

LETTING SLEEPING DOGMAS LIE: A RESPONSE TO JUDGE
POSNER'S CALL TO REFORM THE *RES GESTAE* EXCEPTIONS
TO THE RULE AGAINST HEARSAY

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*"[E]ven if a person is so excited by something that he loses the capacity for reflection . . . how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable? . . . [T]he exception for excited utterances rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas."*¹

In his concurring opinion in the 2014 case of *United States v. Boyce*, Seventh Circuit Court of Appeals Judge Richard A. Posner, known for his judicial intellect and pragmatism, voiced his growing unease for the continued use of the "present sense impression" and "excited utterance" exceptions to the rule against hearsay.² While these exceptions both emerged from the common law doctrine of *res gestae*,³ the theory of reliability behind each exception is distinct.⁴

A "present sense impression" is a statement describing an event or circumstance made by a declarant as the event is unfolding "or immediately thereafter."⁵ The theory behind admitting such statements is that "the contemporaneity of the communication minimizes the opportunity for calculated misstatement[s] as well as

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¹ *United States v. Boyce*, 742 F.3d 792, 801–02 (7th Cir. 2014) (Posner, J., concurring).

² See FED. R. EVID. 803(1), (2); *Boyce*, 742 F.3d at 799–802; Peter F. Lake, *Posner's Pragmatist Jurisprudence*, 73 NEB. L. REV. 545, 546–47 (1994).

³ See *People v. Vasquez*, 670 N.E.2d 1328, 1333–34 (N.Y. 1996) (citing 2 MCCORMICK ON EVIDENCE § 268, at 207 (John William Strong ed., 4th ed. 1992)).

⁴ See *Vasquez*, 670 N.E.2d at 1334.

⁵ FED. R. EVID. 803(1); *Vasquez*, 670 N.E.2d at 1334 (citing *People v. Brown*, 610 N.E.2d 369, 371 (1993)).

the risk of inaccuracy from faulty memory.”⁶ An “excited utterance,” on the other hand, is a statement made by a declarant following a startling or upsetting event “powerful [enough] to render the observer’s normal reflective processes inoperative.”⁷ The Federal Rules of Evidence Advisory Committee adopted both exceptions when they enacted the modern version of the Rules in 1975.⁸ Although these exceptions are widely relied upon by federal and state courts, Judge Posner is not the first to challenge their trustworthiness.⁹

In recent years, various courts and commentators have voiced concerns about the “present sense impression” exception, some calling for a formal modification of the rule.¹⁰ These critics have expressed unease about the range of discretion afforded to judges interpreting the clause “or immediately thereafter,” in contrast to existing empirical research demonstrating that “less than one second is required to fabricate a lie.”¹¹ Interestingly, while the same empirical research undermining the reliability of “present sense impressions” likely applies to “excited utterances,” less has been written about the latter. Judge Posner’s concerns, therefore, warrant renewed examination of the “excited utterance” exception and consideration of possible alternative approaches or modifications.

Part I of this Note provides a brief history of the rule against hearsay, explaining its overall purpose and tracking the evolution and adoption of the “present sense impression” and “excited utterance” exceptions to the rule against hearsay. Part II explores Judge Posner’s concurring opinion in *United States v. Boyce*, discussing his concerns and those presented by other legal scholars in light of empirical research regarding the reliability of “excited utterances.” Part III explores various proposals for alternative approaches or modifications to the Rules, including Posner’s suggestion from *Boyce* that the Rule 807 residual exception swallow most of the Rule 801 through Rule 806 exceptions.¹² Finally, Part IV of this Note concludes that Rules 803(1) and (2) need not be modified despite Posner’s recent condemnation and “sounding of the alarm.”

⁶ *Vasquez*, 670 N.E.2d at 1334 (citing *Brown*, 610 N.E.2d at 371–72).

⁷ *Vasquez*, 670 N.E.2d at 1334 (citation omitted).

⁸ See Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U.L. REV. 907, 907 (2001).

⁹ See, e.g., *Ferrier v. Duckworth*, 902 F.2d 545, 548 (7th Cir. 1990) (“[E]xcited utterance[s] may not be as reliable a form of hearsay as some have thought.”); McFarland, *supra* note 8, at 908.

¹⁰ See, e.g., McFarland, *supra* note 8, at 931.

¹¹ *Id.* at 916, 931.

¹² See *United States v. Boyce*, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J., concurring).

I. THE ORIGINS OF THE RULE

*“All credibility, all good conscience, all evidence of truth come only from the senses.”*¹³

At first glance, the rule against hearsay gives preference to testimony provided by witnesses who are physically present in the courtroom.¹⁴ As one commentator explained: “if you are trying to find out what happened, it is best to hear directly from someone who was there. Call it the principle of the horse’s mouth.”¹⁵ The various risks commonly attributed to the admission of hearsay statements include:

[A] *narration* risk (i.e., the risk that the declarant did not mean what he or she seemed to say); a *sincerity* risk (the risk that the declarant intentionally fabricated); a *memory* risk (the risk that the declarant misrecalled what happened); and a *perception* risk (the risk that the declarant misperceived things to begin with).¹⁶

Additionally, in the criminal context, the admission of hearsay statements raises potential Sixth Amendment issues, as there is no opportunity for cross-examination, threatening a defendant’s right to confront his or her accuser.¹⁷ At the root of all of these concerns is an inherent distrust in the jury’s ability to properly weigh the evidence presented to them and fear that unsubstantiated second-hand statements might unfairly impact the outcome of a trial.¹⁸

Recognizing this danger, early versions of the rule emerged in American jurisprudence around the mid-1500s.¹⁹ During this early era and into the mid-1600s, discussion of the hearsay risks began to arise and such testimony was generally regarded as questionable, although not necessarily inadmissible.²⁰ By the 1600s, it was common practice to admit hearsay statements *only if* the information contained in the statement was otherwise corroborated.²¹ It is generally accepted that the hearsay doctrine as we know it today was not firmly fixed in the rules until somewhere around 1675–90.²²

¹³ FRIEDRICH NIETZSCHE, BASIC WRITINGS OF NIETZSCHE 278 (Walter Kaufmann ed., 1968).

¹⁴ See David Alan Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 11.

¹⁵ *Id.*

¹⁶ *Id.* at 16.

¹⁷ See *id.* at 3.

¹⁸ See Aviva Orenstein, “MY GOD!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CALIF. L. REV. 159, 165 (1997).

¹⁹ See John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 458 (1904).

²⁰ See *id.* at 444.

²¹ See *id.* at 443.

²² See *id.* at 445.

No sooner was the rule adopted, however, than courts began announcing exceptions for special circumstances under which hearsay statements should be admitted, despite the general ban.²³ For instance, when victims of crimes uttered “dying declarations” (often identifying their assailant), such statements were generally considered reliable and admissible.²⁴ Likewise, “family hearsay” statements, categorized as factual testimony about a family member’s birthdate, pedigree, or reputation, were also commonly considered reliable and admissible.²⁵ Yet another broad category of commonly excepted statements were those contained in official documents such as wills, trusts, contracts, or merchant record books.²⁶

The modern rule against hearsay was formally enacted as part of the Federal Rules of Evidence in 1975.²⁷ Although the Rule was initially treated as a rule of preference, the federal version codified in Rule 801 acts as a rule of presumed exclusion, meaning the testimony is presumed to be excluded unless an expressed exception applies.²⁸ The definition of hearsay articulated in Rule 801(c) is as follows: all statements (verbal and non-verbal assertions) uttered outside of the courtroom, offered for the purpose of “prov[ing] the truth of the matter asserted in the statement.”²⁹

When enacted, the Federal Rules of Evidence embraced many of the already existing common law exceptions such as “dying declarations,”³⁰ and exceptions for business³¹ and public records.³² The theory behind these categorical exceptions is that, “under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.”³³

Another category of exceptions adopted by the Advisory Committee on the Federal Rules of Evidence were those rooted in the common law doctrine *res gestae*, sometimes referred to collectively as

²³ See *id.* at 448.

²⁴ See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 519–20 (1898).

²⁵ See *id.* at 520.

²⁶ See *id.*

²⁷ FED. R. EVID. 802.

²⁸ See Sklansky, *supra* note 14, at 20.

²⁹ FED. R. EVID. 801(a), (c).

³⁰ FED. R. EVID. 804(b)(2); THAYER, *supra* note 24, at 519–20.

³¹ FED. R. EVID. 803(6).

³² FED. R. EVID. 803(8).

³³ FED. R. EVID. 803 advisory committee’s note to 1975 amendment.

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“spontaneous’ statements.”³⁴ *Res gestae* translates to “things happened” and traditionally referred to statements that were “so closely connected to [an] occurrence or event in both time and substance as to be a part of the happening.”³⁵ Four of the modern exceptions adopted by the Advisory Committee stem from this doctrine, and are entitled: “Present Sense Impression[s];”³⁶ “Excited Utterance[s];”³⁷ “Then-Existing Mental, Emotional, or Physical Condition[s];”³⁸ and “Statement[s] Made for Medical Diagnosis or Treatment.”³⁹ Early scholars John Henry Wigmore and James Bradley Thayer both contributed to the contemporary formulations of these exceptions.⁴⁰ Thayer rejected the overall concept of *res gestae*, but was a proponent of the theory that when a declaration is made contemporaneous with the event being described, it is likely to be reliable.⁴¹ Thayer did not initially distinguish between “present sense impressions” and “excited utterances,” both of which encompass a contemporaneousness element.⁴²

Wigmore, on the other hand, believed that near contemporaneity alone was not enough to prove trustworthiness, and reasoned that contemporaneous statements are only reliable if they are coupled “with an event creating shock and excitement.”⁴³ This later articulation describes what is now referred to as an “excited utterance.”⁴⁴ The requirements for entering an exception under Rule 803(2) are that: (1) there was a startling event; (2) the statement was made while the declarant was under the effect of the startling event; and (3) the statement relates to that startling event.⁴⁵

The theory behind allowing “excited utterances” to be admitted into evidence is that when an individual utters something after a startling circumstance, the shock, stress, or nervous excitement of that startling event impacts the individual’s “reflective faculties and removes [his or her] control,” temporarily “still[ing] the[ir] capacity of reflection and produc[ing] utterances free of conscious

³⁴ *People v. Vasquez*, 670 N.E.2d 1328, 1334 (N.Y. 1996) (citing MCCORMICK ON EVIDENCE, *supra* note 3, at 207–08).

³⁵ Orenstein, *supra* note 18, at 168, 168 n.19 (quoting BLACK’S LAW DICTIONARY 1305 (6th ed. 1990)).

³⁶ FED. R. EVID. 803(1).

³⁷ FED. R. EVID. 803(2).

³⁸ FED. R. EVID. 803(3).

³⁹ FED. R. EVID. 803(4).

⁴⁰ See McFarland, *supra* note 8, at 908–09.

⁴¹ See *id.* at 908.

⁴² See *id.*

⁴³ *Id.* at 908–09.

⁴⁴ *Id.* at 909.

⁴⁵ See Orenstein, *supra* note 18, at 169.

fabrication.”⁴⁶

Wigmore did not, however, accept the justification for admitting “present sense impressions” which, in contrast to “excited utterances,” do not require the occurrence of a startling event in order to be regarded as reliable.⁴⁷ Wigmore reasoned that because the state of shock itself plays such a critical role in hindering a declarant’s ability to lie, the admission of a statement merely because it was uttered at the same time that an event occurred was an “arbitrary and unreasoned test.”⁴⁸ Nevertheless, when the modern Federal Rules were adopted, both Wigmore and Thayer’s conceptions of “spontaneous statements” were embraced.⁴⁹ Both of these categorical exceptions have continued to play a critical role in modern rules of evidence, though neither have escaped ongoing debate and criticism from legal scholars.⁵⁰

II. THE TRUTH ABOUT UNTRUTHFULNESS

*“[T]he great enemy of the truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic. Too often we hold fast to the clichés of our forebears. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought.”*⁵¹

Seventh Circuit Judge Richard A. Posner is an influential modern American judicial figure and his opinions are among the most frequently cited.⁵² In 2004, Posner wrote the majority opinion in the case of *Lust v. Sealy, Inc.*,⁵³ a Title VII sex discrimination case.⁵⁴ The *Sealy* trial judge excluded office memoranda offered to prove

⁴⁶ FED. R. EVID. 803(2) advisory committee’s note to 1975 amendment; Orenstein, *supra* note 18, at 169.

⁴⁷ See McFarland, *supra* note 8, at 911.

⁴⁸ 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1757, at 238 (James H. Chadbourn ed., 1976).

⁴⁹ See FED. R. EVID. 803(1), (2); see also *People v. Vasquez*, 670 N.E.2d 1328, 1334–35 (N.Y. 1996) (citing MCCORMICK ON EVIDENCE, *supra* note 3, at 206–08, 211–13) (“‘Present sense impression’ statements and ‘excited utterances’ are both often loosely described, sometimes misleadingly, as ‘spontaneous’ statements.”).

⁵⁰ See, e.g., *infra* notes 65–67 and accompanying text.

⁵¹ President John F. Kennedy, Commencement Address at Yale University (June 11, 1962).

⁵² See Lake, *supra* note 2, at 643; Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 tbl.6 (2000).

⁵³ *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004).

⁵⁴ *Id.* at 582.

discrimination, on the basis that the documents contained hearsay and the plaintiff failed to proffer an applicable exception to justify their admission.⁵⁵ On appeal, Judge Posner briefly concluded that the memoranda might have been admissible under one of the “spontaneity exceptions” found in Rules 803(1)–(3).⁵⁶ Yet, in a brief but critical passage of dicta, Posner opined:

As with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances. ‘Old and new studies agree that less than one second is required to fabricate a lie.’ . . . It is time the law began paying attention to such studies. But that is a story for another day⁵⁷

That day came a decade later in Posner’s concurring opinion in *United States v. Boyce*.⁵⁸ The defendant in *Boyce* was convicted of being a felon in possession of a firearm.⁵⁹ The trial judge permitted a recording of a 911 telephone call into evidence in which the mother of the defendants’ children stated that the defendant was carrying around a gun and “going crazy for no reason.”⁶⁰ When the officers arrived at the woman’s house, they described her appearance as “emotional as if she just had an argument, perhaps a fight.”⁶¹ The woman did not testify at trial, but the judge permitted the prosecution to play a recording of the 911 call aloud to the jury on the basis that it was both a “present sense impression” and an “excited utterance.”⁶² Posner’s concurring opinion in *Boyce* indicated that the prosecution had likely been unable to call the woman to testify in person to describe what she saw because the defendant had contacted her and swayed her to recant her statement.⁶³ Therefore, the only way to corroborate the other circumstantial evidence placing the gun with the defendant was to enter the recording of the 911 call into evidence and allow the jury to hear it.⁶⁴

On appeal, Judge Ann C. Williams, writing for the majority of the Seventh Circuit, agreed with the trial judge’s admission of the 911

⁵⁵ See *id.* at 587–88.

⁵⁶ See *id.* at 588.

⁵⁷ *Id.* (quoting McFarland, *supra* note 8, at 916).

⁵⁸ *United States v. Boyce*, 742 F.3d 792, 799–802 (7th Cir. 2014) (Posner, J., concurring).

⁵⁹ See *id.* at 793 (majority opinion).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *id.* at 796.

⁶³ See *id.* at 800 (Posner, J., concurring).

⁶⁴ See *id.*

call recording and affirmed the defendant's conviction.⁶⁵ However, before concluding that the recording satisfied the admissibility requirements under both the "present sense impression" and "excited utterance" exceptions, Judge Williams recognized the broader problematic nature of these categories.⁶⁶ Referring to Posner's prior decision in *Sealy*, Williams acknowledged his critiques, however, she ultimately concluded that, "despite these issues, the exceptions are well-established."⁶⁷ Judge Posner also ultimately concurred with his brethren upholding the lower court's application of Rules 803(1) and (2) to the 911 call, but wrote a separate concurrence solely for the purpose of reiterating his concerns.⁶⁸

With respect to the "present sense impression" exception, Posner expressed apprehension regarding how judges interpret the "or immediately after" clause, which has at times been used to admit statements made as long as twenty-three minutes after the event in question.⁶⁹ Even more troublesome to Posner, however, is the notion that "real immediacy is . . . a guarantor of truthfulness."⁷⁰ According to Posner, there is simply a lack of adequate empirical research to support this conclusion.⁷¹ It is one thing for Wigmore to have speculated about the relationship between immediacy and truth-telling over a century ago,⁷² yet in an era where social science studies on human behavior, communication, and how people lie are commonplace, it is irresponsible at best for the judicial system to disregard such research in favor of "judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas."⁷³

Posner is not the first to challenge this lack of empirical data.⁷⁴ In fact, some critics have suggested that the reliability of "present sense impressions" is even further complicated by the inception of the Internet era and the widespread use of social media.⁷⁵ One of the primary reasons a "present sense impression" is deemed trustworthy

⁶⁵ See *id.* at 799 (majority opinion).

⁶⁶ See *id.* at 796.

⁶⁷ *Id.* (first citing *Ferrier v. Duckworth*, 902 F.2d 545, 547–48 (7th Cir. 1990); and then citing *White v. Illinois*, 502 U.S. 346, 356 n.8 (1992)).

⁶⁸ See *Boyce*, 742 F.3d at 799–800 (Posner, J., concurring).

⁶⁹ See *id.* at 800.

⁷⁰ *Id.*

⁷¹ See *id.* at 801 (citing Monica T. Whitty et al., *Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication*, 63 J. AM. SOCIETY OF INFO. SCI. & TECH. 208, 208–09, 214 (2012)).

⁷² See WIGMORE, *supra* note 48, at 238.

⁷³ *Boyce*, 742 F.3d at 802; see, e.g., Whitty et al., *supra* note 71, at 208–09.

⁷⁴ See, e.g., Jeffery Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 349, 350 (2012); McFarland, *supra* note 8, at 908.

⁷⁵ See Bellin, *supra* note 74, at 332–33.

is because the witness who overheard the statement was present at the time the declarant experienced the events in question, or immediately after.⁷⁶ However, the concept of “presence” is exceedingly more complicated to evaluate in an era of “smartphones [and] Twitter” where there is no guarantee of a “temporal connection between the statement and the event.”⁷⁷ These issues are indeed problematic, and as a result scholars have recently called for the judicial system to revise or abandon altogether the “present sense impression” exception.⁷⁸ Less commentary, however, has focused on how these same concerns extend to “excited utterances.”⁷⁹

In *Boyce*, Posner addressed “excited utterances,” stating that “[t]he Advisory Committee Notes provide an even less convincing justification for the second hearsay exception at issue in this case, the ‘excited utterance’ rule.”⁸⁰ The Advisory Committee Notes Posner refers to clarify that “circumstances *may* produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of *conscious* fabrication.”⁸¹ However, empirical data suggests that the reliability of “excited utterances” is far more complicated than Wigmore or the Advisory Committee suggest.⁸²

Some sociological studies certainly support the conclusion that a declarant speaking under the stress of a startling event is more likely to make an accurate statement.⁸³ Conversely, though, much of the data also supports a contradictory correlation: instead of increasing accuracy, the stress of a startling, surprising, or traumatic event actually *decreases* the accuracy of a declarant’s statement as the stress negatively impacts the individual’s capacity to perceive and retell the events as they occurred.⁸⁴ This appears to be especially true for more peripheral details of an event, such as the identification of a perpetrator.⁸⁵ Based on these conflicting findings, the most logical deduction is that the truth likely lies somewhere in the middle. “People react differently to stress,” and “for the excited

⁷⁶ See *id.* at 333.

⁷⁷ *Id.* at 333–34.

⁷⁸ See, e.g., McFarland, *supra* note 8, at 908; Bellin, *supra* note 74, at 333.

⁷⁹ See Bellin, *supra* note 74, at 347 n.63.

⁸⁰ *United States v. Boyce*, 742 F.3d 792, 801 (7th Cir. 2014) (Posner, J., concurring).

⁸¹ *Id.*

⁸² See *id.* at 802; McFarland, *supra* note 8, at 908–09.

⁸³ See, e.g., Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule against Hearsay*, 63 U. KAN. L. REV. 717, 725 (2015).

⁸⁴ See, e.g., Brian H. Bornstein & Timothy R. Robicheaux, *Methodological Issues in the Study of Eyewitness Memory and Arousal*, 42 CREIGHTON L. REV. 525, 539–40 (2009).

⁸⁵ See *id.* at 540–41.

utterance exception to operate as Wigmore envisioned it, a declarant need be so upset by an event that she cannot lie about it but not so upset that she is inaccurate in her description of the event.”⁸⁶

It should also be noted that the admission of “excited utterances” has an overall more significant impact on trial outcomes than does the admission of “present sense impressions.”⁸⁷ This is attributable to the fact that:

[W]hereas the present sense impression requires that the statement come during or immediately after the event and that it be one “describing or explaining” the event, the excited utterance is a much broader exception, allowing statements that are merely “relating” to the event that may be uttered immediately after—or even weeks after—the event.⁸⁸

This increased leniency regarding the contemporaneousness element of “excited utterances” means that even if a statement is excluded as a “present sense impression” it may nevertheless be admissible as an “excited utterance.”⁸⁹ Consequently, it is no wonder that Posner’s concerns about the Rule 803(2) exception in particular have not gone unnoticed by the legal community.⁹⁰

III. ONWARDS AND UPWARDS!

“[A] problem well put is half-solved.”⁹¹

For scholars already concerned about the potential unreliability of the *res gestae* exceptions, Judge Posner’s concurring opinion in *Boyce* has initiated new commentary and debate about potential options for reform and/or abolishment of the “excited utterance” exception.⁹² This section lays out three such solutions, starting with Judge Posner’s own somewhat dramatic proposal from *Boyce*.

⁸⁶ Williams, *supra* note 83, at 741–42.

⁸⁷ *See id.* at 733–34.

⁸⁸ *Id.* at 733.

⁸⁹ *Id.*

⁹⁰ *See, e.g.*, Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 *FORDHAM L. REV.* 1485, 1488 (2016).

⁹¹ JOHN DEWEY, *The Pattern of Inquiry*, in *LOGIC: THE THEORY OF INQUIRY* 101, 108 (1938).

⁹² *See, e.g.*, Liesa L. Richter, *Reality Check: A Modest Modification to Rationalize Rule 803 Hearsay Exceptions*, 84 *FORDHAM L. REV.* 1473, 1474–75 (2016); Williams, *supra* note 83, at 751–61.

A. Posner's Position

After making well-known his lack of “confidence that . . . unreflective utterance[s], provoked by excitement, [are] reliable[.]” Posner reserved the last paragraph of his opinion to articulate his proposal to dramatically reform the Federal Rules.⁹³ What Posner suggests is that “Rule 807 (‘Residual Exception’) [should] 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.”⁹⁴ This “residual” or “catchall” exception was added as an amendment to the Federal Rules in 1997, absorbing prior Rules 803(24) and 804(b)(5).⁹⁵ Rule 807 provides an avenue for the admission of hearsay statements when:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness; (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.⁹⁶

Posner argues that the existing rule, with its litany of exceptions, is overall “too complex” and “archaic.”⁹⁷ If the Rule 803 exceptions were collapsed into Rule 807, hearsay would be admitted based solely on a statement’s objective reliability, leaving the jury to weigh the “strengths and limitations” of the particular testimony.⁹⁸ This approach, according to Posner, would “materially enhance the likelihood of a correct outcome.”⁹⁹ Posner is not the first to advocate for a more simplified set of hearsay rules.¹⁰⁰ In an evidence treatise published in 1898, Thayer made a similarly radical proposal when he stated that “the rules of evidence should be simplified[,] and should take on the general character of principles, to guide the sound judgment of the judge”¹⁰¹

As this statement illuminates, Posner’s proposed simplification of the rules and eradication of the categorical exceptions under Rules

⁹³ *United States v. Boyce*, 742 F.3d 792, 801–02 (7th Cir. 2014) (Posner, J., concurring).

⁹⁴ *Id.* at 802.

⁹⁵ See FED. R. EVID. 807 advisory committee’s note to 1997 amendment (“The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.”).

⁹⁶ FED. R. EVID. 807(a)(1)–(4).

⁹⁷ *Boyce*, 742 F.3d at 802.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See, e.g., THAYER, *supra* note 24, at 530.

¹⁰¹ *Id.*

801 through 806 would necessarily result in a broadening of judicial discretion and increased use of the Rule 807 “catchall” provision. This outcome, however, presents its own problems, which must be genuinely considered. First, this solution stands in stark contrast to Congress’ intention that Rule 807 should be a “narrow exception . . . applying only in exceptional cases.”¹⁰² Overusing Rule 807 might “permit the total erosion of the hearsay rule by judicial discretion, a result originally suggested when the Federal Rules were first drafted, but quickly rejected.”¹⁰³ Further, allowing Rule 807 to replace the other hearsay rules means that litigators would have little power to predict which hearsay statements may or may not be admitted in a given trial, frustrating their ability to act strategically when weighing the benefits of a settlement offer versus a likely trial outcome.¹⁰⁴ Indeed, it is the existence of “[d]efinitive rules with detailed requirements [that] provide lawyers that certainty. The residual exception provides no certainty, instead relying on the trial judge’s individual interpretation of the loose verbiage of Rule 807’s ‘equivalent circumstantial guarantees of trustworthiness.’”¹⁰⁵ Although the notice requirement in Rule 807(b) may help to ease this burden on attorneys, it is not a wholesale solution.

Another issue with Posner’s approach is that it is unrealistic to believe that we could eliminate the admission of “excited utterances” so easily. Although there is certainly nothing to be gained by holding onto legal rules merely out of “judicial habit” or “reluctance to reconsider ancient dogmas[,]” it is prudent to take into account the role that the “excited utterance” exception has played in the history of evidence law.¹⁰⁶ Even if the Federal Rules were amended to reflect Posner’s suggestions, most state court systems recognize or have codified some version of Rule 803(2).¹⁰⁷ Because litigators would still be in the habit of entering “excited utterances” into evidence in state courts, they would likely continue to use Rule 807 as a mechanism to do so in federal courts. Thus, all that Posner’s solution would do is shift the avenue by which “excited utterances” are entered in federal courts; therefore, the idea that “excited utterances” could be entirely

¹⁰² *United States v. Kim*, 595 F.2d 755, 765 (D.C. Cir. 1979).

¹⁰³ Myrna S. Raeder, *The Hearsay Rule at Work: Has it Been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507, 517 (1992) (discussing the prior versions of the catchall exception before the 1997 amendments and addition of Rule 807; however, the same concerns continue to be relevant today).

¹⁰⁴ *See Williams*, *supra* note 83, at 754.

¹⁰⁵ *Id.*

¹⁰⁶ *United States v. Boyce*, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J., concurring).

¹⁰⁷ *See, e.g.*, CONN. CODE EVID. 8-3(2); WASH. R. EVID. 803(a)(2).

abolished is itself a legal fiction. Recognizing that Posner's solution risks overly broad judicial discretion and unpredictability, some scholars have instead suggested revising Rule 803(2), making it more equipped to provide "[d]efinitive rules" and "certainty."¹⁰⁸

B. *The Addition of Rule 804(b)(7)*

In an article published in 2015, law professor and scholar Alan G. Williams proposed just such a definitive solution—a creative revision to the federal rules, which attempts to preserve the “excited utterance” as a categorical exception while providing more assurance of reliability.¹⁰⁹ Responding to Posner's concerns in *Boyce*, Williams recommends that Rule 803(2) be abolished altogether in exchange for the addition of a new Rule—804(b)(7).¹¹⁰ The Rule 804 category of exceptions apply only when a declarant is unavailable to testify in court as a witness, as opposed to the Rule 803 exceptions, which allow statements to be admitted even where the declarant *could* be called to the stand but for practical or strategic reasons is not, as was the case with the 911 caller in *Boyce*.¹¹¹ Williams's proposed rule 804(b)(7), entitled: “Statement Immediately Subsequent to Startling Event or Condition[,]” reads as follows: “[a] statement made immediately subsequent to a startling event or condition that is supported by corroborating circumstances that clearly indicate its trustworthiness.”¹¹²

In addition to the fact that under Williams' version of the rule “excited utterances” would only be admissible if the declarant were unavailable, there is also the notable addition of a corroboration requirement.¹¹³ Effectively, “excited utterances” would be subjected to a “hybrid of the Rule 807 residual exception's trustworthiness factors and the Rule 804(b)(3) . . . trustworthiness factors, along with a new factor to address the potential inaccuracies of an impaired declarant's excited utterance”¹¹⁴

Williams then goes on to enumerate a litany of thirteen factors that he proposes should be included in the Advisory Committee notes

¹⁰⁸ Williams, *supra* note 83, at 754; *see also* Bornstein & Robicheaux, *supra* note 84, at 540–41 (describing how all eyewitnesses react differently to negative emotions, which in turn impacts their memories differently).

¹⁰⁹ Williams, *supra* note 83, at 758–59.

¹¹⁰ *Id.* at 758.

¹¹¹ *See* FED. R. EVID. 803, 804(b); *United States v. Boyce*, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J., concurring).

¹¹² Williams, *supra* note 83, at 758.

¹¹³ *See id.*

¹¹⁴ *Id.*

accompanying the new rule, which trial judges would be encouraged to evaluate before ruling on a statement's admissibility.¹¹⁵ Williams concludes that this new version of the rule would simultaneously address Posner's reliability concerns while preserving an avenue for the admission of "statements [that] we should and do trust."¹¹⁶

Williams' proposal is attractive for several reasons. It delineates a predictable structure under which "excited utterances" would be evaluated, creates safeguards to limit the admission of statements made when the declarant was under so much stress that the statement lacks reliability, and acknowledges that there is merit in preserving the Rule 803 exceptions in some formulation.¹¹⁷ However, this approach has downsides as well.

First, it is unnecessarily complicated. Imagine a case in which a trial is underway and the prosecutor, similarly to the scenario in *Boyce*, offers a recording of a 911 call into evidence. The defense attorney objects to hearsay. The prosecutor argues that the statement should be excepted under the new Rule 804(b)(7). Now, even assuming that the witness was in fact unavailable (an element that would *not* have been satisfied in *Boyce* and which will be discussed in detail below¹¹⁸), the prosecutor would then launch into an explanation (for one can only begin to imagine how long), listing off the ways in which the circumstances surrounding the particular 911 call satisfy any of the thirteen different factors. There are no other exceptions that require such an elaborate analysis. For example, Rule 807 only requires that four factors be met, while Rule 804(b)(3) suggests the consideration of just six trustworthiness factors.¹¹⁹ The application of this new rule seems cumbersome at

¹¹⁵ *Id.* at 759 ("Such factors should be: (1) the age, education, and experience of the declarant; (2) the personal knowledge of the declarant regarding the subject matter of the statement; (3) the physical, mental, and emotional state of the declarant at the time the statement was made; (4) the timing and circumstances under which the statement was made; (5) the declarant's motive in making the statement and whether there was a reason for the declarant to lie; (6) the ambiguity of the statement; (7) the time lapse between the event and the making of the statement; (8) the partiality of the declarant and the relationship between the declarant and the witness; (9) the spontaneity of the statement, as opposed to responding to leading questions; (10) whether the declarant repeated the statement and did so consistently, even under different circumstances; (11) the relationship between the declarant and the opponent of the evidence; (12) the recantation or repudiation of the statement after it was made; and, (13) the nature and strength of independent evidence relevant to the conduct in question. Twelve of these thirteen factors are an amalgamation of the trustworthiness factors included in the advisory committee notes accompanying Rules 804(b)(3) and 807.")

¹¹⁶ *Id.* at 760.

¹¹⁷ *Id.* at 757–60.

¹¹⁸ See *infra* notes 120–22 and accompanying text.

¹¹⁹ See FED. R. EVID. 804(b)(3), 807(a); FED. R. EVID. 807 advisory committee's note to 2011 amendment; Williams, *supra* note 83, at 758.

best.

Second, the addition of an unavailability requirement for “excited utterances” has been considered and rejected by the Supreme Court, and for good reason.¹²⁰ Writing for the majority in *White v. Illinois*, Chief Judge Rehnquist explained that little would be accomplished by imposing an “unavailability rule” to the admission of spontaneous statements.¹²¹ The Court explained that the addition of this requirement would “do little to improve the accuracy of factfinding,” yet would “impose substantial additional burdens on the factfinding process. The prosecution would be required to repeatedly locate and keep continuously available each declarant, even when neither the prosecution nor the defense has any interest in calling the witness to the stand.”¹²²

Finally, there are strategic and policy reasons why admitting an out-of-court declaration itself (rather than having the witness testify to it) might actually best serve the interest of justice in a particular case. 911 call recordings, like the one in *Boyce*, and other “excited utterances” have “substantial probative value” *precisely because of the context in which they were made*, the force of which would be lost if the declarant simply testified to his or her memory of the event on the stand.¹²³ The impact of a colorful statement made by an eyewitness at the time the startling event occurred is likely to leave a far more lasting impact on a jury.¹²⁴ Additionally, requiring a witness to testify does nothing to protect the interests of a witness such as the woman in *Boyce*, who was intimidated into keeping quiet.¹²⁵ Under the proposed Rule 804(b)(7), the *Boyce* prosecutor would have been left without any clear avenue to enter the state’s key eyewitness account, risking the defendant’s acquittal. Because of these complications, Williams’ adaptation of the rule, like Posner’s, would likely create more new difficulties than it purports to solve.¹²⁶

¹²⁰ See, e.g., *White v. Illinois*, 520 U.S. 346, 357 (1992).

¹²¹ *Id.* at 354 (citing *United States v. Inadi*, 475 U.S. 387, 396 (1986)).

¹²² *White*, 520 U.S. at 355 (citing *Inadi*, 475 U.S. at 398–99).

¹²³ See *White*, 520 U.S. at 355–56.

¹²⁴ See Laura Engelhardt, Commentary, *The Problem with Eyewitness Testimony: Commentary on a Talk by George Fisher and Barbara Tversky*, 1 STAN. J. LEGAL STUD. 25, 25 (1999).

¹²⁵ See *United States v. Boyce*, 742 F.3d 792, 799 (7th Cir. 2014).

¹²⁶ See Michael J. Hutter, *Excited Utterances and Present Sense Impressions: Time to Reevaluate?*, N.Y.L.J. ONLINE (2014).

*C. A More “Modest Modification”*¹²⁷

Yet another alternative approach to Rule 803(2) was recently suggested by University of Oklahoma College of Law evidence professor Liesa L. Richter.¹²⁸ Like Williams, Richter expressed concerns about Posner’s proposal, noting that: “dismantling the categorical hearsay exceptions in favor of a single discretionary residual exception would diminish efficiency and fairness in the litigation market at a time when exploding costs threaten the utility of the jury trial as a mechanism for dispute resolution.”¹²⁹ Unlike Williams, however, Richter proposes a much simpler modification: expanding the “trustworthiness” exception currently available under Rules 803(6), (7) and (8)¹³⁰ and applying it to Rule 803(1) and Rule 803(2) as well.¹³¹

Under this structure, once a witness testifies to hearsay and opposing counsel objects, the proponent bears the burden of satisfying the traditional Rule 803(2) requirements.¹³² If met, the statement would be presumed admissible (thus far, operating like the current rule).¹³³ However, under this new formulation, the opponent would now have the opportunity to demonstrate that the statement was self-serving (or otherwise suspicious) and thus not entitled to a presumption of trustworthiness.¹³⁴ At that point, the trial judge would have discretion to allow or exclude the testimony, despite the fact that it meets the requirements of an “excited utterance.”¹³⁵

Richter’s modification is refreshingly simple in contrast to Williams’ overly complicated thirteen factor unavailable witness rule.¹³⁶ Richter reasons that:

[T]his modest modification of the Rule 803 exceptions that utilizes an existing feature of Rule 803 would avoid a painful

¹²⁷ Richter, *supra* note 92, at 1482.

¹²⁸ See Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1865–67 (2015).

¹²⁹ Richter, *supra* note 92, at 1475; see also Richter, *supra* note 128, at 1908 (“[There are] significant drawbacks of throwing the Federal Rules baby out with the proverbial bathwater and to stimulate thought about more progressive responses to the Seventh Circuit’s articulated concerns about folk psychology.”).

¹³⁰ FED. R. EVID. 803(6)(E), (7)(C), (8)(B) (providing that an opponent may prevent the admission of a business or public record by demonstrating that the information lacks trustworthiness).

¹³¹ See Richter, *supra* note 92, at 1479.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See Williams, *supra* note 83, at 759.

period of adjustment and uncertainty concerning the admissibility of hearsay. While meaningfully addressing longstanding concerns about the rationality of certain hearsay exceptions, this amendment would not scuttle well-accepted hearsay exceptions that have proved invaluable to the trial process.¹³⁷

Richter rightfully acknowledges that common law hearsay exceptions do serve a purpose and that a complicated overhaul of the rules would have an overwhelming impact on the predictability of trial outcomes.¹³⁸ Nevertheless, Richter’s “modest modification” runs into a different sort of problem than Williams’ rule does—redundancy. Richter rationalizes expanding the trustworthiness exception by pointing to the fact that as the Rules currently stand, judges are “[directed] to admit hearsay that fits an exception, whether they find it reliable or not.”¹³⁹ Richter therefore believes that a trustworthiness exception is a necessary addition to Rule 803(2) in order to provide trial judges with a safety-valve of sorts, or a mechanism through which judges may use their discretion to exclude clearly untrustworthy “excited utterances.”¹⁴⁰

However, the Federal Rules already provide two mechanisms through which a judge may exercise such discretion. The first avenue is through the language of the Rule 803(2) exception itself.¹⁴¹ The Rule contains numerous vague terms, which offer judges flexibility in evaluating whether a hearsay statement meets the Rule 803(2) requirements in the first place.¹⁴²

As one New York Judge Arthur M. Diamond explained it: “[f]actors such as timeliness, stress, the startling nature of an incident—all these factors allow a judge ample discretion to refuse to admit hearsay that they believe to be untrustworthy and therefore not competent.”¹⁴³ For example, in *People v. Vasquez*,¹⁴⁴ a trial judge excluded a 911 call recording similar to the one in *Boyce* because the trauma was only “minor” and the declarant did not appear to be sufficiently “agitated.”¹⁴⁵ Further, the facts in *Vasquez* did not clearly

¹³⁷ Richter, *supra* note 92, at 1482.

¹³⁸ *See id.*

¹³⁹ *Id.* at 1480.

¹⁴⁰ *See id.*

¹⁴¹ FED. R. EVID. 803(2).

¹⁴² *See id.*; Arthur M. Diamond, *Don't Mess With Present Sense Impression!*, 64 NASSAU LAWYER 12, 23 (Oct. 2014).

¹⁴³ Diamond, *supra* note 142, at 23.

¹⁴⁴ *People v. Vasquez*, 670 N.E.2d 1328 (N.Y. 1996).

¹⁴⁵ *See id.* at 1337.

demonstrate that the declarant was still under any stress when he made the statement “somebody’s been shot” to the 911 operator.¹⁴⁶ In excluding the recording from evidence, the judge noted that “[w]hile the statement must have been made before the declarant had the opportunity to reflect, ‘the time for reflection is not measured in minutes or seconds,’ but rather ‘is measured by facts.’”¹⁴⁷ This type of fact-dependent inquiry allows judges a first chance to exclude untrustworthy statements.¹⁴⁸

The second mechanism is Rule 403.¹⁴⁹ Under this special rule of relevancy, judges are again empowered to exclude hearsay testimony, *even if it qualifies as an “excited utterance”* for almost any reason if they conclude that it threatens to unfairly impact the outcome of the trial or mislead the jury in some way, *including if it is untrustworthy*.¹⁵⁰ In application, then, the 403 analysis would operate in almost exactly the same way as Richter’s trustworthiness exception. For example, first, upon a hearsay objection, the party proffering the testimony would be required to demonstrate that it meets the basic criteria to be excepted under Rule 803(2).¹⁵¹ Next, the opposing party could make a 403 objection, at which point the burden would shift to that party to demonstrate that despite the fact that the statement was technically an “excited utterance,” it should nevertheless be excluded because, *based on its untrustworthiness*, it would likely mislead the jury or unfairly prejudice the opponent.¹⁵² Finally, the judge could use his or her discretion to allow or exclude the testimony. In practice, this analysis is strikingly akin to the one

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* (first quoting *People v. Marks*, 160 N.E.2d 26, 28 (N.Y. 1959); and then quoting *People v. Norton*, 563 N.Y.S.2d 802, 808 (App. Div. 1990)).

¹⁴⁸ *See, e.g., Vasquez*, 670 N.E.2d at 1337.

¹⁴⁹ 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.”).

¹⁵⁰ There are numerous examples of instances in which judges engage in a 403 analysis even after a statement meets the initial criteria to be admitted under Rule 803(2). *See, e.g., United States v. Hefferon*, 314 F.3d 211, 223, 224 (5th Cir. 2002) (finding that the trial judge did not err in admitting a witness’ statements as “excited utterances” and that the judge’s application of 403 was proper but that the probative value of the evidence was simply not outweighed by the danger of unfair prejudice); *see also United States v. Guthrie*, 557 F.3d 243, 250 (6th Cir. 2006) (finding that a 911 call was admissible as an “excited utterance” despite a 403 objection because on balance, it was highly probative). Although in many instances a judge may opt to admit an “excited utterance” into evidence over a 403 objection, the mere fact that they are willing to conduct such an analysis shows that it is an available option.

¹⁵¹ *See Richter, supra* note 92, at 1479.

¹⁵² *See generally* FED. R. EVID. 403 (demonstrating that “unfair prejudice” and “misleading the jury” are Rule 403 concerns).

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Richter suggests.¹⁵³ For these reasons, although certainly functional, Richter's revision of the rule is simply unnecessary.

IV. CONCLUSION: "IF IT AIN'T BROKE, DON'T FIX IT"

*"Who would tell a daughter to sort out second-hand statements by applying the tests embedded in the hearsay exceptions—'trust what you're told an excited man said,' for example, because 'excited men don't lie'? In ordinary life, after all, we always pay more attention to particulars and draw on a lifetime of experience in assessing the reported say-so of others."*¹⁵⁴

As evidenced by this and other articles on the matter, Posner's recent "sounding of the alarm" in *Boyce* is certainly worthy of the widespread dialogue it has prompted.¹⁵⁵ Not only because Posner is a well-respected, experienced figure of the judiciary and legal scholar, but because he gives a modern voice to a concern that many others have previously identified.¹⁵⁶ Yet, despite Judge Posner's valid concerns, the Federal Rules of Evidence should not be modified nor should the *res gestae* exceptions be abolished. Undeniably, the current formulation of the rules is not perfect. As such, revisions may at times be necessary in order to make sure that they remain up to date and continue to provide a workable framework to govern the admission of trial evidence. However, at this point, the "excited utterance" and "present sense impression" exceptions should be left alone—they serve their indented purposes, notwithstanding their flaws.

It would be one thing if there was some indication that the Rules in their current formulation result in a plethora of unjust convictions or trial outcomes, but that is simply not the case.¹⁵⁷ Instead, what

¹⁵³ See Richter, *supra* note 92, at 1479.

¹⁵⁴ Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 375 (1992).

¹⁵⁵ See, e.g., Richter, *supra* note 92, at 1475.

¹⁵⁶ See, e.g., Lake, *supra* note 2, at 546–47; see also Melissa Hamilton, Symposium, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 STAN. L. & POL'Y REV. 269, 305 (2015) (discussing that without the hearsay exceptions, evidence will often be insufficient to hold perpetrators accountable in domestic and sexual assault cases); James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 20 LOY. L.A. L. REV. 203, 203 (1995) (addressing the issue of the *res gestae* exception to the hearsay rule during stressful and traumatic situations).

¹⁵⁷ See *The Philip D. Reed Lecture Series Advisory Committee on Evidence Rule: Panel Discussion: Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323, 1367 (2016) [hereinafter *Hearsay Reform Panel Discussion*] (involving a discussion among thirteen

we have is a workable body of evidence law, which provides predictability to practitioners and attempts to provide litigants equal treatment under the law.¹⁵⁸ Rules 803(1) and 803(2) are part of this workable system.¹⁵⁹ As Liesa Richter herself acknowledges, a credible argument can be made that the exceptions as they are now serve their intended purpose, despite the reality that unreliable hearsay evidence may at times be admitted.¹⁶⁰ Further, the Rules were codified to serve multiple purposes, the exclusion of unreliable statements being only one of them.¹⁶¹ They were also adopted to serve the purpose of necessity—for instance, by allowing a family member to testify about a person’s family history in order to verify the identity of an immigrant who has no birth certificate or other documentation.¹⁶²

Finally, and most importantly for this discussion, the Rules aim to allow hearsay statements into evidence in instances where the foundation has been adequately provided such that a jury can “make a reasonable judgment about how to weigh the evidence.”¹⁶³ Under any formulation of the rule—whether it be Posner’s Rule 807 discretionary model, Williams’ Rule 804(b)(7), or Richter’s trustworthiness exception—some unreliable evidence is bound to be admitted.¹⁶⁴ Therefore, at some point we have to trust the trial judge on threshold issues of admissibility and the jury to weigh the credibility of admitted hearsay testimony, in light of the particular facts of a case.¹⁶⁵ As law professor Ronald J. Allen put it:

I think the dogmatic slumber . . . that the legal system ought to wake from is not these hundred-year-old folk psychology notions of hearsay exceptions that might be disproven by—or disverified to some extent by—some recent study. The dogmatic slumber is that you should stop treating jurors in such a patronizing way.¹⁶⁶

panelists, including both Judge Posner and Liesa Richter) (“I don’t think we need it. I look around and I ask how many bad cases—how many bad decisions—have there been because evidence that fit within the current exceptions was admitted? . . . [I]t doesn’t appear to be bad at all. Jurors have done a pretty good job of dealing with what we now admit.”).

¹⁵⁸ *See id.* at 1364–65.

¹⁵⁹ *See* FED. R. EVID. 803(1), (2).

¹⁶⁰ *See* Richter, *supra* note 92, at 1475.

¹⁶¹ *See Hearsay Reform Panel Discussion, supra* note 157, at 1365.

¹⁶² *See id.*

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 1344.

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In sum, it is essential for the well-being of the profession, litigants, and society at large that the legal community be willing to reconsider long standing practices if new information comes to light that undermines the justification for the existence of a law in the first place. However, when the relevant statistical evidence is unsettled and inconsistent, the best approach is to play it safe, so to speak. Although Posner's 2014 concurring opinion in *Boyce* has sparked conversation among scholars and prompted the publication of numerous articles, at this point there is no need to continue "sounding the alarm." The "excited utterance" and "present sense impression" exceptions to the rule against hearsay should, for now, be left to rest.