

ON HEARSAY

*Hon. Richard A. Posner**

I need to place the remarks that follow in context. And that means I need to acknowledge a number of heresies: I don't like legal jargon; I don't like the complexity of legal jargon; I don't like the legal profession's indifference to brevity; I don't like the tendency of lawyers and judges always to be looking to the past for answers to novel questions; and I don't consider law to be a science or remotely like a science. I want law to be simple and commonsensical and forward-looking.¹ I take my judicial credo from a poem by the great Irish poet William Butler Yeats: "And I grew weary of the sun / Until my thoughts cleared up again, / Remembering that the best I have done / *Was done to make it plain.*"² Or, in the words of another though lesser known poet, Ezra Pound, "MAKE IT NEW!"³

I want judges to be well-informed, curious, experienced, and empathetic. And speaking of experience, I contend that every appellate judge who does not have a rich background as a trial lawyer or trial judge should volunteer to handle civil and criminal, jury and bench, trials (including the pretrial phase of the litigation that has eventuated in a trial). I was appointed as a federal court of appeals judge in 1981. I was forty-two years old and had experience as a law clerk, an appellate practitioner, an academic, and an expert witness, but no experience as either a trial lawyer or a trial judge. So from the start of my judicial career I handled, and I continue to handle, trials (both jury and bench, and civil and criminal, though very few of the latter) and pretrial proceedings in district courts (mainly the Northern District of Illinois) in my circuit (the Seventh Circuit). And it is this experience that enables me to talk about hearsay evidence and the hearsay rule.

But I need first to provide more in the way of context. The hearsay rule and its numerous exceptions are inseparable from the adversary system of legal procedure, and that system as normally practiced strikes me as unsatisfactory. It relies too heavily on cross-examination to separate truth from falsity, and cross-examination is not, as lawyers and trial judges like to think, the greatest engine ever invented for determining truth. I think

* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

1. So naturally I abhor *The Bluebook*, that symbol of mindless nitpicking.
2. William Butler Yeats, *Words, in THE GREEN HELMET AND OTHER POEMS* 93 (1910) (emphasis added).
3. EZRA POUND, *MAKE IT NEW* (Faber & Faber Ltd. 1934).

judges leave too much of the development of facts to the lawyers—for example, by underutilizing judicial authority (a good example of an important exception to adversary procedure) to appoint neutral expert witnesses under Rule 706 of the Federal Rules of Evidence. I think it generally is a mistake to base jury instructions on the pattern instructions concocted by committees of lawyers and judges; the instructions are too legalistic for the understanding of the average juror. I think judges allow pretrial discovery and the trials themselves to go on for too long. I think they should do more at the pretrial phase to streamline the forthcoming trial, for example, by ruling on objections to exhibits in advance of the trial. I think that jurors should be allowed to ask questions during a trial both orally and in writing, so that they feel they are fully active participants in the trial and not just bumps on a log pretending to understand the legal jargon of the lawyers and the judge and the give and take between the lawyers and the witnesses. And I limit to one word objections to a witness's testimony or to exhibits during trial, with a sidebar if necessary for explanation and ruling. In this way I prevent lawyers from using objections as occasions for making speeches to the jurors.

And, coming closer to my subject, I think the judiciary has allowed the rules of trial procedure and of evidence to balloon excessively—notably including the rules of evidence. There are sixty-eight Federal Rules of Evidence, of which the seven involving hearsay occupy twenty-eight pages in West's immense volume of *Federal Civil Judicial Procedure and Rules*.⁴ The volume devotes 117 pages to the rules of evidence, of which the hearsay rules (for the hearsay "rule" is actually a composite of separate rules relating to hearsay) have a big share: twenty-eight pages is 24 percent of 117 pages. To this must be added an academic literature on evidence that is staggering in its length, indecision, and obscurity. And yet in my experience the hearsay rules play little role in the federal trial process. Hearsay objections are rare and usually can be circumvented. The hearsay rule is a rule of exclusion, yet is riddled with exceptions.

Most of the evidence rules could be discarded without loss, but not all. A few of the rules are accurate and helpful, notably Rule 403 (balancing test permitting exclusion of relevant evidence if probative value is substantially outweighed by prejudicial or other adverse effects),⁵ which ideally would be all you need; Rule 407 (subsequent remedial measures ordinarily not being admissible to prove negligence, as otherwise post-accident remedial measures would be discouraged); Rules 412 to 415, which allow the introduction of evidence of prior crimes by sexual offenders, because such

4. See generally FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES (Thomson West 2016).

5. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

offenders tend to be obsessive;⁶ and the already mentioned Rule 706, authorizing court-appointed expert witnesses.

Rules 801 to 807 are the hearsay rules, and to understand them one needs first to understand the legal meaning of hearsay. Essentially it is a report by one person of what some other person said or wrote. If I say that someone told me it's going to rain this afternoon, my statement is hearsay (I am "saying" what I "heard" = "hearsay"). Hearsay is presumptively inadmissible in a trial because the source of a hearsay statement (repeated by a witness at the trial) is a nonparty to the litigation. He is the person from whom the witness heard the statement that the witness wishes to repeat in court, and ordinarily that nonparty source is unavailable to be cross-examined.

Of course almost all the knowledge we have is hearsay. It is knowledge that was imparted to us in school, on the job, in books, and increasingly in electronic media. It is not the fruit of our own firsthand investigation. Some of it is reliable, much of it not, and because reliability is critical, it's sometimes argued that there should be no hearsay rule—that the main criterion for the admissibility of evidence should be whether it is reliable, not whether it is first or secondhand.⁷ I say "main" and not "sole" because length, materiality, and intelligibility are other criteria of admissibility.

I am not entirely unsympathetic to the suggestion. I can imagine benefits from allowing Rule 807 (the "Residual Exception") to swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee. The hearsay rule, with its multitude of exceptions, is too complex. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its meaning, strengths, and limitations, and when it will materially enhance the likelihood of a correct outcome without taking up too much time at trial. I am mindful too of studies that find that jurors tend to be skeptical of hearsay evidence,⁸ which if the studies are true imply that hearsay evidence admission does little harm even when it's unreliable.

But I am not yet ready to endorse the abolition of the hearsay rule. The reason is that, as I said, most of our knowledge is hearsay. To abolish the

6. See DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT: SEX OFFENSES AND OFFENDERS 26–27 (1997) (determining that convicted sex offenders have a much higher likelihood of being rearrested for rape or sexual assault than any other type of offender); see also *Smith v. Doe*, 538 U.S. 84, 103 (2003) (finding "risk of recidivism posed by sex offenders is 'frightening and high'" and high recidivism rate leads to "dangerousness as a class" (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002))).

7. Professor Richard D. Friedman comes close to advocating this approach in his important article, *Jack Weinstein and the Missing Pieces of the Hearsay Puzzle*, 64 DEPAUL L. REV. 449 (2015). For outright advocacy of the abolition of the hearsay rule, see Ronald J. Allen, Commentary, *A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797 (1992).

8. See Jeffrey Bellin, *The Case for eHearsay*, 83 FORDHAM L. REV. 1317, 1327–31, 1334–35 (2014); Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. (forthcoming 2016).

hearsay rule in favor of Rule 403, which in essence requires weighing the costs versus the benefits (that's appropriate shorthand for weighing probative value against prejudicial effect, confusion potential, etc.) of hearsay evidence, might require the judge in a typical trial to make an enormous number of rulings on whether to admit or exclude such evidence. So without a hearsay rule—that is, without a limitation on the admissibility of hearsay evidence—trials would sprawl. Not only would there be lots of attempts to introduce hearsay evidence in trials, but rulings on objections to such evidence would be difficult because often it's very difficult to estimate the reliability of a hearsay statement. The fact that jurors tend (it appears) to discount hearsay evidence would act as some check on lawyers' eagerness to present such evidence, but not I think enough to avoid weighing down too many trials with too much hearsay evidence.

So I think not only that we're stuck with the hearsay rule as a practical matter, but also that we need the hearsay rule—albeit with exceptions, as the federal hearsay rules recognize—but not, I'll argue, *all* the exceptions. So let me turn now to the rules (subrules, one might call them) that constitute the federal hearsay rule. I will touch on just the main rules and will leave out many of the details of them. The first, Rule 801 of the Federal Rules of Evidence, defines hearsay as a statement that “a party offers in evidence to prove the truth of the matter asserted in the statement.”⁹ But two exceptions are listed: first, where the defendant testified and is subject to cross-examination about a statement that he made out of court;¹⁰ and second, where the out-of-court statement was made by the opposing party in the litigation.¹¹

The limitation of hearsay to statements is important, for there are communications that don't take the form of a statement. The common example is unfurling an umbrella. That action communicates the fact that it's raining, but because there is no statement, the communication is not subject to the hearsay rule.¹²

Rule 803, the next rule I'll discuss, is a list of twenty-three exceptions to the hearsay rule. Two of these—“present sense impression” and “excited utterance”—I'll discuss later, together with an exception found in Rule 804, “dying declaration.” Other exceptions in Rule 803 include various types of records (including a record of something that the witness doesn't recall), records kept in the regular course of business, public records, records of baptism and similar ceremonies, some types of reputation evidence, and legal judgments.

Rule 804 contains five more exceptions (so we're up to thirty). These include former testimony, dying declarations (“statement[s] under the belief of imminent death”),¹³ and statements “against interest,”¹⁴ that is, a

9. FED. R. EVID. 801.

10. *Id.* 801(d)(1).

11. *Id.* 801(d)(2).

12. See Christopher G. Miller, *Implied Assertions in Evidence Law: A Retrospective*, 33 MISS. COLL. L. REV. 1, 3–6 (2014).

13. FED. R. EVID. 804(b)(2).

statement that actually is harmful to the person making it; the theory is that he would be unlikely to make a *false* statement that harmed him—to say, for example, “I must have been drunk when my car hit the lamp post,” if one doesn’t drink.

The last rule I want to mention (which happens also to be the final subrule of the federal hearsay rule) is Rule 807, entitled “residual exception,” a catchall provision that allows the admission of hearsay evidence if

- (1) the statement has equivalent circumstantial guarantees of trustworthiness [equivalent, that is, to hearsay statements permitted by other hearsay exceptions to be admitted in evidence]; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.¹⁵

There are thus a total of thirty-one exceptions to the exclusion of hearsay evidence. The first thirty are quite specific, and there is value to such a list of exceptions—otherwise a judge would in each case have to decide whether proffered hearsay evidence satisfied the balancing test in Rule 403. The problem comes with Rule 807, quoted above. It is essentially open-ended and, stripped of what amounts to ornamental verbiage, allows the admission of hearsay evidence whenever it is reliable and important to the case. So the federal hearsay rule taken as a whole amounts to declaring that reliable hearsay evidence is admissible when necessary to a full adjudication of a case, and in addition thirty specific forms of hearsay evidence are routinely admissible. The bar to hearsay evidence is thus full of holes. In practice, maybe the bar is limited to unreliable or superfluous hearsay evidence. And maybe that’s the best we can do.

Those thirty exceptions seem to me on the whole sound, but with three exceptions.¹⁶ One of them, found in Rule 803(1) and captioned “present sense impression,” allows into evidence a “statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.”¹⁷ The stated rationale is that if the event described and the statement describing it are near each other in time, this “negate[s] the likelihood of deliberate or conscious misrepresentation,” as the Advisory Committee Notes to the Rule state.¹⁸ I don’t get it—especially when “immediacy” is interpreted to encompass periods as long as twenty-three minutes,¹⁹ sixteen minutes,²⁰ and ten minutes.²¹ Even genuine immediacy is not a guarantor of truthfulness. For it’s false that people can’t

14. *Id.* 804(b)(3).

15. *Id.* 807.

16. My discussion of the first two is based on my concurring opinion in *United States v. Boyce*, 742 F.3d 792, 799–802 (7th Cir. 2014).

17. FED. R. EVID. 803(1).

18. *Id.* advisory committee’s note.

19. *United States v. Blakey*, 607 F.2d 779, 785–86 (7th Cir. 1979).

20. *United States v. Mejia-Velez*, 855 F. Supp. 607, 614 (E.D.N.Y. 1994).

21. *State v. Odom*, 341 S.E.2d 332, 335–36 (N.C. 1986).

make up a lie in a short period of time. Most lies in fact are spontaneous.²² So we read that “[a]s with previous research, we found that planned lies were rarer than spontaneous lies.”²³ Suppose I run into an acquaintance on the street and he has a new dog with him—a little yappy thing—and he asks me, “Isn’t he beautiful?” I answer “yes,” though I’m a cat person and consider his dog hideous.

The “present sense impression” exception to the hearsay rule never had any grounding in psychology. It entered American law in the nineteenth century,²⁴ long before there was a field of cognitive psychology. It has neither a theoretical nor an empirical basis; it’s not even common sense. As remarked in *Lust v. Sealy, Inc.*,²⁵ “As with much of the folk psychology of evidence, it is difficult to take this rationale [that immediacy negates the likelihood of fabrication] entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances”²⁶—I would add that “[o]ld and new studies agree that less than one second is required to fabricate a lie.”²⁷ Wigmore made the point 111 years ago: “To admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle”²⁸

The second exception to the hearsay rule that I question—the “excited utterance” exception of Rule 803(2)—allows into evidence “[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”²⁹ The Advisory Committee Notes provide an even less convincing justification for this exception than for the exception for present sense impressions. The proffered justification is “simply that circumstances *may* produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of *conscious* fabrication.”³⁰ The two words I’ve emphasized (“*may*” and “*conscious*”) drain the attempted justification of any content. And even if a person is so excited by something that he loses the capacity for reflection (which doubtless does happen), how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable? “One need not

22. See, e.g., Monica T. Whitty et al., *Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication*, 63 J. AM. SOC’Y OF INFO. SCI. & TECH. 208, 208–09, 214 (2012).

23. *Id.* at 214.

24. See Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 871–73 (1981).

25. 383 F.3d 580 (7th Cir. 2004).

26. *Id.* at 588.

27. *Id.* (quoting Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 916 (2001)); see also Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 362–66 (2012); I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 27–29.

28. 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1757, 2268 (1904).

29. FED. R. EVID. 803(2).

30. *Id.* advisory committee’s note (emphasis added).

be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation.”³¹

As pointed out in the McCormick treatise,

The entire basis for the [excited utterance] exception may . . . be questioned. While psychologists would probably concede that excitement minimizes the [possibility of] reflective self interest influencing the declarant’s statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant’s observation and judgment.³²

The Advisory Committee Notes acknowledge that the exception has been criticized, but defend it on the ground that “it finds support in cases without number.”³³ That is less than reassuring. Like the exception for present sense impressions, the exception for excited utterances rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas.

And finally, the dying declaration exception to the hearsay rule, an exception of medieval origin based on the Latin expression *nemo moriturus praesumitur mentiri*—“no one about to die is presumed to be lying,” as he would be jeopardizing his soul. Many people nowadays do not believe that they have souls, or, if they do believe that, they’re dubious that a dying declaration will critically affect their afterlife destiny. Moreover,

Physical or mental weakness consequent upon the approach of death, a desire of self-vindication, or a disposition to impute the responsibility for a wrong to another, as well as the fact that the declarations are made in the absence of the accused, and often in response to leading questions and direct suggestions, and with no opportunity for cross-examination: all these considerations conspire to render such declarations a dangerous kind of evidence.³⁴

Indeed so. The hearsay exception for dying declarations, as for present sense impressions and excited utterances, is a fossil.

To summarize briefly: the hearsay rule is imperfect, but probably should be retained; the open-ended hearsay exception in Rule 807 should probably be tightened up; some of the hearsay exceptions should be abolished. Beyond these modest suggestions I am not yet prepared to go.

31. Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432, 437 (1928).

32. 2 MCCORMICK ON EVIDENCE §§ 272, 366 (7th ed. 2013). For a thorough up-to-date analysis and criticism of the excited utterance exception, see Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717 (2015).

33. FED. R. EVID. 803(2) advisory committee’s note.

34. Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1425 (quoting *State v. Dickinson*, 41 Wis. 299, 303 (1877)). As Bellin remarks, “[T]he dying declaration exception . . . is: (1) based on untested spiritual assumptions and (2) presumes a counterintuitive measure of lucidity on the part of the dying that science does not support.” See Bellin, *supra* note 8, at 1331.