply curtailed the newly revitalized confrontation right.”).

of the cases suggests.⁸ It would seem quite foolhardy to think that the Advisory Committee could anticipate the direction this case law will go. Second, there is a critical distinction between civil and criminal litigation that should be kept in mind but that I will not address in detail. Rules of evidence have different implications in procedural regimes with and without cheap access to evidence. In modern federal civil litigation, universal discovery is essentially the rule of day, and thus (putting aside the question of cost) everyone more or less has access to everything. That is not the case in the limited discovery regime of criminal trials. Just as an example, burdens of production are largely meaningless when one has access to evidence but can be outcome determinative when one does not.

Now to substance. To intelligently analyze what changes to the hearsay rule should be considered, one needs to examine: first, the overall objectives of the field of evidence; second, the particular objectives of the Federal Rules of Evidence; third, how well the hearsay rule advances, or retards, those objectives; and finally, the sense and sensibility of any proposed changes.

I. OVERALL OBJECTIVES OF THE FIELD OF EVIDENCE

The conventional view is that the field of evidence is almost exclusively concerned with epistemological questions: Are the systemic practices and rules of evidence truth conducing, and do they facilitate accurate factual findings? This is clearly an important aspect of the field, but there are additional functions as well. For example, the law of evidence serves a governance function by creating incentives for primary (not just litigation) behavior.⁹ Social issues are affected because of the expressive function of trials. The problem of the law on the books versus the law in action has to be accommodated; the rules drafter must try to anticipate how the rules laid down will be understood and implemented. Most important for purposes of analyzing hearsay is the *organizational* function of the law of evidence. The law of evidence organizes the relationships among parties, witnesses, and trial and appellate judges and also between legislatures and courts. For example, consider the implications of the choice between detailed rules and general standards. Detailed rules maintain control over the evidentiary process in whoever issues the rules (judges, legislatures, or rules

8. The Supreme Court is handing down strained opinions to limit the damage it wrought in *Crawford v. Washington*, 541 U.S. 36 (2004). The most recent case is *Williams v. Illinois*, 132 S. Ct. 2221 (2012), in which a badly splintered court (another sign of instability) upheld an expert testifying on the basis of inadmissible expert reports because the reports were not being introduced for their truth but only to explain the basis of the expert's opinion. This is patently ridiculous. The reliability of the expert's opinion depends upon the truth of its foundation.

9. See Ronald J. Allen, *Introduction to Reforming the Law of Evidence of Tanzania (Part Three): The Foundations of the Law of Evidence and Their Implications for Developing Countries*, 33 B.U. INT'L L.J. 101 (2015) [hereinafter Allen, *Foundations of Law*]; Ronald J. Allen, *A Note to My Philosophical Friends About Expertise and Legal Systems*, 28 HUMANA.MENTE 71, 79–97 (2015).

committees); they also allocate authority to the parties at the expense of trial judges. This is a critical point with regard to hearsay that I return to below.

II. THE PARTICULAR OBJECTIVES OF THE FEDERAL RULES OF EVIDENCE

The history of the FRE is long and complicated. Still, in light of the overall aspirations of the law of evidence and its common law background, three objectives stood out, all of which were solved¹⁰: uniformity over *Erie* doctrine concerns; sweeping away ossified common law, particularly rules of relevancy; and facilitating free flow of relevant information to the fact finder.

III. THE PRESENT HEARSAY RULE EFFECTIVELY ACCOMPLISHES THE GENERAL PURPOSES OF EVIDENCE LAW AND THE PARTICULAR OBJECTIVES OF THE FEDERAL RULES OF EVIDENCE

There is some ambiguity about what the hearsay rule is. To be clear, it is a specialized relevancy rule concerned with increasing the probability of accurate outcomes and answering FRE 403 type questions by rule rather than by judicial discretion. The evolution of the American hearsay rule accomplished these purposes by transforming the British fetishism with first-hand knowledge into a general rule of admission. Since the seventeenth century, there has been almost a one-way ratchet of adding but never subtracting hearsay exceptions. (I understand the Advisory Committee will propose the first exception by proposing the elimination of the ancient documents exception¹¹—second, actually, as the scope of dying declarations narrowed in an increasingly secular world.) The earliest English treatises demonstrate the strength of this fetish. Some do not even mention hearsay, although some “hearsay” is admitted through documents.¹² Today, by contrast, virtually all hearsay that might have

10. These can easily be extracted from a report by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. See COMM. ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS (1962); see also Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978); Ronan E. Degan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 301 (1962) (“Privileges, bad as they are, are not the area of evidence law most in need of improvement. Sensible modernization and simplification of relevance and hearsay are more urgent needs.”); John M. McGuire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741 (1961); Herman L. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 391 (1952). “[I]n principle, under the Federal Rules no common law of evidence remains.” Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 135 (1987) (quoting Cleary, *supra*, at 915); see also Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879 (1988).

11. Peter Nicolas, *Saving an Old Friend from Extinction: A Proposal to Amend Rather than to Abrogate the Ancient Documents Hearsay Exception*, 63 UCLA L. REV. DISCOURSE 172 (2015).

12. Many examples from early treatises could be given. Geoffrey Gilbert says in *The Law of Evidence* that “the [a]ttestation of the Witness must be to what he knows, and not to

probative force is admitted, leaving exclusion primarily for the kinds of evidence that no one would be convinced by anyway (such as the product of the telephone game). If in a particular case reliable hearsay not within an exception is adduced, FRE 807 provides an escape hatch to allow its admission. Analogously, if a proffer is within an exception but quite unreliable or absurd, FRE 403 creates the opposite escape hatch by allowing a judge to exclude it.

These are all laudatory developments. No sensible legal system can operate without large amounts of hearsay being freely admitted, for we live in a sea of it. Who are your parents, what city is this, what is the date, where did you grow up, who are your relatives, what building did this conference take place in, all ask for hearsay. A huge proportion of what people think they know, and certainly of what passes as first-hand knowledge at trial, is hearsay. Virtually the entire foundation of most expert testimony is hearsay; the expert is using knowledge gained from books. The rules accomplish the purpose of admitting this both necessary and reliable evidence with low transaction costs by delegating most of these choices to the parties with virtually no judicial oversight. This is the *organizational* function described above. Rather than check cases and brief a motion in limine, a party knows that most reliable hearsay will be admissible under the rules with little controversy or fanfare. The Federal Rules thus sweep away the obfuscating common law and facilitate the presentation of evidence to the jury largely free from judicial meddling and the increased transaction costs such meddling would generate.¹³ They have

that only which he hath heard, for a mere Hearsay is no Evidence.” GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 107 (1754). He does say that although “[h]earsay be not allow’d as direct Evidence, . . . it may be in Corroboration of Witness Testimony.” *Id.* at 108. And scattered throughout the book are references to some documents that would be hearsay today. *See generally id.* *See also* Henry Bathurst, *THE THEORY OF EVIDENCE* 111 (1761) (repeating the phrase that “hearsay is no evidence”). William Nelson, in *The Law of Evidence*, writes a treatise without a hearsay entry. WILLIAM NELSON, *THE LAW OF EVIDENCE* (1774). Thomas Peake, in *A Compendium of the Law of Evidence*, refers to “the few instances in which this general rule [of exclusion of hearsay] has been departed from.” THOMAS PEAKE, *A COMPENDIUM OF THE LAW OF EVIDENCE* 8 (1806). But the exceptions begin to multiply to include legislative and judicial records, *id.* at 19–27, books of public corporations such as cities or towns, *id.* at 61, and some private corporate records, *id.* at 62. Still, even in 1872, James Fitzjames Stephens could maintain the fiction in his *Indian Evidence Act* that one of the general principles operationalized was that no hearsay would be admitted. JAMES FITZJAMES STEPHEN, *THE INDIAN EVIDENCE ACT WITH AN INTRODUCTION ON THE PRINCIPLES OF JUDICIAL EVIDENCE* (1872). In contrast, by 1898 in the United States, James Bradley Thayer would remark about the hearsay rule that “[a] true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible.” JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 522 (1898). The process of expanding hearsay exceptions has accelerated in the twentieth century. Thayer’s *Select Cases on Evidence at the Common Law* identified ten hearsay exceptions, compared with the more than forty (counting FRE 801(d)). JAMES BRADLEY THAYER, *SELECT CASES ON EVIDENCE AT THE COMMON LAW*, at v–vi (1892).

13. On the transaction cost point, see the excellent article by Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861 (2016). As Professor Richter points out, the increased judicial meddling would probably increase unpredictability

the further advantage of respecting rather than trying to regulate the natural reasoning processes of jurors who, like any sensible person, would want and expect to hear much of what falls within the definition of hearsay because it both reflects how people live and learn and usually will be conducive to factually accurate outcomes.

The federal law of hearsay thus works pretty well, all things considered, although admittedly the regulatory mechanism to accomplish this looks weird on its face with its promise of exclusion vitiated by all the exceptions.¹⁴ Personally, I do not see much of a disadvantage to this weird structure except that some people continue to mistake the American hearsay rule for a complex rule of exclusion.¹⁵ There are some costs to having to learn it, to be sure, and perhaps some costs from its mistaken application. And there are appellate costs, as the *Boyce* case demonstrates, but many of those are attributable to cases such as *Anders v. California*¹⁶ that mandate that virtually all tried criminal cases be appealed. The three issues that formed the appeal in *Boyce*, including the hearsay issue, were all trivial and probably would not have been appealed but for *Anders*.¹⁷

Still, why not improve on the weird structure if possible? The best way to do so is to continue expanding the largely unreviewable admission of hearsay either by expanding exceptions or moving toward the total elimination of the hearsay rule, leaving FRE 403 to do the necessary

about the evidence that can be admitted, adversely affecting the probability of settling cases. *Id.*

14. But this is not the only place in the Federal Rules of Evidence with this weird regulatory structure; it is more or less replicated with the character evidence rules. *See* FED. R. EVID. 404.

15. As does Judge Posner. *See* Hon. Richard Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1466 (2016) (“The hearsay rule is a rule of exclusion, yet is riddled with exceptions.”); *see also* MIRJAN DAMAŠKA, EVIDENCE LAW ADRIFT 15–16 (1997). For a critique of this mistaken view, *see* RONALD J. ALLEN & GEORGIA ALEXAKIS, UTILITY AND TRUTH IN THE SCHOLARSHIP OF MIRJAN DAMAŠKA, CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOR OF MIRJAN R. DAMAŠKA 342–62 (J. Jackson et al. eds., 2008). It is pointless to have a semantic argument over this, but it is mildly absurd to call a rule that admits most reliable evidence within its domain and that has expanded admissibility relentlessly for over 200 years a rule of exclusion.

16. 386 U.S. 738 (1967).

17. There is also another benefit from the rule. It is educational; it is a wonderful clinical summary of types of evidence found over time to be usefully admitted at trial. I consult with the Government of the United Republic of Tanzania on law reform, and at its request, my team and I drafted a replacement code for its present 1967 Tanzania Evidence Act (which is almost word for word the 1872 Indian Evidence Act). There are no juries in Tanzania (although there are lay assessors who sit in some cases); thus we were initially inclined to recommend the elimination of the hearsay rule. We were convinced not to by the Tanzanian judiciary itself, and to a lesser extent practitioners, on just such an educational ground. The code is published in Ronald J. Allen, *A Proposed Evidence Law*, 33 B.U. INT’L L.J. 359 (2015). For background, *see* Allen, *Foundations of Law*, *supra* note 9, at 101; Ronald J. Allen, *A Proposed Evidence Law for Tanzania with Commentary*, 33 B.U. INT’L L.J. 359 (2014), <http://www.bu.edu/ilj/reforming-the-law-of-evidence-of-tanzania-part-three/> [perma.cc/Q7QX-CQY7]; Ronald J. Allen et al., *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*, 31 B.U. INT’L L.J. 217 (2013); Ronald J. Allen et al., *Reforming the Law of Evidence of Tanzania (Part Two): Conceptual Overview and Practical Steps*, 32 B.U. INT’L L.J. 1 (2014).

work.¹⁸ The path to avoid is that laid out by Judge Posner in *Boyce*; his concurrence neglects the foundational issues discussed above. He suggests that all the exceptions be collapsed into FRE 807, or alternatively (I am not sure he realizes it is an alternative) that hearsay “should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.”¹⁹ What is wrong with either suggestion should be abundantly clear. Reflect again on the sea of hearsay that surrounds us. Under either alternative, trials would be at risk of being bogged down by whether patently reliable information that now is presumptively admissible has “equivalent circumstantial guarantees of trustworthiness”²⁰ as the forty or so formal exceptions or “is more probative on the point for which it is offered than any other evidence which the proponent can [procure].”²¹ There is no reason to think that judges making idiosyncratic decisions over such variables would advance the objectives of trials better than the present structure of hearsay; and even if there is some slight gain, it would surely be overwhelmed by the costs of transferring this power from the parties to the trial judge.

Judge Posner’s substitute for FRE 807 is even worse. Where would the knowledge necessary to determine that a particular proffer is “reliable, . . . the jury can understand its strengths and limitations, and [that] it will materially enhance the likelihood of a correct outcome” come from?²² Omniscience is neither a criterion for appointment to the federal bench nor a perquisite for office once attained. There is, literally, no data that indicates that trial judges can do a better job of picking and choosing what hearsay is reliable than the rules presently do, and in any event the rules give them the power to adjust things at the margins. And how would a trial judge (let alone appellate judges) have even a clue as to whether a jury will understand the “strengths and limitations” of a particular proffer? Judge Posner is quite keen on citing empirical studies, but his opinion in *Boyce* cites none that answers these questions, which is not surprising, as they do not exist. I also recommend that the Advisory Committee avoid any rule that conditions the admissibility of evidence on the trial judge determining whether it will “materially enhance the likelihood of a correct outcome.”²³ I simply note that the reason a case is being tried is to determine the facts, and what the judge thinks is true—however the conclusion is reached—should not condition the admissibility of

18. Cf. Jeffrey Bellin, *The Case for eHearsay*, 83 FORDHAM L. REV. 1317 (2014) (arguing for expanding hearsay admissibility by categorical exceptions). For more information, see Richard D. Friedman, *Jack Weinstein and the Missing Pieces of the Hearsay Puzzle*, 64 DEPAUL L. REV. 449 (2015), which is largely sympathetic to expanding admissibility but adding unnecessary complexity (complex analysis with an available hearsay declarant, for example; trying to incorporate confrontation problems into the hearsay rule).

19. *United States v. Boyce*, 742 F.3d 792, 802 (2014).

20. FED. R. EVID. 807(a)(1).

21. *Id.* 807(a)(3).

22. *Boyce*, 742 F.3d at 802.

23. *Id.*

evidence.²⁴ Last, both of these proposals have the capacity to regenerate the complex common law of admissibility and encourage the judicial manipulation of the inferential process that were part of the objectives of the Federal Rules to eliminate.

Remarkably, this entire dustup is about a case that should be a celebration of the hearsay rule, not a cause for its condemnation. Neither party wanted to call the witness, and yet the jury was able to hear important information that led to an obviously correct outcome.²⁵ The transaction costs at trial were apparently low, and as I have already explained, the appellate costs were most likely a function of the constitutional obligation to take an appeal no matter if trivial.²⁶

At the conference, Judge Posner switched his ground to FRE 403, and as I alluded to above that is a different story. The combined effect of FRE 401 and the actual structure of FRE 403 creates a strong presumption of the admissibility of evidence. Eliminating the hearsay rule and allowing trial judges to listen to arguments that the risk of adverse consequences substantially outweighs the probative value of evidence might work reasonably well. The risk is that such a move might encourage trial judges to intrude farther than they presently do into the prerogatives of parties to decide how to prove their cases and into jurors' natural reasoning process, both of which would be mistakes. If amendment were done as a signal to liberalize further the admission of hearsay, it would be sensible, but taking into account the problem of the law on the books versus the law in action, the Advisory Committee should think about how to ensure that would be the result.

There is one other risk to weigh in considering a move to FRE 403. Another aspect of the organizational effects of the present hearsay rule is that the proponent of evidence outside an exception has the burden to present, and bear the cost of, witnesses with first-hand knowledge. In a costless evidentiary regime with full discovery, that would be irrelevant; if the opponent thought the proponent was using less reliable or misleading hearsay evidence, the opponent could call the witness with first-hand knowledge. In the real world, proffers are costly, and thus a move to an unbridled 403 approach could lead to a deterioration in the evidence offered in many trials and to cost shifting with the proponent being able to foist off its normal costs to the opponent. This could also put the opponent in the position of presenting evidence inconsistent with its case, even though less damaging than that which the proponent offered, thus generating unproductive tactical games. All things considered, these are not happy possibilities and, along with the risk of the way in which judges might react to such a move, lead me to conclude that the present weird structure of the

24. A point Professor Richter identified as well. *See* Richter, *supra* note 13, at 27.

25. No omniscience operating here; the facts of *Boyce* were glaringly clear.

26. It is worth noting that FRE 807 does not appear to be overused. A Westlaw search indicated that it has been cited in about 1500 federal cases. This compares to about 19,000 cases citing FRE 404(b), for example.

hearsay rule is probably preferable to this alternative (and thus confess that I have reconsidered my enthusiasm for the death of hearsay).

But what of the claim of Judge Posner that the foundation for FRE 803(1)–(2) has been discredited by the study that he discovered?²⁷ The concurrence gets off to a bad start by implicitly asserting that the hearsay rule and its exceptions should be judged exclusively by the folk psychology of 100 years ago initially offered as its justification, in this case that spontaneous descriptions or statements under the influence of a disturbing event have some essential guarantee of reliability, mainly because lies do not form spontaneously or in agitated states.²⁸ Judge Posner then cites a recent empirical study that shows, sure enough, that sometimes lies do form spontaneously.²⁹ From this he concludes that the basis of the present sense impression exception has been destroyed. There are two problems here. First, the measure of a rule of evidence should be all the variables I laid out above (and more in some cases) and not its consistency with 100-year-old folk psychology. Second, the study does not support Posner’s conclusion.

The first point needs no further elaboration. As for the second, the study says nothing that allows a rational inference about the uses of hearsay at trial. It only shows that in various media conversations (phone, instant messaging, and text messaging) people “spontaneously” flattered their correspondent and tried to build themselves up in the other party’s eyes.³⁰ First, I doubt this counts as spontaneous as it involves forms of social interaction that repeat over time, but even if it does, what does that have to do with 911 calls about being attacked by an armed intruder? Does anyone think that Sarah Porter was trying to flatter the 911 operator or build herself up in that person’s eyes? Unlike puffing and social flattery, that is serious business, and it turns out that the study actually shows that “[the] perceived seriousness of the lie and the level of planning were significantly correlated,”³¹ which is the opposite of Judge Posner’s point.

As I mentioned at the conference, a natural experiment on just this topic is waiting to be done—and that is to look at the cases actually employing the present impression and excited utterance exceptions to see if one can

27. None of the briefs in the case cite to the study. Circumventing the adversary process in this fashion is an ill-advised practice that has generated opinions. *See* *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015). Perhaps it is less ill-advised in concurrences or dissents than majority opinions, but it is ill-advised nonetheless.

28. *United States v. Boyce*, 742 F.3d 792, 800 (7th Cir. 2014).

29. Monica T. Whitty et al., *Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication*, 63 J. AM. SOC’Y INFO. SCI. & TECH. 208, 208–16 (2012). He also cites John Henry Wigmore’s disapproval of the present sense impression exception but neglects to note his approval of the excited utterance exception. Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 909 (2001).

30. Whitty et al., *supra* note 29, at 211–15.

31. *Id.* at 212. I attempted to confirm my interpretation of the Whitty study by contacting the authors. They declined to make their raw data available. They did acknowledge, however, that spontaneous lies were less likely to be serious although they were unwilling to say that the data showed no evidence of spontaneous lies that hurt innocent individuals. Rather plainly, although the study is interesting, it has little pertinence to the present discussion.

gauge the reliability of the evidence being offered. Taking my own advice, I searched for citations to those exceptions and read the first ten cases of each.³² In eighteen of the twenty cases, the hearsay was strongly corroborated by the other evidence in the case.³³ In one present sense impression case, corroboration was not clear, but nonetheless the court of appeals reversed because the trial judge excluded one of the proffers, obviously suggesting that the court of appeals thought it was reliable.³⁴ In one excited utterance case, the hearsay statement was not corroborated, but neither was it disconfirmed.³⁵ One can criticize my empirical design, but the results are startling nonetheless. There is somewhere between a 90 and 100 percent confirmation rate of the reliability of the statements in these cases. It looks to me as if the derided folk psychology applied to the actual problem of trials comes out pretty well. Moreover, if reliability because of the lack of spontaneity is really the problem, compare these hearsay statements to testimony of coached witnesses; the likelihood of statements falling into FRE 803(1)–(2) being generated by motivated lying is surely orders of magnitude less likely than the category of witnesses at trial who have months and the assistance of counsel to decide what to say.

Judge Posner's opinion has an erudite implicit reference to the effect of David Hume's work on Immanuel Kant when the Judge says that "[i]t is time the law awakened from its dogmatic slumber."³⁶ I agree, but the slumber that it should awake from is represented by, and what the committee should look at, is not either the accuracy of 100 year old speculation about folk psychology or the irrelevant empiricism cited by Judge Posner³⁷ but the consistent line of work showing that jurors, not

32. The searches were simple: adv: "evidence 803(1)" and adv: "evidence 803(2)."

33. Actually the numbers are even higher, as *Boyce* came up in the searches, but we excluded it for obvious reasons. The nine present sense impression cases are: *United States v. Daniels*, 554 F. App'x 885 (11th Cir. 2014), cert. denied, 134 S. Ct. 2687; *United States v. Holmes*, 498 F. App'x 923 (11th Cir. 2012); *United States v. Harrison*, 293 F. App'x 929 (3d Cir. 2008); *United States v. Ruiz*, 249 F.3d 643 (7th Cir. 2001); *United States v. Mitchell*, 145 F.3d 572 (3d Cir. 1998); *United States v. Morrow*, No. CRIM.A. 04-355CKK, 2005 WL 3163803 (D.D.C. June 9, 2005); *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703 (S.D. Ga. 1993); *United States v. Campbell*, 782 F. Supp. 1258 (N.D. Ill. 1991); *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976), modifying, 677 F.2d 180 (2d Cir. 1981). The nine excited utterance cases are: *United States v. Graves*, 756 F.3d 602 (8th Cir. 2014); *United States v. Rice*, 423 F. App'x 653 (8th Cir. 2011); *United States v. Jennings*, 496 F.3d 344 (4th Cir. 2007); *United States v. Arnold*, 486 F.3d 177 (6th Cir. 2007); *United States v. Tabaja*, 91 F. App'x 405 (6th Cir. 2004); *United States v. Alexander*, 331 F.3d 116 (D.C. Cir. 2003); *United States v. Moore*, 791 F.2d 566 (7th Cir. 1986); *United States v. James*, 164 F. Supp. 2d 718 (D. Md. 2001); *United States v. Glenn*, 473 F.2d 191 (D.C. Cir. 1972).

34. *Burrows v. Gen. Motors Corp.*, 999 F.2d 539 (6th Cir. 1993).

35. *United States v. Angleton*, 269 F. Supp. 2d 878 (S.D. Tex. 2003).

36. There are different versions of translations of Kant's remark, but one is: "I freely admit that it was the remembrance of David Hume which, many years ago, first interrupted my dogmatic slumber and gave my investigations in the field of speculative philosophy a completely different direction." *Kant and Hume on Causality*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 11, 2013), <http://plato.stanford.edu/entries/kant-hume-causality/> [perma.cc/4FZA-57UC].

37. The rest of the empiricism cited by Judge Posner is less useful than the study cited *supra* note 33, and some of the "empiricism" cited by that empiricism verges on the ridiculous. One "study" relies on the advice from the members of the psychology

actually being as dumb as they are treated by courts, pretty effectively manage hearsay.³⁸ The last thing the Advisory Committee should do is reverse the long standing commitment of the Federal Rules of Evidence to freeing up the evidentiary and inferential processes from the grip of the judges, trial or appellate.

department at Wayne State University. Charles W. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 210 & n.24 (1960).

38. See, e.g., Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655 (1992); Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 923–24 (2015) (demonstrating experimentally that “jurors attend to the infirmities that lurk beneath the evidence provided by out-of-court hearsay declarants” and properly discount the credibility of such evidence). A good review of the pertinent literature on juror and judge cognitive competence is Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165 (2006), which systematically demonstrates that there is no good reason to think that judges collectively are significantly better at fact-finding than juries. See also Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, 2003 MICH. ST. L. REV. 1149. Judges are systematically different from jurors in education, et cetera, but the comparison is between judges and juries rather than individual jurors. There is some contested evidence of jury limitations, but there is no good reason to believe that that makes judges better at fact-finding. As Schauer summarizes the data:

First is that the empirical evidence that does exist supports the “judges are not as smart as they think they are” view, although primarily in the context of the ability to disregard constitutionally inadmissible evidence rather than in the more germane (here) context of overvaluing, or otherwise mis-assessing, actually probative evidence. In addition, although we may not know much about the actual cognitive abilities of judges as compared to juries, we do know quite a bit about the tendency of people, and especially professionals, to overestimate their own cognitive abilities. And what we know is not encouraging. Schauer, *supra*, at 189 (citations omitted).