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Posnerian Hearsay: Slaying the Discretion Dragon

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POSNERIAN HEARSAY: SLAYING THE DISCRETION DRAGON

*Liesa L. Richter**

Abstract

Distinguished jurist and scholar, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit penned a concurrence in *United States v. Boyce*, 742 F.3d 792 (7th Cir. 2014), in which he launched a scathing attack on the scheme of categorical hearsay exceptions embodied in the Federal Rules of Evidence. After characterizing the existing hearsay regime as bad “folk psychology,” Judge Posner called for the repeal of categorical hearsay exceptions in favor of case-by-case determinations about the “reliability” of particular hearsay statements by trial judges. Prior to adoption of the Federal Rules, evidence experts debated whether a case-by-case or categorical approach to hearsay exceptions was superior. Judge Posner’s concurrence in *Boyce* resurrects that debate. Recent evidence scholarship highlights differences of opinion regarding the operation and propriety of specific hearsay exceptions within the Federal Rules of Evidence. Not until the gateway question raised in *Boyce* about the proper structure of the hearsay regime is resolved may the debate proceed concerning which hearsay exceptions belong in a categorical regime fit to serve the twenty-first century.

This Article explores Judge Posner’s proposal through an economic lens, specifically highlighting the costs and benefits of the purely discretionary approach he proposes. On the cost side of the ledger, the article points out the decrease in predictability that a case-by-case reliability approach to hearsay would create and examines the litigation consequences of such decreased information flow. This Article also cautions against the damage to consistency and fairness certain to follow case-by-case consideration of all hearsay. Further, this Article highlights the scant benefits of a discretionary approach to hearsay. The Article concludes that Judge Posner’s proposal represents a bad bargain for the law of evidence and suggests that efforts to reform the hearsay regime would be more effectively focused on modifying existing categorical

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exceptions or in pursuing a truly new paradigm for hearsay evidence that eliminates amorphous considerations of “reliability” altogether. Thus, the Article urges the rejection of the purely discretionary model for evaluating hearsay evidence once and for all and seeks to stimulate thought about hearsay reforms that move evidence law forward.

INTRODUCTION	1863
I. HEARSAY: THAT WAS THEN; THIS IS NOW	1868
A. <i>Common Law</i>	1869
B. <i>Rules of Evidence</i>	1870
C. <i>Criticisms of the Categorical Hearsay Model</i>	1874
II. THE SEVENTH CIRCUIT WEIGHS IN: <i>UNITED STATES V. BOYCE</i>	1876
A. <i>The Case Against Boyce</i>	1876
B. <i>The Seventh Circuit Opinion</i>	1877
C. <i>Judge Posner’s Concurrence</i>	1879
III. THE POSNER PROPOSAL DECONSTRUCTED	1881
A. <i>The Economics of Posnerian Hearsay: Measuring the Cost</i>	1882
B. <i>Reliability Is in the Eye of the Beholder</i>	1886
C. <i>The Futility of It All</i>	1891
IV. SLAYING THE DISCRETION DRAGON: A WAY FORWARD FOR HEARSAY DOCTRINE	1894
A. <i>The Devil We Know: The Case for the Categorical Approach</i>	1895
B. <i>Hope Springs Eternal: Modernizing the Categorical Regime</i>	1896
C. <i>Judges Tend to Be Curious</i>	1901
D. <i>Breaking Up Is Hard to Do</i>	1903
E. <i>Brave New World: A Hearsay Paradigm Shift</i>	1904
CONCLUSION.....	1907

INTRODUCTION

*A teenager tweeting about events or activities at the very moment that she observes them is likely to give a reliable account of those events or activities.*¹

*A 911 caller suffering significant distress following a violent assault is likely to provide a reliable account of that assault.*²

*A patient would not lie to a treating physician about his symptoms or other relevant habits and history.*³

All but the most credulous would reject the universality of these statements. Characterized most benignly, such truisms about human behavior are overly broad, if not patently fictional. Yet, these statements represent just a few of the assumptions underlying hearsay exceptions routinely applied to admit hearsay evidence in federal court.⁴

American hearsay doctrine is complex and sometimes counterintuitive, consisting of a prohibition on hearsay evidence punctuated by dozens of hearsay exceptions authorizing the admission of certain categories of hearsay statements in federal trials.⁵ Mastery of the maze of hearsay exceptions embodied in the Federal Rules of Evidence (Federal Rules) is an important rite of passage for American law students and a hallmark of an accomplished trial attorney.⁶ Lauded as the law's most "celebrated nightmare," the American hearsay regime has drawn considerable criticism from the bench, bar, and academy due to its byzantine structure and antiquated requirements.⁷ Numerous scholars and judges have explored proposals for reform. Some have suggested modest

1. See FED. R. EVID. 803(1) (providing a hearsay exception for present sense impressions).

2. See FED. R. EVID. 803(2) (providing a hearsay exception for excited utterances).

3. See FED. R. EVID. 803(4) (providing a hearsay exception for statements made for purposes of medical treatment or diagnosis).

4. See FED. R. EVID. 803(1)–(2), 803(4) (providing hearsay exceptions for present sense impressions, excited utterances, and statements made for purposes of medical diagnosis or treatment, respectively).

5. See FED. R. EVID. 802 (prohibiting admission of hearsay evidence unless otherwise provided by federal statutes, rules of evidence, or Supreme Court rules); FED. R. EVID. 801(d)(1)–(2), 803, 804, 807 (providing for the admissibility of certain hearsay statements).

6. See David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 1 [hereinafter Sklansky, *Hearsay's Last Hurrah*] (opining that lawyers sometimes develop a "fondness" for the "oddities of hearsay law" but that it is the sort of "affection a volunteer docent might develop for the creaky, labyrinthine corridors of an ancient mansion, haphazardly expanded over the centuries"); David Alan Sklansky, *What Evidence Scholars Can Learn from the Work of Stephen Yeazell: History, Rulemaking, and the Lawyer's Fundamental Conflict*, 61 UCLA L. REV. DISCOURSE 150, 159 (2013) [hereinafter Sklansky, *What Evidence*] ("[I]n terms of forbidding mystery is there any parallel to the law of hearsay anywhere in the law school curriculum?").

7. See Sklansky, *Hearsay's Last Hurrah*, *supra* note 6, at 11 (quoting PETER MURPHY, EVIDENCE AND ADVOCACY 24 (5th ed. 1998)) (internal quotation marks omitted).

reforms to the existing hearsay system.⁸ Others have crafted thoughtful proposals for the complete transformation of the hearsay regime.⁹

Joining the chorus of hearsay dissidents, a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit recently echoed oft-repeated critiques of two commonly utilized exceptions to the hearsay rule: the present sense impression exception and the excited utterance exception. In its opinion in *United States v. Boyce*, the Seventh Circuit panel posited that both hearsay exceptions rest upon highly suspect assumptions supported only by “folk psychology.”¹⁰ Judge Richard Posner, a distinguished and influential jurist and scholar, penned a separate concurrence for the purpose of amplifying his concerns about both hearsay exceptions.¹¹ In his concurrence, Judge Posner proposed the repeal of the intricate system of categorical hearsay exceptions in the Federal Rules.¹² He suggested simplifying hearsay doctrine by creating a single hearsay exception that would admit hearsay based upon a trial judge’s assessment of the reliability of particular hearsay statements

8. See, e.g., Jeffrey Bellin, *The Case for eHearsay*, 83 *FORDHAM L. REV.* 1317, 1318–20 (2014) [hereinafter Bellin, *Case for eHearsay*] (proposing the addition of an ehearsay exception to the existing hearsay regime to allow for increased flow of electronic communications into the trial process); Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 *U. PA. L. REV.* 331, 337–38 (2012) [hereinafter Bellin, *Facebook, Twitter*] (advocating a corroboration limitation on the present sense impression exception to control flow of electronic hearsay); Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 *FLA. ST. U. L. REV.* 509, 534 (1997) (advocating the substantive admissibility of all prior consistent statements admitted to rehabilitate); Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 *HOW. L.J.* 319, 325–26 (2009) [hereinafter Imwinkelried, *The Need to Resurrect*] (decrying judicial retreat from present sense impression); Liesa L. Richter, *Seeking Consistency for Prior Consistent Statements: Amending Federal Rule of Evidence 801(d)(1)(B)*, 46 *CONN. L. REV.* 937, 942–43 (2014) [hereinafter Richter, *Seeking Consistency*] (proposing revisions to the amended hearsay exception for prior consistent statements).

9. See, e.g., Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 *MINN. L. REV.* 723, 724 (1992) (suggesting a hearsay model based upon a determination about which party should bear the cost of producing the hearsay declarant); Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 *OR. L. REV.* 723, 774–78 (1992) (proposing the broadening of admissible hearsay with procedural protections); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 *MICH. L. REV.* 51, 54 (1987) (proposing to expand the admissibility of hearsay in civil cases); Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 *B.U. L. REV.* 893, 896 (1992) (proposing a hearsay framework designed to determine when hearsay evidence constitutes the best available evidence); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 *CALIF. L. REV.* 1339, 1341–42 (1987) (suggesting the admission of more factual information to assist juries in evaluating hearsay in place of the restrictive exclusion of hearsay evidence).

10. 742 F.3d 792, 796 (7th Cir. 2014) (“[A]s with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously.” (quoting *Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir. 2004))).

11. *Id.* at 799 (Posner, J., concurring).

12. *Id.* at 802.

proffered at trial in place of a classification-based system in which the category to which a particular hearsay statement belongs drives admissibility.¹³

Recent evidence scholarship highlights differences of opinion regarding the operation and propriety of specific hearsay exceptions within the existing categorical approach taken by the Federal Rules.¹⁴ With the explosion of electronically stored communications, much of the modern debate focuses on the problems of admitting electronic communications, or “eHearsay,” through traditional categorical hearsay exceptions.¹⁵ The recent Seventh Circuit opinion in *Boyce*, however, raises a more fundamental issue that has long been a source of debate among evidence scholars: whether the categorical construct for the admissibility of hearsay evidence adopted by the Federal Rules is the optimal approach to hearsay evidence. While Judge Posner’s critique of the categorical hearsay regime is not entirely novel, harsh criticism from such a respected quarter threatens to undermine public confidence in the Federal Rules. Not until scholars lay to rest this gateway question about the proper structure of a hearsay regime may the debate proceed concerning which hearsay exceptions belong in a categorical regime fit to serve the twenty-first century.

This Article examines Judge Posner’s proposal to abandon the existing categorical hearsay exceptions. Although some criticisms of the existing hearsay exceptions may be well-founded and may indeed extend beyond the two exceptions treated in *Boyce*, it is impossible to determine whether those shortcomings militate in favor of a particular reform without significant exploration of the proposed alternative. This Article uses an economic lens to examine Judge Posner’s proposed alternative, specifically highlighting the costs and benefits of the purely discretionary approach he proposes. On the cost side of the ledger, this Article points out the decrease in predictability that a single catchall approach to hearsay would create. This Article explores the litigation consequences of such decreased information flow about the admissibility of evidence in both criminal and civil cases. In addition, this Article laments the serious harm to consistency and fairness certain to result from case-by-case consideration of all hearsay.

13. *Id.*

14. *See, e.g.,* Bellin, *Case for eHearsay*, *supra* note 8, at 1327–35 (describing the debate over the eHearsay proposal); Steven W. Tepler, *Testable Reliability: A Modernized Approach to ESI Admissibility*, 12 AVE MARIA L. REV. 213, 225 (2014); Richter, *Seeking Consistency*, *supra* note 8, at 940.

15. *See, e.g.,* Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7, 9–10 (2013) [hereinafter Bellin, *eHearsay*]; Colin Miller, *No Explanation Required? A Reply to Jeffrey Bellin’s eHearsay*, 98 MINN. L. REV. HEADNOTES 34, 56–57 (2013). *But see* Liesa L. Richter, *Don’t Just Do Something!: E-hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657, 1660–62 (2012) [hereinafter Richter, *Case for Caution*].

After exploring the costs of case-by-case treatment of hearsay evidence, this Article highlights the scant benefits of a discretionary approach to hearsay. Free to evaluate the reliability of “particular” hearsay statements uttered by human declarants, trial judges are likely to resort to the same folk psychology that drives the existing system of exceptions. To the extent that they exercise any meaningful control over trial judge hearsay determinations, appellate courts may craft common law exceptions to the hearsay rule that strongly resemble those that Judge Posner seeks to displace. Indeed, the hearsay exceptions embodied in the Federal Rules largely derive from categories of hearsay admissible during the common law era preceding the Federal Rules.¹⁶ Judge Posner’s proposal for reform in *Boyce* thus threatens to be a costly exercise in futility. This Article ultimately concludes that a single discretionary hearsay 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.¹⁷

A thoughtful weighing of the merits and demerits of a discretionary approach to evidence decisions, and the admissibility of hearsay specifically, preceded the adoption of the Federal Rules.¹⁸ Following years of study, a distinguished advisory committee determined that individualized treatment of hearsay statements involved “too great a

16. See 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:66, at 560 (4th ed. 2013) (“Most of [the hearsay exceptions in Federal Rule of Evidence 803] are restatements of exceptions that had evolved at common law.”).

17. Recent rule making has revolved around reducing mounting litigation costs. See, e.g., FED. R. EVID. 502 advisory committee’s note (stating that the 2008 rule of evidence “responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive”); REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf> (including Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice & Procedure (June 14, 2014) (describing proposed amendments to discovery rules and noting public comment that disproportional litigation costs bar many from access to federal courts)).

18. See Comm. on Rules of Practice & Procedure, Judicial Conference of the United States, Rules of Evidence: *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the U.S. District Courts*, 30 F.R.D. 73, 95, 109 (1962) [hereinafter Preliminary Report]; Edward J. Imwinkelried, *The Golden Anniversary of the “Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts”: Mission Accomplished?*, 57 WAYNE L. REV. 1367, 1368–69 (2011) [hereinafter Imwinkelried, *The Golden Anniversary*]; see also Josh Camson, *History of the Federal Rules of Evidence*, PROOF, Spring 2010, available at https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html (last visited May 25, 2015).

measure of judicial discretion.”¹⁹ Judge Posner’s proposal seeks to rehash that debate, to discard forty years of hearsay doctrine, and to venture down the discretionary hearsay road less traveled. This back-to-the-future approach to hearsay reform fails to move the law forward. Thus, this Article posits that the discretionary methodology proposed by Judge Posner in *Boyce* represents a hearsay model that was amply debated in the pre-Rules era, that failed to gain approval as an efficient and predictable roadmap for the admission of hearsay evidence, and that should be laid to rest once and for all.

This Article does not suggest, however, that existing hearsay doctrine is perfect or that it should remain eternally entrenched in what some may view as antiquated “dogma.”²⁰ Rather, this Article demonstrates that rational reasons exist for continuing to experiment with a categorical model for admitting hearsay. Additionally, this Article outlines the mechanisms available to improve and refine that hearsay model to address some of the concerns raised by Judge Posner in *Boyce*. This Article posits that there is cause for optimism concerning modifications and interpretations within the categorical regime that will equip that regime to deal with hearsay evidence of the twenty-first century.

This Article, therefore, cautions that it is wise to tread carefully in making any sweeping reforms to the hearsay scheme that litigants and judges have been utilizing for forty years under the Federal Rules. That said, should a continued effort to refine and improve the categorical hearsay exceptions fail to yield coherent and supportable outcomes, an alternative to the categorical approach certainly could be considered. Importantly, to move the law forward, any overhaul of the hearsay regime should *increase* the predictability and consistency of hearsay doctrine to facilitate the fair and efficient valuation and resolution of lawsuits. Scholars have offered thought-provoking proposals for the complete transformation of hearsay doctrine.²¹ Many of those alternatives could realize the critical goal of increasing the predictability and rationality of hearsay doctrine by eliminating a slippery reliability filter for admitting hearsay evidence. In sum, while it is time to discard a discretionary approach to hearsay evidence, the search for potential improvements to the existing hearsay regime is a game that is worth the candle.

Part I of this Article traces briefly the common law evolution of hearsay doctrine to the enactment of the Federal Rules in 1975. Part I also describes the categorical hearsay regime embodied in the Federal Rules, as well as common criticisms of that model. Part II examines the Seventh

19. *Advisory Committee’s Introductory Note on Hearsay Problem*, in 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 802App.100 (Joseph M. McLaughlin ed., 2d ed. 2002) (compiling the legislative history of Rule 802).

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

21. *See* sources cited *supra* note 9.

Circuit's opinion in *United States v. Boyce*, highlighting Judge Posner's concerns about the present sense impression and excited utterance exceptions to the hearsay rule. In addition, Part II lays out Judge Posner's tripartite proposal for reform, which calls for a discretionary case-by-case evaluation of hearsay evidence. Part III of this Article identifies the consequences of the reform suggested by Judge Posner in *Boyce*, emphasizing valuation difficulties and decreased litigation efficiency likely to result from such a change. Although Judge Posner's proposed reform tempts with an elegant and simplistic antidote to the complexity of the Federal Rules, Part III posits several reasons why this proposed alternative remains inferior to the existing hearsay regime. Part IV theorizes about the fundamental failure of the Posner proposal to move the law forward and explores alternative avenues for addressing perceived deficiencies in the existing hearsay regime more directly and efficiently. In conclusion, this Article urges the rejection of the purely discretionary model for evaluating hearsay evidence once and for all and seeks to stimulate thought about hearsay reforms that move evidence law forward.

I. HEARSAY: THAT WAS THEN; THIS IS NOW

Hearsay may be defined simply as an out-of-court statement of a person that is offered during trial for the purpose of proving the truth of that prior statement.²² For example, when a prosecutor offers at trial a victim's statements to a 911 operator recounting an assault to prove that the assault actually occurred, those statements constitute hearsay evidence.²³ Because of concerns regarding the reliability of such out-of-court statements and the difficulty in evaluating them fairly without contemporaneous cross-examination of the speaker or "declarant," the American legal system has long prohibited the admission of hearsay, deeming it an unreliable "tale of a tale."²⁴ At the same time, the American system has recognized exceptions to the hearsay prohibition in circumstances where the reliability of and need for hearsay statements is paramount.²⁵ The struggle to separate the admissible from the inadmissible in the realm of hearsay has raged for centuries and remains

22. FED. R. EVID. 801(a)–(c).

23. See *Boyce*, 742 F.3d at 796–98 (majority opinion) (noting that statements made to a 911 operator by *Boyce*'s girlfriend constituted hearsay evidence requiring hearsay exceptions to admit them).

24. GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 244, at 539 (Kenneth S. Broun ed., 7th ed. 2014).

25. 5 WEINSTEIN & BERGER, *supra* note 19, § 802App.100 ("The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness.").

ongoing in the American contemporary trial system.²⁶ Today, the Federal Rules govern the admissibility of hearsay evidence in federal court, and the majority of states largely follow the Federal Rules' model.²⁷

A. Common Law

The codification of the rules of evidence is a recent phenomenon in the United States.²⁸ Before the enactment of the Federal Rules in 1975, evidence rules were largely the product of judicial decisions defining admissible and inadmissible evidence.²⁹ It was within the context of this common law of evidence that modern hearsay doctrine was shaped.³⁰ Prior to the Federal Rules, federal cases uniformly recognized a general prohibition on hearsay evidence.³¹ Those decisions also carved out exceptions to that prohibition.³² For example, cases consistently accepted the “former testimony” and “dying declaration” exceptions to the hearsay rule imported from English common law.³³ The decisions also contemplated the admissibility of many other hearsay statements, including those comprising part of the *res gestae* of underlying events being litigated.³⁴ The famous Supreme Court decision in *Mutual Life Insurance Co. v. Hillmon* endorsed an exception for hearsay statements

26. See John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1186 (1996) (noting examples of hearsay in seventeenth-century papers).

27. 1 MUELLER & KIRKPATRICK, *supra* note 16, at 3 (noting that forty-five states now have evidence codes closely tracking the federal rules).

28. 1 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 2–4 (7th ed. 1998) (detailing the adoption of the Federal Rules in 1975).

29. *Id.* at 2 (describing the approach to evidentiary decision-making under former Federal Rule of Civil Procedure 43 and Federal Rule of Criminal Procedure 26 prior to enactment of Federal Rules).

30. See *supra* note 16; see also Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437, 2439 (2000) (tracing the history of twentieth-century evidence reform through the codification efforts led by Professor James Bradley Thayer, Dean John Henry Wigmore, and Professor Edmund M. Morgan and the ultimate drafting of the Federal Rules of Evidence in 1975).

31. See DIX ET AL., *supra* note 24, § 244, at 539 (noting the characterization of the hearsay ban as “that most characteristic rule of the Anglo-American Law of Evidence” (quoting 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364 (James H. Chadbourne rev. ed. 1974))).

32. See *id.* § 253, at 243 (“The traditional solution has been to recognize numerous exceptions where ‘circumstantial guarantees of trustworthiness’ justify departure from the general rule excluding hearsay.” (quoting WIGMORE, *supra* note 31, § 1422)).

33. See, e.g., *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972) (admitting former testimony into evidence); *United States v. Barnes*, 464 F.2d 828, 831 (D.C. Cir. 1972) (admitting dying statement of murder victim into evidence).

34. See Edmund M. Morgan, *Res Gestae*, 12 WASH. L. REV. 91, 91–92 (1937).

describing the contemporaneous feelings or intentions of the declarant.³⁵ In addition, hearsay exceptions for party admissions, business records, declarations against interest, and many others recognized under the Federal Rules can be traced to pre-Rules practice.³⁶

The common law approach to evidentiary doctrine proved challenging to navigate, and critics described it as a “scattered” and disorganized “crazy quilt.”³⁷ Ascertaining the admissibility of a particular piece of evidence often required sorting through “voluminous” cases and treatises to “search[] out” an applicable rule.³⁸ Critics of the common law approach to evidence law suggested that evidence principles needed to be “easily accessible” to enable judges and lawyers to apply them “quickly in the heat of battle.”³⁹ Some commentators advocated a “‘pocket bible’ of the law of evidence” in the form of a “brief pamphlet” as a tool that lawyers and judges could quickly read and digest for real-time application at trial.⁴⁰

B. Rules of Evidence

Because of the difficulties inherent in locating and applying an increasingly complex common law of evidence, incentives to codify the rules of evidence mounted.⁴¹ Even among proponents of codification, however, views differed sharply regarding the optimal form and appropriate substance for rules of evidence.⁴²

35. 145 U.S. 285, 295 (1892).

36. See *United States v. Coppola*, 526 F.2d 764, 769 & n.2 (10th Cir. 1975) (discussing the party admission exception and citing pre-Rules precedent); *Donnelly v. United States*, 228 U.S. 243, 273 (1913) (discussing the hearsay exception for a declaration against a pecuniary interest); see also *Federal Business Records Act*, 28 U.S.C. § 1732(a) (1970) (authorizing admission of business records prior to the enactment of the Federal Rules).

37. E.g., Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937); see also *Preliminary Report*, *supra* note 18, at 73, 115.

38. See Imwinkelried, *The Golden Anniversary*, *supra* note 18, at 1372–73 (quoting *Preliminary Report*, *supra* note 18, at 109–10).

39. See *id.* at 1369 (quoting *Preliminary Report*, *supra* note 18, at 115); *Preliminary Report*, *supra* note 18, at 109; see also SALTZBURG ET AL., *supra* note 28, at 2 (“[M]uch of the impetus toward legislation arose from enactment of the Federal Rules of Civil Procedure in the late 1930’s.”).

40. See Imwinkelried, *The Golden Anniversary*, *supra* note 18, at 1373; 21 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5006 n.41 (2d ed. 2005).

41. See *supra* note 38.

42. Swift, *supra* note 30, at 2457–58 (discussing the debate between Dean Wigmore and Professor Morgan regarding the adoption of common law standards as well as the desired specificity of evidence rules); see also 1 MUELLER & KIRKPATRICK, *supra* note 16, § 1.2, at 11–13 (describing the tension between advocates of more restrictive rules and proponents of trial judge discretion).

Dean John Henry Wigmore, noted twentieth-century evidence scholar, favored the restatement of common law evidence standards in the form of highly specific rules, detailing appropriate evidentiary rulings in particularized factual contexts that would significantly restrict trial judge discretion.⁴³ In keeping with this philosophy, Dean Wigmore drafted a “Code of Evidence”⁴⁴ that proved ponderous and unmanageable.⁴⁵ Professor Edmund M. Morgan, Dean Wigmore’s contemporary, also favored codification of the law of evidence but espoused a different philosophy.⁴⁶ Professor Morgan expressed little faith in common law evidentiary standards, emphasizing the haphazard process by which they were crafted.⁴⁷ Therefore, Professor Morgan envisioned a code of evidence embodying significant reforms to the common law.

Professor Morgan did not differ from Dean Wigmore merely with respect to the content of an evidence code, but also as to its form. In place of highly particularized standards, Professor Morgan favored more general evidence standards. He envisioned that trial judges would employ such standards to determine the admissibility of evidence in a fact-specific context, thus allowing for greater flexibility and judicial discretion in evidentiary rulings.⁴⁸ Another commentator advocated for even more flexibility in evidentiary decisions, with all details regarding admissibility left to the trial judge.⁴⁹ According to Professor Morgan, the choice in drafting rules of evidence was between “a catalogue, a creed, and a Code.”⁵⁰

Professor Morgan served as the reporter for the American Law Institute’s Model Code of Evidence (Model Code) proposed in 1942, which captured Professor Morgan’s views about appropriate evidence standards.⁵¹ The Model Code employed standards and factors limiting trial judge discretion concerning the admissibility of evidence but did not

43. See Swift, *supra* note 30, at 2457–58 (describing Dean Wigmore’s detailed approach to the “best evidence” rule).

44. JOHN HENRY WIGMORE, A POCKET CODE OF THE RULES OF EVIDENCE (1st ed. 1910).

45. See K.T.F., Book Note, 10 COLUM. L. REV. 494 (1910) (reviewing WIGMORE, *supra* note 44).

46. Swift, *supra* note 30, at 2455, 2457.

47. See *id.* at 2457 (describing Professor Morgan’s view of common law evidence standards).

48. *Id.* (contrasting Professor Morgan’s version of the best evidence rule with Dean Wigmore’s).

49. *Id.* at 2459 (describing Judge Charles E. Clark’s proposal to allow “an even more liberal form of discretion than was envisioned by Morgan”).

50. *Id.* (citing Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 1, 12–13 (1942)).

51. See *id.*; SALTZBURG ET AL., *supra* note 28, at 2.

spell out highly particularized factual scenarios warranting exclusion.⁵² In keeping with Professor Morgan's disdain for the common law of evidence, the Model Code made drastic reforms, including the rejection of the categorical approach to hearsay exceptions.⁵³ Under the Model Code, hearsay statements were admissible regardless of their content or context either when the hearsay declarant was "unavailable" to testify at trial, or when the hearsay declarant was "present and subject to cross-examination" at trial.⁵⁴ The "radical" nature of the hearsay provision in the Model Code,⁵⁵ which expanded the admissibility of hearsay and abandoned traditionally recognized categories of admissible hearsay, generated dissent and even "hostility" toward the Model Code.⁵⁶ Accordingly, no state adopted the Model Code.⁵⁷

The Federal Rules became effective in 1975 following eight years of drafting work by a distinguished advisory committee.⁵⁸ The Federal Rules that were proposed for Congressional review represented a compromise in the historical codification debate between Dean Wigmore and Professor Morgan. In terms of form, the Federal Rules eschewed highly particularized rules in favor of broader categorical standards and limitations, thus adopting Professor Morgan's philosophy of a "Code" of evidence rules rather than a "catalogue."⁵⁹ Although the Federal Rules avoided the cumbersome "catalogue" approach to evidentiary rules advanced by Dean Wigmore, they did not create a wide-open "creed" approach that left all decisions about the admissibility of evidence to the discretion of the trial judge.⁶⁰ Some of the Federal Rules, such as Rule 403, expressly grant discretion to trial judges to weigh evidence and exercise judgment according to articulated factors.⁶¹ Others, such as the

52. See MODEL CODE OF EVIDENCE r. 503 (1942).

53. See *id.*

54. *Id.*

55. *Id.* cmt. a.

56. See Sklansky, *Hearsay's Last Hurrah*, *supra* note 6, at 20 ("[The] professional reception [for the Model Rules] varied between chilliness and heated antagonism." (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 153 (1947)) (internal quotation marks omitted)).

57. SALTZBURG ET AL., *supra* note 28, at 2 ("[N]o jurisdiction ever adopted the Model Code of Evidence."). The National Conference of Commissioners on Uniform State Laws proposed Uniform Rules of Evidence in 1953, which were simpler and less radical than the Model Code. *Id.* at 3. Only a "handful of jurisdictions" adopted evidence codes based upon the Uniform Rules. *Id.*

58. *Id.* at 3–4.

59. Swift, *supra* note 30, at 2458–59.

60. *Id.* at 2462.

61. *Id.*

hearsay rules, create categorical restrictions requiring the trial judge to admit or exclude evidence falling within designated parameters.⁶²

The optimal nature of hearsay rules in particular was a topic of intense debate among evidence luminaries of the twentieth century, with some commentators advocating a discretionary approach to the admissibility of hearsay evidence.⁶³ Indeed, a preliminary draft of the hearsay exceptions prepared by the advisory committee adopted a discretionary approach based upon the reliability of proffered hearsay, listing modern categorical exceptions only as “illustrations.”⁶⁴ The shortcomings of discretionary treatment of hearsay evidence ultimately led to the “prescriptive and limiting” categorical exceptions, more in keeping with the “Code” philosophy that underlies the Federal Rules today.⁶⁵

Rule 802 of the Federal Rules prohibits the admission of hearsay evidence, except as provided by federal statutes, the Federal Rules themselves, or other rules prescribed by the Supreme Court.⁶⁶ Rule 801 defines hearsay as a statement “that the declarant does not make while testifying at the current trial or hearing” and that a party offers “to prove the truth of the matter asserted in the statement.”⁶⁷ The hearsay

62. Compare FED. R. EVID. 403 (providing that the court “may exclude relevant evidence if its probative value is substantially outweighed by” certain dangers), with FED. R. EVID. 803(1) (permitting the trial court to admit a hearsay statement that “describ[es] or explain[s] an event or condition, made while or immediately after the declarant perceived it”). For a description of different types of evidence rules affording varying levels of judicial discretion, see Swift, *supra* note 30, at 2462–63.

63. See 4 MUELLER & KIRKPATRICK, *supra* note 16, § 8:66, at 561 (explaining that a preliminary draft of the hearsay rules took “an open approach to hearsay that emphasized the admissibility of reliable hearsay”); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 337–38 (1961) (advocating greater discretionary power in trial judges to admit hearsay evidence and criticizing class-based hearsay exceptions).

64. See Comm. on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the U.S. District Courts and Magistrates*—March 1969, 46 F.R.D. 161, 345 (1969) [hereinafter *Preliminary Draft of March 1969*] (stating that Rule 8-03(a) would have permitted admission of a hearsay statement “if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available”).

65. See 4 MUELLER & KIRKPATRICK, *supra* note 16, § 8:66, at 561 (noting that later drafts of the Federal Rules “abandoned this open approach in favor of the traditional closed one, in which the list of exceptions was prescriptive and limiting rather than exemplary and illustrative”); see also FED. R. EVID. art. VIII advisory committee’s introductory note on the hearsay problem, reprinted in WEINSTEIN’S FEDERAL EVIDENCE, *supra* note 19, § 802App.100, at 802App.-4 (“The Advisory Committee has rejected this [individualized treatment] approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases.”).

66. FED. R. EVID. 802.

67. FED. R. EVID. 801(c).

prohibition continues to rest on concerns about the fact finder's reliance upon out-of-court statements absent the opportunity to evaluate the reliability of those statements during live cross-examination under oath with the declarant's demeanor on display.⁶⁸

This hearsay prohibition is notoriously riddled with exceptions. Five basic categories of hearsay are admissible under the Federal Rules. Certain prior statements of a testifying witness who is subject to cross-examination at trial about those prior statements are admissible "non-hearsay" under the Federal Rules.⁶⁹ Statements made or adopted by an opposing party, its agents, or coconspirators may also be admitted against that party to prove the truth of the matter asserted in those statements.⁷⁰ Rule 803 of the Federal Rules permits twenty-three different types of hearsay statements to be admitted for their truth, regardless of the availability of the declarant, based upon assumptions about the reliability of human statements made in certain contexts or for certain purposes.⁷¹ The present sense impression and excited utterance exceptions criticized in *Boyce* are located in Rule 803.⁷² Five additional exceptions are available for certain hearsay statements when the declarant is unavailable to testify at trial.⁷³ Finally, Rule 807 preserves discretion for a trial judge to admit hearsay not within any of the categorical hearsay exceptions if that hearsay "has equivalent circumstantial guarantees of trustworthiness."⁷⁴

C. Criticisms of the Categorical Hearsay Model

There has been longstanding academic criticism of the categorical hearsay regime contained in the Federal Rules, and many have offered proposals for reform.⁷⁵ Scholars have criticized the over-breadth of the

68. 4 MUELLER & KIRKPATRICK, *supra* note 16, § 8:3, at 28–30 (describing four hearsay risks and the rationale for the hearsay prohibition).

69. See FED. R. EVID. 801(d)(1).

70. See FED. R. EVID. 801(d)(2).

71. See FED. R. EVID. 803; Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 95 B.U. L. REV. 1865, 1910 (2012).

72. See FED. R. EVID. 803(1)–(2); *United States v. Boyce*, 742 F.3d 792, 800–01 (7th Cir. 2014) (Posner, J., concurring).

73. See FED. R. EVID. 804(b).

74. See FED. R. EVID. 807. The "residual exception" to the hearsay rule also requires that the proponent offer the hearsay as evidence of a "material fact" and that it is "more probative" than "any other evidence that the proponent can obtain through reasonable efforts." *Id.* The exception also cautions that the judge should admit such hearsay only when admission serves the "interests of justice" and when the adverse party receives pretrial notice. *Id.*

75. See sources cited *supra* note 9 (citing articles criticizing the current hearsay regime and offering proposals for reform); see also 4 MUELLER & KIRKPATRICK, *supra* note 16, § 8:2, at 26 & n.2 (noting that the "underlying theme" of most commentary is that "more hearsay should be admissible, especially in civil cases").

ban on hearsay evidence.⁷⁶ Echoing a Model Rules' philosophy, some have argued that nothing justifies a prohibition on hearsay evidence when the declarant is either (1) present at trial for the opposing party to cross-examine before the jury or (2) unavailable to testify at trial, making the preferred live testimony impossible.⁷⁷ Scholars also have questioned the hearsay ban's inherent distrust of juries, suggesting that jurors may be capable of discerning and discounting unreliable hearsay.⁷⁸ Many critics have derided the "myth" of the hearsay prohibition, emphasizing the voluminous hearsay exceptions that swallow the Rule.⁷⁹ Numerous commentators have lamented the complicated and labyrinthine structure of the categorical hearsay regime that requires litigants to consult dozens of provisions to assess the admissibility of hearsay evidence.⁸⁰ Finally, critics have questioned the purported justifications for specific categorical hearsay exceptions and the reliability of assumptions about human behavior that support them.⁸¹

76. See 4 MUELLER & KIRKPATRICK, *supra* note 16, § 8:2, at 26 & n.2; Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545, 564 (1998) (advocating broad admissibility of hearsay in civil cases).

77. See Sklansky, *Hearsay's Last Hurrah*, *supra* note 6, at 9–10 (noting the "familiar if discomfiting fact that nothing seems to justify [the hearsay rule]" and opining that a preferential rule requiring live testimony when it is possible is the "more sensible rule"); see also Weinstein, *supra* note 63, at 346 (noting that even Dean Wigmore advocated admitting hearsay of deceased declarants).

78. See Weinstein, *supra* note 63, at 339 (critiquing the categorical approach to hearsay at common law and opining, "Some faith must be reposed in triers to assess the evidence as 'responsible persons' engaged in 'serious affairs.'" (quoting *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 873 (2d Cir. 1938))).

79. See *id.* at 346 ("In the sea of admitted hearsay, the rule excluding hearsay is a small and lonely island."); Myrna S. Raeder, Commentary, *A Response to Professor Swift: The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507, 514–19 (1992) (arguing that the catchall exception to the hearsay rule has eroded the prohibition on hearsay evidence).

80. See, e.g., Morgan & Maguire, *supra* note 37, at 921 (describing the common law hearsay rule as "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists"); Sklansky, *Hearsay's Last Hurrah*, *supra* note 6, at 1 (deriding the "quirky dysfunctionality" of the hearsay scheme).

81. See, e.g., CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 459, 627 (1st ed. 1954) ("[T]he values of hearsay declarations or writings, and the need for them, in particular situations cannot with any degree of realism be thus minutely ticketed in advance. . . . Too much worthless evidence will fit the categories, too much that is vitally needed will be left out."); Friedman, *supra* note 76, at 552 (opining that "few lawyers are satisfied with the cracker-barrel psychology that underlies exceptions like the one for excited utterances"); Morgan, *supra* note 50, at 38–47 (describing how much probative evidence the hearsay rule excludes and how much unreliable evidence of low probative value the categorical hearsay exceptions permit); Weinstein, *supra* note 63, at 339 ("[A] series of independent letters written by disinterested ministers who were eyewitnesses to an event and who are shown to have acute vision, sound memories, and clear powers of communication might well be given more weight than many dying declarations

This last criticism is the one prominently reiterated in the Seventh Circuit's opinion in *United States v. Boyce*.⁸² Concerns about baseless folk psychology underlying the hearsay exceptions prompted Judge Posner to propose a transition to a single hearsay exception that would allow trial judges to evaluate the reliability of hearsay statements on a case-by-case basis, unhindered by the categorical prescriptions in the Federal Rules.⁸³ Although the hearsay rules embodied in the Federal Rules have been under nearly constant attack since their inception, Judge Posner's recent concurrence in *Boyce* represents serious criticism from a distinguished quarter. Importantly, this is not Judge Posner's first attack on the categorical hearsay model.⁸⁴ Increasingly vocal opposition to the governing hearsay rules from a highly respected circuit judge and scholar threatens to erode public confidence in evidence standards and merits thoughtful consideration.⁸⁵

II. THE SEVENTH CIRCUIT WEIGHS IN: *UNITED STATES V. BOYCE*

The criticism of hearsay doctrine in *United States v. Boyce* is significant because it occurred in connection with a routine admission of hearsay evidence in a typical federal prosecution of a convicted felon for possession of a firearm.⁸⁶ Notwithstanding the routine nature of the case, the majority opinion reached out for the opportunity to critique the present sense impression and excited utterance exceptions to the hearsay rule. Judge Posner added a concurrence solely to emphasize that critique and to propose the repeal of the categorical hearsay exceptions.

A. *The Case Against Boyce*

On March 27, 2010, officers responded to a 911 call from defendant Darnell Boyce's girlfriend reporting a domestic battery in which Boyce

or implied admissions which may be made by a party having no knowledge of the event or may have been made many years before by a predecessor in interest who had every motive to lie.”).

82. 742 F.3d 792, 796–97 (7th Cir. 2014) (majority opinion).

83. *Id.* at 801–02 (Posner, J., concurring).

84. See *Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir. 2004) (Posner, J.) (“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.” (quoting Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 916 (2001))).

85. See Jonathan J. Koehler, *Forensic Fallacies and a Famous Judge*, 54 JURIMETRICS 211, 212 (2014) (“Because Judge Posner’s views and analyses are likely to be influential, it is important to examine the arguments that he offers.”).

86. 742 F.3d at 793 (majority opinion). The government also prosecuted defendant Boyce for possession of ammunition. *Id.*

was purportedly “going crazy for no reason.”⁸⁷ During that call, the 911 operator asked whether Boyce had any weapons.⁸⁸ In response to the operator’s questions, Boyce’s girlfriend reported that Boyce had a gun.⁸⁹ After officers arrived at the scene, they observed Boyce running away and pursued him.⁹⁰ During the chase, officers saw Boyce throw a handgun over a garage and into a neighboring yard.⁹¹ After detaining Boyce, officers recovered a .357 Magnum handgun from the area where Boyce had thrown it and found ammunition for that handgun in Boyce’s pocket.⁹²

At trial, officers testified to their pursuit of Boyce, his attempt to dispose of the gun, and his possession of ammunition.⁹³ Boyce’s girlfriend, who had reported the incident to the 911 operator, did not testify at trial.⁹⁴ Instead, the district court permitted the government to play for the jury her hearsay statements to the 911 operator asserting that Boyce possessed a gun.⁹⁵ The district court found that these hearsay statements were admissible as present sense impressions pursuant to Rule 803(1) and as excited utterances pursuant to Rule 803(2).⁹⁶ Boyce was convicted.⁹⁷

B. *The Seventh Circuit Opinion*

Following his conviction, Boyce appealed to the Seventh Circuit, claiming that the admission of the hearsay statements to the 911 operator was erroneous because those statements did not fit within the present sense impression exception or excited utterance exception to the hearsay

87. *Id.*

88. *Id.*

89. *Id.* The 911 operator asked: “Any weapons involved?” to which Boyce’s girlfriend responded: “Yes.” *Id.* After the operator asked what kind of weapons were involved, Boyce’s girlfriend replied: “A gun.” *Id.*

90. *Id.* at 793–94.

91. *Id.* at 794.

92. *Id.*

93. *Id.*

94. *Id.* While Boyce was incarcerated awaiting trial, he wrote a letter to his girlfriend asking her to recant her statements about his possession of a gun and providing her with a “story” she should tell to explain the change in her testimony. *Id.* In his concurring opinion, Judge Posner notes that the government likely did not call Boyce’s girlfriend as a trial witness due to the strong probability that she would recant on the stand and that Boyce likely did not call her to testify because of the likelihood that reference to Boyce’s letter encouraging her to recant would lead to her impeachment. *Id.* at 800 (Posner, J., concurring).

95. *Id.* at 794 (majority opinion).

96. *Id.* at 796.

97. *Id.*

rule.⁹⁸ In affirming Boyce's conviction, a three-judge panel of the Seventh Circuit explored the requirements of the present sense impression and excited utterance exceptions, as well as the theoretical underpinnings of each.⁹⁹

The court noted that the present sense impression exception permits admission of statements "describing or explaining an event or condition, made while or immediately after the declarant perceived it."¹⁰⁰ As the court pointed out: "The theory underlying the present sense impression exception 'is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.'"¹⁰¹ The excited utterance exception permits admission of statements "relating to a startling event" so long as the declarant made the statements "while . . . under the stress of excitement" caused by that startling event.¹⁰² As noted by the Seventh Circuit panel in *Boyce*, the philosophy underlying the excited utterance exception is that a condition of excitement "temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."¹⁰³

After articulating the rationales for both exceptions, the panel opinion proceeded to question the validity of both, referring to "the folk psychology of evidence" that is "difficult to take . . . seriously" and emphasizing the potentially distorting effects of shock and excitement on a declarant's observations.¹⁰⁴ These criticisms notwithstanding, the court recognized that both hearsay exceptions are "well-established" and proceeded to evaluate their applicability to the hearsay statements introduced at Boyce's trial.¹⁰⁵

First, the court evaluated Boyce's claim that the statements to the 911 operator failed to satisfy the Seventh Circuit's interpretation of the present sense impression exception because those statements described his conduct with "calculated narration."¹⁰⁶ Boyce argued that his girlfriend made the statements to the 911 operator with calculated narration because she only reported that he had a gun following questions

98. *Id.* Boyce also challenged his felon in possession convictions by arguing that his civil rights had been restored. *Id.* at 794–95.

99. *Id.* at 796–97.

100. *Id.* at 796.

101. *Id.* (quoting FED. R. EVID. 803 advisory committee's note).

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

103. 742 F.3d at 796 (quoting FED. R. EVID. 803 advisory committee's note) (internal quotation marks omitted).

104. *Id.* (quoting *Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir. 2004)) (internal quotation marks omitted).

105. *Id.*

106. *Id.* at 797.

from the 911 operator about weapons.¹⁰⁷ In considering this argument, the Seventh Circuit noted that a declarant may utter present sense impressions without calculated narration even in response to questions and emphasized that the 911 operator in Boyce's case did not mention guns in questioning Boyce's girlfriend.¹⁰⁸ Still, the court declined to affirm the admission of the 911 statements on the basis of the present sense impression exception, acknowledging that answering questions could increase the chances of calculated narration.¹⁰⁹

The court held, however, that the 911 statements fit within the excited utterance exception and were thus properly admitted.¹¹⁰ The court found that the domestic battery reported to the 911 operator constituted a "startling event" for purposes of the excited utterance exception.¹¹¹ The court also found ample evidence to suggest that Boyce's girlfriend remained under the stress of that event at the time she spoke to the 911 operator.¹¹² Finally, the court rejected Boyce's argument that the statement about his possession of a gun was unrelated to the domestic battery.¹¹³ The court found that the "level of danger posed by [the declarant's] assailant" was undoubtedly related to the battery and within the broad subject matter permitted by the excited utterance exception.¹¹⁴ Accordingly, the court upheld the admission of the 911 statements and affirmed Boyce's conviction.¹¹⁵

C. Judge Posner's Concurrence

Judge Posner wrote separately, concurring in the panel's decision.¹¹⁶ Rather than expressing alternative rationales for the decision, Judge Posner penned a concurrence solely to "amplify" concerns about the present sense impression and excited utterance exceptions to the hearsay rule, opining that "there is profound doubt whether either should be an exception to the rule against the admission of hearsay evidence."¹¹⁷

107. *Id.*

108. *Id.*

109. *Id.* at 797–98.

110. *Id.* at 798.

111. *Id.*

112. *Id.* (noting a police officer's testimony that the declarant "appeared emotional, as though she had just been in an argument or fight").

113. *Id.*

114. *Id.* at 798–99 ("[I]f a domestic battery victim . . . knows her assailant has access to a gun nearby, the potential for more lethal force to be used against her would be a subject likely to be evoked in the description of her assault.").

115. *Id.* at 799.

116. *Id.* (Posner, J., concurring) ("I agree that the district court should be affirmed—and indeed I disagree with nothing in the court's opinion.").

117. *Id.* at 800.

First, Judge Posner noted that the ban on hearsay is designed largely to prevent admission of declarant statements that the opposing party cannot test by cross-examination.¹¹⁸ He emphasized that either the prosecution or defense could have called Boyce's girlfriend to provide the first-hand testimony subject to cross-examination preferred in the American adversarial system.¹¹⁹ Judge Posner did not expressly criticize the present sense impression and excited utterance exceptions for being applicable without regard to the declarant's availability as a witness.¹²⁰ Still, this reference to the availability of Boyce's girlfriend appears to be a strong, if rather obliquely made, suggestion that hearsay exceptions such as the present sense impression and excited utterance should not apply when the declarant can give live testimony at trial.

Judge Posner continued by discrediting the rationales supporting the reliability of present sense impressions and excited utterances. First, Judge Posner questioned the assumption inherent in the present sense impression that contemporaneous observation and speech negates deliberate misrepresentation, pointing to studies suggesting that most lies are spontaneous rather than planned and that "less than one second is required to fabricate a lie."¹²¹ Judge Posner concluded his discussion of the present sense impression exception by stating that it "has neither a theoretical nor an empirical basis; and it's not even common sense—it's not even good folk psychology."¹²²

Judge Posner expressed similar disdain for the excited utterance exception, noting that even the advisory committee notes supporting the exception are equivocal with respect to the effect of excitement upon fabrication.¹²³ Even assuming that the excitement produced by a startling event minimizes self-interest and reflection, Judge Posner highlighted scholarship questioning whether the "distorting effect of shock" might

118. *Id.*

119. *Id.* ("But in this case, either party could have called [Boyce's girlfriend] to testify, and her testimony would not have been hearsay.")

120. *See id.* at 799–802.

121. *Id.* at 800–01 (citing McFarland, *supra* note 84, at 916; 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, 208–09, 214 (2012)). The judge also noted judicial opinions broadly interpreting the timing requirement of the present sense impression to encompass "periods as long as 23 minutes." *Id.*

122. *Id.* at 801. Although Judge Posner cited scholarly criticism of the present sense impression in his concurrence, recent scholarship has emphasized the value of contemporaneous hearsay in our technology-driven culture. *See* Bellin, *eHearsay*, *supra* note 15 (proposing a new hearsay exception to broaden admissibility of contemporaneously recorded hearsay statements).

123. *Boyce*, 742 F.3d at 801 (emphasizing that the advisory committee notes provide only that excitement "may produce . . . utterances free of *conscious* fabrication" (quoting FED. R. EVID. 803(2) advisory committee's notes on proposed rule)).

undermine the reliability of excited utterances.¹²⁴ According to Judge Posner, once stripped of their purported justifications, the present sense impression and excited utterance exceptions are nothing more than “judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas.”¹²⁵

Following this scathing indictment of the present sense impression and excited utterance exceptions, Judge Posner offered his vision for improving contemporary hearsay doctrine. In so doing, Judge Posner was clear that he does not favor reducing the amount of hearsay admissible in federal trials.¹²⁶ Rather, Judge Posner opined that trials would proceed more smoothly with a “simpler” and more principled approach to the admission of hearsay than the one embodied in the existing Federal Rules framework.¹²⁷ Dissatisfied with the theoretical underpinnings of the existing hearsay categories, Judge Posner posited a test for the admissibility of hearsay that he suggests rests on more rational foundations free from suspect folk psychology. Judge Posner suggested that allowing the existing “residual” or catchall exception to swallow the remainder of the hearsay provisions in Article Eight of the Federal Rules would constitute a superior and workable approach to hearsay evidence.¹²⁸ Specifically, Judge Posner favors a tripartite inquiry that would admit hearsay evidence whenever a trial judge finds that (1) it is “reliable” hearsay, (2) the jury can “understand its strengths and limitations,” and (3) it will “materially enhance the likelihood of a correct outcome.”¹²⁹

III. THE POSNER PROPOSAL DECONSTRUCTED

Few, if any, would argue that the existing categorical system of hearsay exceptions is perfect. Indeed, many would likely agree with the criticisms levied against the present sense impression and excited

124. *Id.* (citing, among others, Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origin and Attributes*, 66 IOWA L. REV. 869 (1981)).

125. *Id.* at 802. Under the Federal Rules framework, it is difficult to attribute continued application of these hearsay exceptions to “judicial incuriosity.” Judges lack the authority to exclude relevant evidence admissible under the Federal Rules. *See* Edward J. Imwinkelried, *A Brief Defense of the Supreme Court’s Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 281 (1993) (noting that judicial power under the Federal Rules “does not equate with the common-law power to create general exclusionary rules of evidence”).

126. *Boyce*, 742 F.3d at 802 (“I don’t 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.”).

127. *Id.*

128. *Id.*

129. *Id.*

utterance exceptions in the *Boyce* opinion.¹³⁰ Further, similar folk psychology underscores several hearsay exceptions in the Federal Rules. Statements made for purposes of medical treatment that are pertinent to such treatment are likely reliable because who would lie to a doctor?¹³¹ Similarly, statements made with a settled, hopeless expectation of impending death concerning the cause or circumstances of that death are likely reliable because the declarant would not meet his maker with a lie on his lips.¹³² Indeed, the folk psychology lamented by Judge Posner in *Boyce* is the cornerstone of several contemporary hearsay exceptions.

While it is natural and important to critique existing doctrine, it is impossible to evaluate the merits of the hearsay system in a vacuum by virtue of its shortcomings alone. Although the demerits of the existing categorical hearsay system are amply highlighted in *Boyce*, the merits of Judge Posner's alternative hearsay regime remain unexplored in the opinion. To condemn the hearsay regime contained in the Federal Rules in favor of Judge Posner's alternative, it is critical to evaluate the ramifications of accepting Posnerian hearsay. Even assuming that Judge Posner's criticisms of contemporary hearsay exceptions are well-taken, examination of Judge Posner's three-pronged alternative reveals that it is inferior to the existing hearsay regime from the standpoint of litigation economics and justice. Furthermore, adopting the tripartite approach suggested in the *Boyce* concurrence would be unlikely to create meaningful substantive change in hearsay policy notwithstanding a corresponding decrease in efficiency.

A. *The Economics of Posnerian Hearsay: Measuring the Cost*

A likely casualty of adopting a generic reliability approach to hearsay would be litigation efficiency and valuation. The case-by-case hearsay model suggested in *Boyce* undoubtedly would result in an increased expenditure of judicial and litigant resources to ascertain the admissibility of key hearsay evidence and the corresponding value of a case. At a time when mounting costs are diminishing the viability of the trial process as

130. See, e.g., Friedman, *supra* note 76, at 552.

131. See FED. R. EVID. 803(4). The hearsay exception found in Rule 803(4) is, of course, broader than that description implies. The declarant does not need to make the statement to a doctor, and the declarant does not have to be a patient—the individual with the strongest incentive to receive appropriate treatment. Further, an amendment to the exception permits statements made for purposes of “diagnosis” only. See 4 MUELLER & KIRKPATRICK, *supra* note 16, § 8:75, at 676–77.

132. FED. R. EVID. 804(b)(2); see also 5 MUELLER & KIRKPATRICK, *supra* note 16, § 8:124, at 132 n.1.

a vehicle for dispute resolution, evidentiary reforms that promise to *increase* transaction costs should be cause for concern.¹³³

In litigation, some of the principal assets and liabilities come in the form of evidence admissible at trial to prove one's position. Judge Posner's discretionary approach to hearsay evidence would require litigation investors to "buy" into a litigation strategy by filing or defending a lawsuit, although they would learn the true worth of the investment only after the purchase. On the criminal side, such a regime may result in fewer plea bargains with defendants and prosecutors overestimating the strength of a case. On the civil side, early settlements may be eschewed in favor of summary judgment practice designed to ascertain the admissibility of trial evidence.¹³⁴ In both civil and criminal cases, trial judges likely would face increased motions in limine to gauge the admissibility of hearsay pretrial and would need to resort to time-consuming, case-specific reliability analysis to admit hearsay rather than relying upon accepted categorical hearsay exceptions.¹³⁵ In sum, the Posner approach would decrease the information litigants have to value their cases and increase the resources consumed in administering hearsay doctrine.

In contrast, the categorical hearsay regime embodied in the Federal Rules provides potential litigants greater predictability about the admissibility of crucial hearsay evidence. To be sure, it is not possible to make admissibility predictions with perfect precision because even the categorical hearsay exceptions permit the bridled exercise of judicial discretion.¹³⁶ Within the categorical regime, hearsay exceptions contain interpretive issues that may make some *ex ante* assessments difficult. For example, the present sense impression exception requires the hearsay statement to follow the declarant's observation of the described events "immediately," thus requiring judges to evaluate timing on a case-by-case basis.¹³⁷ As Judge Posner aptly notes in *Boyce*, some disparity exists

133. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004) (noting a sixty percent decline in trials since the mid-1980s).

134. See Bellin, *Case for eHearsay*, *supra* note 8, at 1326 (opining that "given ever-expanding dockets and increasing reliance on settlements and guilty pleas," the objections to the discretionary model proposed by Judge Posner "have gained strength since 1969").

135. See Weinstein, *supra* note 63, at 338 (advocating for discretionary treatment of hearsay, while acknowledging the increased burden on trial judges).

136. See *infra* notes 220–21 and accompanying text (discussing trial judge interpretation of categorical exceptions).

137. FED. R. EVID. 803(1) (requiring that the declarant make statements describing an event or condition either as the declarant observes that event or condition "or immediately after").

among judicial interpretations of this crucial timing requirement.¹³⁸ Even under the current hearsay regime, litigants may need to seek a judicial ruling on hearsay evidence outside the core definition of each exception. Still, the highly specific hearsay exceptions and the many federal cases interpreting them make advance judgments about the admissibility of hearsay evidence far more predictable than the open-ended discretionary approach espoused in Judge Posner's *Boyce* concurrence.¹³⁹ Therefore, at the earliest stages of a dispute, participants in the trial process have access to material information central to the valuation of a case. A litigant who can readily measure access to key evidence can make rational and informed judgments about the expenditure of litigation resources.¹⁴⁰

For example, consider a potential plaintiff evaluating whether to sue a car manufacturer following a serious accident that only the plaintiff and the driver of another vehicle involved in the same accident observed. Suppose that the driver of the other vehicle made a statement to an insurance investigator weeks after the accident in which the driver denied fault and claimed that the plaintiff's car swerved into his without warning. Suppose also that the driver was deceased by the time the potential plaintiff considered filing suit and that plaintiff wished to use the hearsay statement to describe the accident and to support her theory that a manufacturing defect in the car caused her to swerve suddenly. This potential plaintiff evaluating her case under the existing categorical hearsay rules likely would conclude that the driver's statement would not constitute admissible evidence available for use at the summary judgment or trial stage of a lawsuit against the car manufacturer because it satisfies none of the specific hearsay exceptions identified in the Federal Rules and appears to be an unlikely candidate for the residual exception.¹⁴¹ Thus, this potential plaintiff would evaluate the merits of her case absent this hearsay statement. Knowing in advance that the driver's hearsay

138. 742 F.3d 792, 800 (7th Cir. 2014) (citing cases allowing time lapses of sixteen and twenty-three minutes between the described event and the hearsay statement).

139. See Imwinkelried, *The Golden Anniversary*, *supra* note 18, at 1371 (noting that within the Federal Rules, a litigator "will find a rule providing an answer to the clear majority of evidentiary questions that arise in federal court").

140. See Bellin, *eHearsay*, *supra* note 15, at 26.

141. Although the Federal Rules preserve important flexibility for admitting hearsay not within a defined hearsay exception, such a self-serving statement by an interested party in response to questioning by an investigator that the party did not make in excitement or contemporaneously would be unlikely to qualify for the residual exception. FED. R. EVID. 807 (admitting hearsay that possesses "equivalent circumstantial guarantees of trustworthiness" to those enjoyed by hearsay statements admissible through Rules 803 and 804); see *Land v. Am. Mut. Ins. Co.*, 582 F. Supp. 1485, 1486 (E.D. Mich. 1984) (excluding a self-serving hearsay statement of an interested party under all traditional exceptions, as well as the residual exception to the hearsay rule).

statement will not be admissible may affect the plaintiff's decision to bring suit at all, depending upon the availability of other evidence to support her theory of the case. Similarly, the ability to assess admissibility in advance could impact settlement valuation of the case, persuading the potential plaintiff to accept a settlement from the car manufacturer early in the proceedings rather than pursuing the case to the summary judgment or trial stage without the helpful hearsay account of the accident.¹⁴²

Conversely, under the discretionary case-by-case approach to hearsay proposed by Judge Posner in *Boyce*, the same hypothetical plaintiff may expend significant resources pursuing a case against the car manufacturer in the hopes that the trial judge will admit the hearsay statement of the deceased driver to corroborate her account of the accident. The plaintiff's counsel may conclude that he can make a credible argument that a hearsay statement by the only other eyewitness made in the weeks following the accident is reliable, capable of valuation by the jury, and likely to lead to a correct outcome, especially in the absence of other evidence describing the accident.¹⁴³ The plaintiff may not only bring a lawsuit, but may also decline to settle the case until the summary judgment or even the trial stage when she is able to obtain a definitive ruling from the judge about the admissibility of the hearsay statement.¹⁴⁴ Faced with a hearsay objection to the driver's statement at such a late stage in the litigation process, a trial judge could find it lacking in the necessary reliability as a self-serving statement of an interested party made after ample time to reflect and in the context of an insurance investigation creating a strong motive to fabricate. Absent the car manufacturer's ability to cross-examine the driver, a judge could exclude the statement. Because of the uncertainty inherent in the Posner approach to hearsay analysis, the plaintiff may arrive at a valuation of her case at this late stage in the litigation process that approximates the valuation she would have made prior to filing suit under the Federal Rules.¹⁴⁵ A settlement at such a late stage for the same amount that the parties would

142. See Imwinkelried, *The Golden Anniversary*, *supra* note 18, at 1374 ("In part, the value of the case is determined by the admissibility of the respective parties' best evidence. To the extent that it is difficult for the parties to evaluate the admissibility of the crucial items of evidence, it will be harder for them to reach common ground as to the settlement value of the case.").

143. See *Boyce*, 742 F.3d at 802 (proposing these three factors for admissibility of hearsay evidence).

144. See Imwinkelried, *The Golden Anniversary*, *supra* note 18, at 1374 ("If the litigator cannot identify the rule determining the admissibility of the vital evidentiary items, he or she must guess as to settlement value.").

145. *Id.* ("To the extent that it is difficult for the parties to evaluate the admissibility of the crucial items of evidence, it will be harder for them to reach common ground as to the settlement value of the case.").

have agreed upon earlier under the Federal Rules represents a net loss of litigant and judicial resources.¹⁴⁶

To be sure, it may be an unusual case that hinges on a single piece of hearsay evidence. Numerous hearsay statements could be at issue in any given federal case; however, the totality of which could be significant in terms of the likely outcome.¹⁴⁷ Evaluating the potential admissibility of each hearsay statement through the lens of a flexible reliability standard is likely to create significant uncertainty as to the hearsay evidence that ultimately will be available at trial. This collective uncertainty promises to impede effective case valuation as illustrated with the single hearsay statement in the example above. At a time when efforts to reform litigation are focused on *decreasing* the mounting costs of the trial process, alteration of the evidence rules in a manner that taxes litigant and judicial resources is ill-advised.¹⁴⁸

B. *Reliability Is in the Eye of the Beholder*

Case-by-case determinations about the admissibility of hearsay would do more than deprive litigants of crucial *ex ante* information needed to evaluate the likelihood of success at trial. Such a flexible standard also would eliminate any meaningful governor on a trial judge's decision to admit or exclude hearsay evidence in any given case. A standard embodying such unbridled flexibility is certain to generate greater inconsistency in admissibility decisions and unfairness to litigants whose fortunes may turn on the assignment of a particular trial judge rather than on the strength of their positions.¹⁴⁹ Deferential appellate review of such discretionary decisions based upon context-specific reliability offers little promise of correcting inconsistencies.

Judge Posner's proposed reform would require a trial judge to evaluate the reliability of particular hearsay statements at trial without the limitations of standardized categories of admissible hearsay.¹⁵⁰ In sympathetic, compelling, or politically charged cases, for example, trial

146. See Weinstein, *supra* note 63, at 338 (acknowledging the increased burden on trial judges in administering a discretionary hearsay regime).

147. Swift, *supra* note 30, at 2476 (noting the increased importance of hearsay evidence in drug and gang related prosecutions).

148. See *Report of the Judicial Conference Committee on Rules of Practice and Procedure*, *supra* note 17.

149. See Swift, *supra* note 30, at 2446–47 (describing “fears that discretionary power will be exercised arbitrarily and unfairly; that broad and ambiguous principles make evidentiary rulings unpredictable to parties preparing for trial and result in inconsistent outcomes; and that the perceived unfairness of inconsistent outcomes, or outcomes dependent on the personality of the judge one happens to draw, could lead to a loss of confidence in the judicial system”).

150. See Sklansky, *Hearsay's Last Hurrah*, *supra* note 6, at 29–30 (describing the Canadian system and the similar ad hoc reliability standard applicable there).

judges would experience inevitable pressure to admit hearsay evidence “needed” to support a case.¹⁵¹ Without standardized hearsay exceptions limiting the trial court’s discretion, a flexible reliability test could easily be manipulated to permit admission of hearsay in almost any case. This could result in some litigants in the federal system having greater access to evidence than other litigants facing different trial judges in less compelling cases. Importantly, it would also mean that opponents of hearsay evidence would enjoy less meaningful protection against the admission of hearsay evidence, thus eroding the hearsay prohibition in Rule 802. While much scholarship has emphasized the potential benefits of broadening the admissibility of hearsay evidence, any such revision to the existing hearsay regime should broaden admissibility expressly and evenly, rather than leading litigants to rely upon a continued hearsay “prohibition” of questionable value.

Judge Posner’s proposed tripartite standard acknowledges the role that a judge’s assessment of the merits of a case must play in administering a flexible reliability approach to hearsay. Judge Posner’s test would instruct trial judges to admit reliable hearsay evidence when it “would materially enhance the likelihood of a correct outcome.”¹⁵² Presumably, a trial judge following this standard should be more inclined to admit hearsay evidence if she determines that the proponent of the hearsay has the better case. Such a standard for the admission of evidence could transform judicial assessments about “correct” outcomes into dangerous self-fulfilling prophecies. The better the judge’s assessment of the merits of a litigant’s position, the more evidence that litigant is likely to have at his disposal. Rather than the narrow judgment focused on the attributes of a particular piece of evidence required by the existing categorical hearsay exceptions, such a flexible approach to hearsay invites a trial judge to prejudge the entire case as a precondition to admitting hearsay evidence.¹⁵³ While perhaps an unavoidable phenomenon in a system

151. See Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1546–48 (2015) (describing a “motivated justice hypothesis” positing that “when the general commitment that judges and jurors have to following legal rules clashes with their own sense of justice in a given case, they may inadvertently perceive, interpret, or construct the circumstances of the case in a manner that enables them to achieve their desired outcome ostensibly within the stated parameters of the law”).

152. *United States v. Boyce*, 742 F.3d 792, 802 (7th Cir. 2014).

153. See Swift, *supra* note 30, at 2465 (“When judges use such a discretionary standard in admitting hearsay, primarily substituting the court’s estimates of the hearsay declarant’s trustworthiness for categorical ‘fit,’ categorical constraints disappear. This raises the specters of the outright evaluation of credibility by judges on a case-by-case basis, inconsistency in outcomes, and potential for unfairness.”). Perhaps Judge Posner intended only to emphasize the importance of reliability with this reference to “correct outcomes.” Still, this additional component of the

administered by human beings, evidence rules ought to be designed to diminish the impact of such judicial evaluations, leaving the crucial task of deciding the case to the fact finder.¹⁵⁴

Of course, the residual or catchall hearsay exception currently embodied in Rule 807 already vests federal trial judges with discretion to admit hearsay statements that do not satisfy the categorical exceptions—and even counsels judges to admit hearsay evidence when doing so will advance the “interests of justice.”¹⁵⁵ Still, Rule 807 guides a trial judge’s exercise of discretion by allowing the admission of hearsay only when that hearsay exhibits “circumstantial guarantees of trustworthiness” “equivalent” to hearsay statements falling within the categorical exceptions.¹⁵⁶ This flexibility permitted in the current hearsay system by the residual exception, however, does not present the same risk of inconsistency and injustice that a lone reliability standard poses.¹⁵⁷

First, a trial judge’s exercise of discretion under the residual exception is cabined by reference to the categorical exceptions. In theory, a hearsay statement should be admitted through Rule 807 only if its trustworthiness equals that of a statement admissible through other established exceptions.¹⁵⁸ Thus, the language of the rule suggests a comparative exercise, requiring a trial judge to assess how a proffered hearsay statement stacks up against statements routinely admitted through other exceptions.¹⁵⁹ Judge Posner has suggested doing away with the categorical exceptions, thus eliminating these important benchmarks for judicial consideration.¹⁶⁰ Rule 807 further restricts the admissibility of hearsay through the residual exception by requiring hearsay statements as “evidence of a material fact” and that are “more probative . . . than any other evidence that the proponent can obtain through reasonable

Posner proposal is capable of great mischief if trial judges can assess hearsay evidence on a purely discretionary basis.

154. *Id.* at 2440 (cautioning “against the seemingly inexorable trend toward the expansion of [judicial] discretion”).

155. FED. R. EVID. 807.

156. *Id.*

157. 5 MUELLER & KIRKPATRICK, *supra* note 16, § 8:140, at 273 (“[T]he catchall comes to us with conditions devised by Congress . . . which are designed to make it less accessible in practice, and to signal that the catchall is to be ‘used very rarely, and only in exceptional circumstances.’”).

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

159. *See id.* Although this comparative exercise does provide important benchmarks for judicial consideration, it too may undermine the categorical exceptions to some degree. *See, e.g.,* United States v. Valdez-Soto, 31 F.3d 1467, 1471–72 (9th Cir. 1994) (emphasizing contemporaneity of hearsay, declarant motivations, and declarant availability for cross-examination in affirming admission of unsworn prior inconsistent statements through the catchall exception).

160. United States v. Boyce, 742 F.3d 792, 802 (7th Cir. 2014).

efforts.”¹⁶¹ The message of Rule 807 comes through loud and clear: It is only to be used sparingly when there is a high degree of both reliability and necessity.¹⁶²

Notwithstanding the design and intent of Rule 807 to limit the use of the residual exception, scholars have suggested that judges have abused the flexibility permitted by the residual exception in compelling cases.¹⁶³ If the limited discretion vested in trial judges through the residual exception has indeed opened the door for increasingly expansive admission of hearsay evidence and decreased predictability, litigants may expect that Judge Posner’s wide-open reliability approach will serve to exacerbate the problem. Because the catchall or residual exception would be the *only* hearsay exception under the Posnerian version of hearsay doctrine, judges could not apply it with caution. Judge Posner proposed essentially a simplification of Rule 807, which would pave the way for hearsay evidence of any stripe so long as it satisfied the trial judge’s notions of trustworthiness. Therefore, adopting the Posner approach would not represent a mere continuation of flexibility already inherent in the Federal Rules, but a significant expansion of judicial discretion with respect to the admission of hearsay evidence.

The Supreme Court’s landmark decision in *Crawford v. Washington* in 2004 highlighted the dangers inherent in a flexible reliability standard for the admission of hearsay evidence.¹⁶⁴ That decision redefined the promise of the Confrontation Clause for criminal defendants faced with hearsay evidence.¹⁶⁵ In articulating a Sixth Amendment standard dependent upon the “testimonial” nature of hearsay statements, the Court rejected the long-standing test established decades earlier in *Ohio v. Roberts*.¹⁶⁶ Essentially, *Roberts* permitted judges to admit hearsay statements against a criminal defendant consistent with the Sixth Amendment if those hearsay statements enjoyed “adequate indicia of reliability.”¹⁶⁷ The chief reason for *Crawford*’s rejection of *Roberts* was

161. FED. R. EVID. 807(a).

162. See Swift, *supra* note 30, at 2464 (pointing out that the advisory committee sought to limit the use of the residual exception to “‘exceptional cases’ where the hearsay had a high degree of both probativeness and necessity”).

163. See Raeder, *supra* note 79, at 514–19 (opining that judicial resort to the catchall exception is eroding the hearsay prohibition); Seigel, *supra* note 9, at 895 (“[C]ourts are resorting to the residual exceptions on an increasingly routine basis in ways clearly not contemplated by Congress.”).

164. 541 U.S. 36 (2004).

165. See *id.* at 40.

166. See *id.* at 66–68 (highlighting *Roberts*’ flaws and declining to apply it); see also Whorton v. Bockting, 549 U.S. 406, 413 (2007) (noting that *Crawford* overruled *Roberts*).

167. *Crawford*, 541 U.S. at 42 (“*Roberts* says that an unavailable witness’s out-of-court statement may be admitted so long as it has adequate indicia of reliability—*i.e.*, falls within a

the nature of the confrontation right as a procedural one, incapable of being satisfied by anything other than the promised cross-examination process when “testimonial” hearsay statements are at issue.¹⁶⁸

Another important reason explored by the Court for rejecting the long-standing *Roberts* doctrine was the malleability of a reliability standard for the admission of hearsay.¹⁶⁹ The Court noted that “[r]eliability is an amorphous, if not entirely subjective, concept” that turns on “which factors the judge considers and how much weight he accords each of them.”¹⁷⁰ Importantly, the Court noted that judges often attach significance to “opposite facts” in assessing the reliability of a hearsay statement.¹⁷¹ Among many examples, the Court highlighted that the Colorado Supreme Court found a hearsay statement reliable in one case because the declarant made it “immediately after” the events in question, while it found a statement reliable in another case precisely because “two years had elapsed” between the events at issue and the hearsay statement.¹⁷² Indeed, the Court described the *Crawford* case as a “self-contained demonstration” of the “unpredictable and inconsistent application” of the *Roberts* reliability standard.¹⁷³ The Court pointed out that the trial court, intermediate appellate court, and highest state court in the *Crawford* proceedings all focused on different factors surrounding the challenged hearsay statements in reaching differing and sometimes opposite conclusions about reliability.¹⁷⁴

The overhaul of hearsay suggested by Judge Posner would involve a case-by-case assessment of the reliability of particular hearsay statements very similar to the Sixth Amendment framework that ruled the day under *Roberts*. It is inconceivable that capable and creative counsel will have difficulty identifying motivational and circumstantial factors weighing for or against the reliability of particular hearsay statements. Further, experienced trial judges could easily articulate reasons for the reliability of almost any hearsay statement, reviewable on appeal only for abuse of discretion.¹⁷⁵ Such a flexible system would afford inadequate protection

‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness.’” (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

168. *Id.* at 61 (explaining that the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination”).

169. *Id.* at 63.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 66.

174. *Id.*

175. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (“We have held that abuse of discretion is the proper standard of review of a district court’s evidentiary rulings.”).

and predictability for litigants. As with Sixth Amendment analysis pursuant to *Roberts*, a rules-based approach to hearsay dependent on amorphous notions of reliability would be driven by those of a multitude of factors a particular judge emphasizes in the analysis. This remade hearsay system would likely produce inconsistent outcomes based upon contradictory factors, such as those described in *Crawford*. Of course, the Sixth Amendment *Crawford* standard would continue to protect criminal defendants from a malleable rules-based standard where testimonial hearsay is at issue.¹⁷⁶ Even outside the confrontation context, however, similar fairness concerns remain about using an approach to hearsay evidence that is so inherently subjective. The Federal Rules are designed to achieve accurate and fair fact-finding across all cases.¹⁷⁷ Based upon the amorphous and malleable nature of a reliability approach to hearsay, Posnerian hearsay would extract a significant price to be paid in fairness.

C. *The Futility of It All*

Adopting the Posner approach threatens to transform the Federal Rules' categorical "Code" governing hearsay evidence into a general "creed," blessing the admission of all reliable hearsay statements.¹⁷⁸ As detailed above, the price of adopting such an approach may be significant in terms of both resources and justice. From an economic perspective, however, the steep cost associated with any strategy alone reveals little about its fundamental merit. Indeed, viewing the costs associated with a change detached from any corresponding benefits is a meaningless exercise. To truly evaluate the merits of Posnerian hearsay, the benefits that it promises to deliver must be factored into the equation.

According to Judge Posner's concurrence in *Boyce*, eliminating hearsay exceptions such as the present sense impression and the excited utterance exceptions would remove arbitrary and irrational hearsay categories from the evidence rules.¹⁷⁹ Judge Posner suggests that these hearsay exceptions lack any "theoretical" or "empirical" basis and are unsupported even by "common sense."¹⁸⁰ Dispensing with categorical hearsay exceptions, some of which are founded upon similar

176. *See Crawford*, 541 U.S. at 61 (decoupling the Sixth Amendment standard from evidence rules) ("[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . .").

177. *See* FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

178. *See supra* note 50 and accompanying text.

179. 742 F.3d 792, 800–01 (7th Cir. 2014) (criticizing rationales for present sense impression and excited utterance exceptions); *see also* Seigel, *supra* note 9, at 898 (characterizing hearsay reform as "urgent" and decrying "the cynicism and contempt for law that is fostered by the firm entrenchment of wholly irrational doctrine at a critical place in legal education and practice").

180. *Boyce*, 742 F.3d at 800–01.

psychological assumptions, would therefore free the evidence rules from such irrational and arbitrary standards and permit a more particularized assessment of hearsay evidence. A more rational approach to hearsay devoid of bad folk psychology certainly sounds like a laudable goal. Indeed, few would argue in favor of the perpetuation of arbitrary and unsupported evidence rules. In sum, the purported benefit of eliminating suspect hearsay exceptions would be a rational and supportable approach to the admission of hearsay evidence.

But, what would replace those arbitrary categorical hearsay exceptions? Pursuant to the Posner approach, eliminating arbitrary exceptions would pave the way for a more rational and particularized judicial assessment of the genuine reliability of every specific hearsay statement offered at trial.¹⁸¹ Rather than basing the admission of hearsay evidence on unsupported assumptions regarding “generic” human behavior, the discretionary model would require targeted assessments about the reliability of specific declarants in crystallized factual contexts.¹⁸² To be sure, arguments that individualized treatment is superior to a one-size-fits-all approach resonate in many contexts. In the education arena, for example, who would argue that generic treatment of all students based upon assumptions about general learning style is superior to individualized instruction based upon the strengths and weaknesses of a particular student?

Apart from the issue of the resources required to administer an individualized system, Judge Posner’s case-specific standard creates a new problem. How should a trial judge determine the reliability of *particular* hearsay statements made by *specific* declarants? What factors should a trial judge consider in deciding whether a specific declarant’s hearsay statement was reliable or unreliable? Presumably, all judges would take the context of the statement into account by considering the following questions: What were the circumstances surrounding the statement? What role did the declarant play in any underlying events? When did the declarant make the statement in relation to underlying events? What motivations was the declarant likely to have had at that time?

The problem with replacing the hearsay exceptions with a reliability test to avoid folk psychology is that human nature and psychology are the only tools available to assess the reliability of hearsay statements uttered

181. See 1 MUELLER & KIRKPATRICK, *supra* note 16, § 1.2, at 11–12 (“[T]here are strong views as well that trial courts can do better without rules, and need broad discretion to reach wise results. Nowhere was the difference between these views more visible than in the gestation of the catchall exceptions.”).

182. Weinstein, *supra* note 63, at 337 (“Wigmore’s rationale . . . makes admissible a *class* of hearsay rather than *particular* hearsay for which, in the circumstances of the case, there is need and assurance of reliability.” (emphasis added)).

by human declarants in a variety of situations. While a case-by-case assessment of reliability may particularize the human psychology inherent in the existing hearsay rules by requiring reference to a specific declarant in a precise context, it cannot avoid assumptions about human psychology. What assurance would litigants have that the particular psychological assumptions employed by the trial judge in assessing reliability are more reasoned and supportable than those embodied in the categorical hearsay exceptions?

Further, a discretionary model would make the psychological assumptions creating trustworthiness less overt. For example, under a flexible reliability standard, a trial judge might find a hearsay statement such as the one admitted against the defendant in *Boyce* to be reliable for many reasons. The trial judge might conclude that the statement was reliable because the declarant had personal knowledge of her encounter with the defendant, and the declarant made her statements in the heat of the moment before she had time to consider the ramifications, as evidenced by her call to 911 and police observations of her demeanor at the scene. Thus, the same considerations used to admit the statement as an excited utterance under Rule 803(2) would be employed to admit the hearsay under a discretionary reliability standard. While litigants would be deprived of a predictable roadmap for the future admissibility of hearsay evidence, imperfect assumptions about human psychology would remain the foundation for specific decisions to admit or exclude such evidence.

To be sure, predictability for litigants under a lone reliability standard would likely improve over time as particular judicial decisions began to coalesce around specific circumstances or attributes giving hearsay statements reliability. Indeed, this is precisely the common law evolution of hearsay that preceded the Federal Rules and from which the existing categorical exceptions were largely derived.¹⁸³ It would be surprising if a transition to entirely judge-driven reliability analysis produced results vastly different from those achieved during the common law era. After a period of time during which federal trials operated under this simplified hearsay rule, the reliability analysis would likely converge around many of the existing categorical hearsay exceptions currently embodied in the Federal Rules.

This final piece of the cost-benefit puzzle suggests that Judge Posner's tempting invitation to simplify hearsay practice represents a bad bargain. The loss of specific hearsay exceptions would decrease the information litigants have available to value cases and predict trial outcomes. Such a decrease in *ex ante* information would require parties to expend already scarce litigation resources to ascertain the value of a

183. See *supra* notes 32–36 and accompanying text.

particular case and the likelihood of success at trial. Likewise, trial judges would be forced to expend additional judicial resources ruling on pretrial motions seeking information about the likely admissibility of hearsay statements. A malleable case-by-case reliability standard also would create inconsistent application of hearsay doctrine across cases and courtrooms and could invite admissibility decisions based upon preconceived judicial assessments of correct outcomes. After paying this high price, the federal trial process would receive little in return. Human psychology would be inescapable, remaining embedded within particularized judicial assessments of reliability. Even more troubling, an experiment with discretionary treatment of hearsay would likely lead the trial process full circle, leaving the evidentiary system right where it started, with common law exceptions to the hearsay rule eerily reminiscent of the categorical exceptions in the Federal Rules.

IV. SLAYING THE DISCRETION DRAGON: A WAY FORWARD FOR HEARSAY DOCTRINE

The costs inherent in a purely discretionary approach to hearsay should be familiar to the educated consumer of evidence law. The need for accessibility and pretrial clarity with respect to evidence standards drove the codification of evidence law in the first place.¹⁸⁴ Furthermore, the optimal nature of hearsay rules was a topic of debate that arose during the original drafting of the Federal Rules.¹⁸⁵ As described above, an early draft of the hearsay exceptions prepared by the advisory committee proposed a discretionary approach based upon the reliability of proffered hearsay, with contemporary exceptions listed as “illustrations.”¹⁸⁶ After considering the advantages and disadvantages of an approach like the one advocated by Judge Posner, the advisory committee proposed the “prescriptive and limiting” categorical exceptions that make up the Federal Rules today.¹⁸⁷

Indeed, the downfall of Judge Posner’s concurrence in *Boyce* is not necessarily its criticism of existing hearsay exceptions. Rather, it is the suggested response to the flaws in existing hearsay doctrine: adoption of a hearsay “creed” that would tell trial judges to trust only their instincts

184. See Imwinkelried, *The Golden Anniversary*, *supra* note 18, at 1372–73 (describing challenges for trial lawyers in a pre-Rules universe and the findings of a preliminary report on the need for evidence rules).

185. See *supra* notes 45–52 and accompanying text (describing the debate over the appropriate nature of evidence rules).

186. See 4 MUELLER & KIRKPATRICK, *supra* note 16, § 8:66, at 561 (explaining that a preliminary draft of the hearsay rules took “an open approach to hearsay exceptions that emphasized the admissibility of reliable hearsay”).

187. *Id.*; see *supra* note 65 and accompanying text.

concerning reliability in evaluating hearsay evidence that the advisory committee rejected as unworkable after years of study.¹⁸⁸ Even assuming the validity of Judge Posner's critique of existing hearsay rules, the question becomes how to address shortcomings in certain categorical exceptions within the "Code" paradigm for evidence rules that has proved largely successful in addressing many of the flaws in the common law approach to evidence.¹⁸⁹ A complete reversal of course to allow discretionary consideration of hearsay on a case-by-case basis fails to capitalize on the lessons learned in the Federal Rules era. Rather than throwing hands up in surrender, reformers should continue to explore opportunities to advance hearsay doctrine for the twenty-first century.

A. *The Devil We Know: The Case for the Categorical Approach*

The most obvious path going forward is to continue riding the categorical hearsay horse that has brought evidence doctrine this far. The categorical approach to hearsay in the Federal Rules may represent the best hearsay compromise possible, even assuming the validity of Judge Posner's criticisms of the present sense impression and excited utterance exceptions. Indeed, Judge Posner's proposal to discard the categorical regime in favor of a purely discretionary approach may be the quintessential case of allowing the perfect to be the enemy of the good.

Notwithstanding imperfect foundations for certain contemporary hearsay exceptions, it may be the height of inefficiency to attempt any significant overhaul of the well-established hearsay regime embodied in the Federal Rules. First, as discussed above, the existing hearsay exceptions provide a general, if not precise, roadmap of admissibility for litigants seeking to value cases and weigh alternatives to trial.¹⁹⁰ While the hearsay compromise reached by the Federal Rules may suffer from defects of folk psychology, the system of highly specific hearsay exceptions defining admissibility by reference to particularized circumstances serves the critical informational role necessary to an efficient litigation market. While there is some question whether an excited utterance is truly reliable in all cases, lawyers often know one when they see it and can develop litigation strategy with a significant degree of clarity about the statement's admissibility. Moreover, Judge

188. See Sklansky, *What Evidence*, *supra* note 6, at 155 (“[I]nvocations of the past in evidence law and scholarship tend all too often to take the form of appeals to lost wisdom.”).

189. See SALTZBURG ET AL., *supra* note 28, at § PT1.04 (“[I]t is fair to state that the goals of codification—increased certainty as to what the rules are, predictability, efficiency, and uniformity of result—have been met in large part, but not completely.”).

190. See *supra* note 139 and accompanying text. *But see* Bellin, *eHearsay*, *supra* note 15, at 25 (suggesting that existing exceptions provide too little certainty to litigants seeking to “forecast trial outcomes”).

Posner's criticisms of the present sense impression and excited utterance exceptions are not attacks on a categorical *approach* to hearsay; rather, they represent attacks on specific *categories* accepted within that system.

Admittedly, Judge Posner's concerns regarding folk psychology may extend beyond the two hearsay exceptions analyzed in *Boyce*. Still, the over-breadth of Judge Posner's proposed revision of hearsay doctrine illustrates its inefficiency. To counteract allegedly faulty psychological assumptions inherent in a few hearsay exceptions, Judge Posner suggests completely dismantling Article Eight of the Federal Rules.¹⁹¹ Although several of the hearsay exceptions rest on assumptions about human psychology, other important exemptions and exceptions to the hearsay prohibition in the Federal Rules do not. For example, admissions by party opponents are admissible under Rule 801(d)(2) in the interests of adversarial fairness, regardless of their inherent reliability.¹⁹² The former testimony of an unavailable declarant is admissible due to the need for the evidence as well as the cross-examination previously afforded to the opponent of the evidence.¹⁹³ In a reform that allows the residual hearsay exception to swallow all others, litigants would also lose the predictability provided by these categories.

A response more narrowly tailored to identifiable shortcomings in particular categorical hearsay exceptions is superior to a transformation that throws out the good with the bad. Working to reimagine or repudiate specific categorical exceptions that lack rational underpinnings may serve to resolve concerns about the modern hearsay regime without eliminating the needed predictability and efficiency created by a categorical model.

B. *Hope Springs Eternal: Modernizing the Categorical Regime*

Notwithstanding the blind adherence to "dogma" and "judicial incuriosity" lamented in *Boyce*,¹⁹⁴ there is reason to be optimistic about revisions to specific categorical exceptions that are not functioning effectively. First, there is an active advisory committee charged with monitoring the operation of the Federal Rules. The committee was

191. *United States v. Boyce*, 742 F.3d 792, 802 (7th Cir. 2014) ("What I would like to see is Rule 807 ('Residual Exception') swallow much of Rules 801 through 806 . . .").

192. FED. R. EVID. 801(d)(2) advisory committee's note.

193. FED. R. EVID. 804(b)(1) advisory committee's note. Of course, previous cross-examination aids reliability. Still, the hearsay exception is driven by the inability to obtain live testimony and the previous opportunity of the opponent to test the hearsay through examination of the declarant rather than by assumptions about the declarant's motivations to give the previous statements. *Id.*

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

reconstituted in 1993 to review and update the rules.¹⁹⁵ Since that time, the committee has proactively monitored the operation of the Federal Rules to identify problem areas and to propose revisions.¹⁹⁶ The advisory committee has collaborated with Congress to address litigation inefficiencies through amendments to the Federal Rules.¹⁹⁷ Additionally, the advisory committee has engaged in long-term monitoring of federal decisions to evaluate the operation of the Federal Rules in the courts and to ascertain the need for modifications.¹⁹⁸ The committee has also sought the input of scholars, judges, and practitioners in identifying the need for amendments to the Federal Rules.¹⁹⁹ The advisory committee completed an ambitious “restyling” project to make the Federal Rules “more easily understood and to make style and terminology consistent throughout the rules.”²⁰⁰ This active oversight has led to numerous amendments to the Federal Rules, including changes to the categorical hearsay exceptions that are the source of Judge Posner’s concerns.²⁰¹ Two recent examples demonstrate that incuriosity and blind adherence to dogma will not impede the modernization of the categorical hearsay exceptions. The advisory committee worked to amend and update the hearsay exceptions covering prior consistent witness statements and declarations against

195. See SALTZBURG ET AL., *supra* note 28, at § PT1.05 (“In 1993, the Judicial Conference, responding to calls from Judges, scholars and practitioners, appointed a new Advisory Committee on the Federal Rules of Evidence.”); see also Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 862 (1992) (calling for a reconstituted advisory committee to oversee the Federal Rules).

196. 1 MUELLER & KIRKPATRICK, *supra* note 16, at x (“In their first twenty years (1975–1995), the Rules changed hardly at all, but the pace of change has accelerated The acceleration reflects the coming in 1993 of the Evidence Rules Advisory Committee, which meets regularly and proposes changes to the Rules almost every year.”). *But see* Paul R. Rice & Neals-Erik William Delker, *A Short History of Too Little Consequence*, 191 F.R.D. 678, 678 (2000) (lamenting the “hands-off approach adopted by the Evidence Advisory Committee”).

197. SALTZBURG ET AL., *supra* note 28, at 6 (noting amendments originating in Congress and generated by the Judicial Conference).

198. Memorandum from the Honorable William K. Sessions, Chair, Advisory Comm. on Evidence Rules, to the Honorable Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure at 1, 3 (Nov. 15, 2014) [hereinafter Memorandum], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV11-2014.pdf> (noting continued monitoring of *Crawford v. Washington* and its progeny, as well as case law concerning admission of personal electronic communications).

199. See *id.* at 2–3 (describing a symposium hosted by the advisory committee at which Professor Jeffrey Bellin proposed additional hearsay exceptions).

200. FED. R. EVID. 101 advisory committee’s note to the 2011 amendment; see 1 MUELLER & KIRKPATRICK, *supra* note 16, at x (noting that the Restyling Project “changed the wording of nearly every provision” in the Federal Rules).

201. See 1 MUELLER & KIRKPATRICK, *supra* note 16, at x–xi (chronicling several recent amendments to the evidence rules, including to the categorical hearsay exceptions).

interest to resolve perceived irrationality within those long-standing categorical exceptions.²⁰²

When the Federal Rules were enacted, Rule 804(b)(3) admitted hearsay declarations against penal interest made by unavailable declarants that were not admissible at common law.²⁰³ The common law dogma rejected such hearsay due to the concern that criminal defendants too easily could fabricate “confessions” to their own crimes by conveniently unavailable declarants.²⁰⁴ Because of the perceived strength of incentives to avoid criminal liability, rule makers recognized the irrationality of foreclosing access to hearsay statements that subject the speaker to criminal liability in a system based upon reliability.²⁰⁵ Therefore, such statements against penal interest were included within the hearsay exception for declarations against interest. To resolve concerns about criminal defendants utilizing fabricated confessions, rule makers added a requirement of “corroborating circumstances that clearly indicate [the] trustworthiness” of hearsay statements against penal interest offered to exculpate the accused in a criminal case.²⁰⁶

This requirement imposed a corroboration obligation on criminal defendants relying on declarations against penal interest, but no corresponding corroboration obligation on prosecutors relying on the same kinds of hearsay statements to implicate the accused.²⁰⁷ As prosecutorial reliance on declarations against penal interest increased, commentators, judges, and litigants became concerned with the anomalous one-way limitation on a criminal defendant’s access to

202. FED. R. EVID. 804(b)(3) advisory committee’s note on the 2010 amendment; FED. R. EVID. 801(d)(1)(B) advisory committee’s note on the 2014 amendment. In addition, the advisory committee is currently considering the amendment or abrogation of the “ancient documents” exception to the hearsay rule in response to durable electronically stored information. *See* Memorandum, *supra* note 198, at 2.

203. FED. R. EVID. 804(b)(3) advisory committee’s note on proposed rule (noting the “refusal of the common law to concede the adequacy of a penal interest” and extending the exception to hearsay statements exposing the declarant to criminal liability).

204. *Id.* (“[O]ne senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant.”).

205. *Id.* (“The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic . . .”).

206. FED. R. EVID. 804(b)(3) (language prior to 2010 amendment); *see* FED. R. EVID. 804(b)(3) advisory committee’s notes on proposed rule (“The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.”).

207. FED. R. EVID. 804(b)(3) advisory committee’s notes on the 2010 amendment (noting that the text of the original rule did not apply the corroboration requirement to all declarations against penal interest).

exculpatory evidence.²⁰⁸ In light of the unforeseen and increasing use of declarations against penal interest by prosecutors, rule makers proposed and ultimately obtained an amendment to Rule 804(b)(3) to level the playing field. A 2010 amendment to the hearsay exception for declarations against interest added a corroboration obligation for prosecutors relying on declarations against penal interest to resolve the irrational and uneven application created by the original exception.²⁰⁹

Even more recently, the advisory committee proposed an amendment to the hearsay exemption for prior consistent statements of testifying witnesses to resolve a seemingly irrational gap in the original rule.²¹⁰ Original Rule 801(d)(1)(B) permitted substantive use of “pre-motive” prior consistent witness statements that served to rebut a charge that the witness recently fabricated trial testimony or acted from a recent improper influence or motive in testifying.²¹¹ The advisory committee’s note to the original rule suggested that substantive treatment of a prior consistent statement was appropriate where the opponent of the statement opened the door to its admissibility with an impeaching attack, and where “no sound reason” existed to prevent its general use once admitted.²¹² In 2013, the advisory committee proposed the expansion of Rule 801(d)(1)(B), noting that prior witness consistencies admitted to rebut types of impeaching attacks, other than the motivational attack described in the original rule, would share the same attributes as those substantively admissible through the original exception.²¹³ Thus, the omission of prior

208. *Id.* (“A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution . . .”).

209. FED. R. EVID. 804(b)(3) (requiring the support of “corroborating circumstances that clearly indicate [the] trustworthiness” of any declaration against penal interest offered “in a criminal case”); *see* FED. R. EVID. 804(b)(3) advisory committee’s notes on the 2010 amendment (“A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.”).

210. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Criminal Procedure, and the Federal Rules of Evidence: Request for Comment 217 (Aug. 2012), *available at* http://federalevidence.com/pdf/FRE_Amendments/2012Amendments/ACR.FRE-Pub-Comment8-2012.pdf.

211. FED. R. EVID. 801(d)(1)(B); *see* *Tome v. United States*, 513 U.S. 150, 155–56 (1995) (interpreting Rule 801(d)(1)(B) to cover “pre-motive” prior consistent statements only).

212. FED. R. EVID. 801(d)(1)(B) advisory committee’s notes on proposed rule.

213. *See* Memorandum from Judge Sidney A. Fitzwater, Chair, Advisory Comm. on Evidence Rules, to the Honorable Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice & Procedure, at 2 (May 7, 2013) [hereinafter May 7, 2013 Memorandum], *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2013.pdf> (noting the “practical problems in distinguishing between substantive and credibility use” for “other rehabilitative statements . . . not admissible under the hearsay exemption”).

consistent witness statements admitted to repair other impeaching attacks from the original rule seemed like an irrational oversight.²¹⁴ To address this perceived gap in the existing hearsay exemption, the advisory committee proposed and obtained an amendment to embrace these similarly situated prior consistent statements, notwithstanding some criticism from judges and lawyers resistant to alterations to the long-standing and well-understood hearsay rule.²¹⁵

These two recent amendments to the hearsay exceptions reveal a realistic path for hearsay reform within the categorical regime. To the extent that judges, litigants, and commentators expose inadequacies in certain categorical exceptions, there is every reason to expect that the advisory committee will take those concerns seriously and consider proposals to address them. If the past twenty years is any indication, the advisory committee will not shy away from making needed reforms due to “incuriosity” or “reluctance to reconsider ancient dogmas.”²¹⁶

Further, there is an active scholarly community in the evidence arena studying the fair and effective operation of the Federal Rules. Commentators—almost too numerous to count—have opined regarding hearsay evidence and have devoted much contemporary scholarship to exploring specific hearsay exceptions within the categorical regime.²¹⁷ As previously noted, the advisory committee has monitored the scholarship and considered proposals for reform arising in the academy.²¹⁸ With an active scholarly community engaged in debate concerning the specific categorical hearsay exceptions, irrational foundations and inadequate requirements underlying those exceptions are certain to be identified. Proposals for revision and repudiation will continue to be advanced and considered regularly.²¹⁹

214. See FED. R. EVID. 801(d)(1)(B) advisory committee’s note on the 2014 amendment.

215. See FED. R. EVID. 801(d)(1)(B)(ii) (allowing substantive use of prior consistent statements offered to “rehabilitate the declarant’s credibility as a witness when attacked on another ground”); see also May 7, 2013 Memorandum, *supra* note 213 (noting that public comment on the proposal was “largely negative” but “sparse”).

216. See *United States v. Boyce*, 742 F.3d 792, 802 (7th Cir. 2014) (“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.”).

217. See, e.g., Bellin, *eHearsay*, *supra* note 15; Bellin, *Facebook, Twitter*, *supra* note 8; Imwinkelried, *The Need to Resurrect*, *supra* note 8; Richter, *Case for Caution*, *supra* note 15; Richter, *Seeking Consistency*, *supra* note 8.

218. See *supra* note 199 and accompanying text.

219. See Memorandum, *supra* note 198, at 5–6 (explaining that the advisory committee will continue monitoring the need for a recent perceptions exception to the hearsay rule).

C. Judges Tend to Be Curious

The categorical hearsay regime allows judges to play a critical role in ensuring the rationality and consistency of the hearsay exceptions. Notwithstanding legitimate concerns about the universality of the psychological assumptions underlying certain hearsay exceptions, those exceptions contain numerous requirements and limitations designed to exclude unreliable evidence. In particularized factual contexts where the generic psychological assumptions supporting a proffered hearsay exception appear suspect, trial judges may resort to the requirements and limitations in the exceptions themselves to exclude such evidence.

For example, if an interested party attempted to offer his own self-serving excited utterance of innocence made shortly after an accident, a judge could exclude the hearsay statement, notwithstanding the exception, by finding that the declarant exhibited inadequate signs of stress or excitement and that the statement appeared to be the product of conscious reflection rather than a spontaneous reaction to the accident.²²⁰ Further, to exclude an anonymous hearsay statement purporting to describe a disputed event as the declarant perceived it, a trial judge could find inadequate evidence to establish the anonymous declarant's personal knowledge and exclude the statement, notwithstanding the present sense impression exception.²²¹ Indeed, Judge Posner imagined a hypothetical present sense impression in his *Boyce* concurrence that Rule 803(1) would likely exclude in similar fashion:

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.²²²

Despite Judge Posner's suggestion that his “lie” about his acquaintance's dog could qualify for admission as a present sense impression, a federal trial judge applying Rule 803(1) would almost

220. In fact, in an opinion penned by Judge Posner, a panel of the Seventh Circuit utilized such an analysis to reject the admissibility of self-serving memos offered to support a company's purported nondiscriminatory rationale for denying plaintiff a promotion. *See Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir. 2004) (“Boulden was hardly under emotional pressure when he was writing these memos, and their length, lucidity, and self-congratulatory tone all refute any inference of spontaneity.”).

221. *See, e.g., United States v. Mitchell*, 145 F.3d 572, 577 (3d Cir. 1998) (explaining that an anonymous note failed to satisfy the personal knowledge requirement of Rule 803(1)); *Miller v. Keating*, 754 F.2d 507, 511 (3d Cir. 1985) (finding inadequate evidence of the declarant's personal knowledge); *People v. Brown*, 610 N.E.2d 369, 374 (N.Y. 1993) (allowing present sense impression by 911 caller “Henry” where responding officer found circumstances that matched Henry's description).

222. 742 F.3d 792, 801 (7th Cir. 2014).

certainly exclude this statement. Responding “yes” to a question about the dog would be unlikely to count as a “description” or “explanation” of an “event or condition.”²²³ Here, the declarant is not explaining that the acquaintance has a dog or describing the dog (as little and yappy for example). Rather, the declarant simply answers “yes” to a question posed about the dog.²²⁴ Further, the fact that the declarant made the hearsay statement in response to a leading question could defeat the immediacy or lack of conscious reflection that is the foundation for the present sense impression exception.

The Seventh Circuit has interpreted the present sense impression exception to require a description of an event or condition “without calculated narration.”²²⁵ The court analyzed the meaning of this “calculated narration” limitation in *Boyce*. The court opined that statements made in response to questions were not automatically disqualified as “calculated narrations” under the present sense impression exception.²²⁶ The court went on to emphasize that Boyce’s girlfriend made the hearsay statement accusing defendant Boyce of possessing a gun in response to “open-ended” questions by a 911 dispatcher about whether the declarant’s attacker had any weapons.²²⁷ However, the Seventh Circuit ultimately declined to affirm the admission of the hearsay statement against Boyce on the basis of the present sense impression exception simply because “answering questions rather than giving a spontaneous narration could increase the chances that the statements were made with calculated narration.”²²⁸

This analysis strongly suggests that the Seventh Circuit would exclude a statement given in response to such a blatantly leading question as the one posited by Judge Posner as a calculated narration not within the present sense impression exception. Perhaps with his hypothetical Judge Posner intended simply to illustrate the speed with which one can lie, rather than to suggest that the statement would be an admissible present sense impression. Still, the fact that the single example provided of a spontaneous lie would be excluded as a present sense impression

223. See FED. R. EVID. 803(1) (requiring a hearsay statement “describing or explaining an event or condition”).

224. This statement might be admitted against the declarant as an adoptive admission of the dog’s beauty but only if offered against him as a party to litigation in which the dog’s beauty was of consequence. See FED. R. EVID. 801(d)(2)(b). Even in this case, such a hearsay statement is admissible under the rules not because it is reliable but because it is fair to require a litigant to answer for a statement he made or adopted. See FED. R. EVID. 801(d)(2)(b) advisory committee’s notes on the proposed rule.

225. *Boyce*, 742 F.3d at 797 (majority opinion).

226. *Id.*

227. *Id.* (“The operator did not ask whether Boyce had a gun; it was [Boyce’s girlfriend] who first brought up the gun’s presence.”).

228. *Id.* at 797–98.

illustrates that the exception is not as useless in excluding the unreliable as Judge Posner suggested in his concurrence in *Boyce*.

The point is that federal judges do not rigidly adhere to the technical requirements of the categorical hearsay exceptions while turning a blind eye to the context of a specific hearsay statement. The exceptions already permit bridled discretion for trial judges to measure the validity of the general psychological assumptions underlying them as applied to the human context presented by particular hearsay statements proffered at trial. Assuming a hearsay regime that continues to be premised largely on reliability as Judge Posner advocates, the requirements of the recognized hearsay exceptions provide ample basis for a trial judge to reject a particular hearsay statement that appears unreliable, notwithstanding the assumptions about human behavior contained in those exceptions.

D. *Breaking Up Is Hard to Do*

Finally, any reinvention of the well-established categorical hearsay regime followed in all federal courts and the majority of state jurisdictions is certain to result in significant inefficiency as judges and lawyers struggle to define and embrace a new order.²²⁹ The recent confrontation revolution precipitated by the *Crawford v. Washington* decision in 2004 illustrates this concern.²³⁰ More than ten years after the *Crawford* opinion, judges and litigants remain embroiled in a cumbersome and resource-intensive effort to integrate the *Crawford* paradigm shift into contemporary trial practice.²³¹ Arguably, the uncertainty and inefficiency of the *Crawford* revolution is increasing over time rather than diminishing, with the recent *Williams v. Illinois* decision obscuring the intersection between expert opinion testimony and confrontation rights.²³² To be sure, concerns of efficient resource allocation must give way to issues of constitutional magnitude such as

229. See Bellin, *Case for eHearsay*, *supra* note 8, at 1326 (“[T]he passage of time has likely made it more difficult as a practical matter to abolish a class-based hearsay framework, given litigators’ long experience with the framework and its adoption in every American jurisdiction.”); Paul F. Kirgis, *A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not Be Codified—but Privilege Law Should Be*, 38 LOY. L.A. L. REV. 809, 809 (2004) (“[B]road changes to the basic structure of evidence law, by way of revision, retraction, or expansion of the current Rules, seem unlikely at best.”).

230. See 541 U.S. 36 (2004).

231. See David Crump, *Overruling Crawford v. Washington: Why and How*, 88 NOTRE DAME L. REV. 115, 115 (2012) (noting that “even commentators who support the apparent goal” of *Crawford* “describe *Crawford* and its progeny as unstable”); Michael H. Graham, *Confrontation Clause—Crawford/Davis/Melendez-Diaz: 2010 Application Summary—Recent Chaos*, 46 CRIM. L. BULL. 1334 (2010) (describing “chaos” in applying *Crawford*).

232. See *Williams v. Illinois*, 132 S. Ct. 2221 (2012).

those raised by the Sixth Amendment.²³³ Importantly, Judge Posner's criticism of the hearsay exceptions contained in the Federal Rules does not rest on constitutional grounds. Where constitutional imperatives do not mandate a reimagining of the existing hearsay regime, the inefficiency and uncertainty created by a design change merit careful consideration.²³⁴ Thus, the persistence of the existing categorical hearsay construct may not simply be a product of "incuriosity" or blind adherence to "dogma."²³⁵ There is genuine reason to eschew a protracted and costly period of adjustment for the litigation process that ultimately may yield unsatisfactory outcomes.

Acknowledging the imperfections of the existing categorical hearsay regime does not necessarily counsel in favor of change. In crafting a hearsay middle ground between the polar opposites of free admissibility and total exclusion, Article Eight of the Federal Rules may represent a workable compromise. The hearsay exceptions provide crucial information necessary to predict trial outcomes and value cases that is familiar to judges and litigants in every jurisdiction and that operates to exclude specific hearsay statements of doubtful reliability. To the extent that specific categorical exceptions lack adequate contemporary empirical support, those categories may be criticized, examined, and amended.²³⁶ It simply may be that alternative hearsay regimes remain insufficiently superior to justify the cost of switching.

E. *Brave New World: A Hearsay Paradigm Shift*

Dismantling the entire categorical approach to hearsay enshrined in Article Eight of the Federal Rules to address deficiencies in a handful of hearsay categories thus seems inefficient and unnecessary. Retaining a categorical approach to hearsay evidence but amending or repealing specific categorical hearsay exceptions that lack rational foundations represents the most narrowly tailored and efficient response to criticisms such as those highlighted in Judge Posner's *Boyce* concurrence.

Should efforts to reform perceived flaws in certain categorical exceptions ultimately prove unsuccessful, however, rejection of the

233. See *Bruton v. United States*, 391 U.S. 123, 135 (1968) (securing "greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty" and stating that the "price is too high" (quoting *People v. Fisher*, 164 N.E. 336, 341 (N.Y. Ct. App. 1928) (Lehman, J., dissenting))).

234. See Bellin, *Case for eHearsay*, *supra* note 8, at 1326 (emphasizing that there is no guarantee that states would accept a change to the categorical hearsay regime).

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

236. See Memorandum, *supra* note 198, at 3 (describing the intent to monitor case law to ensure that categorical exceptions are adequately filtering modern technological communications).

categorical regime certainly could be considered.²³⁷ Crucially, any overhaul of the hearsay system should accomplish two objectives.²³⁸ First, it should *increase* the predictability and consistency of hearsay doctrine to promote fair and efficient valuation and resolution of lawsuits.²³⁹ Second and relatedly, it should eliminate the problematic reliability filter for hearsay evidence, leaving consideration of human psychology to fact finders weighing the hearsay evidence that judges admit. As illustrated above, the case-by-case discretionary approach proposed in *Boyce* accomplishes neither of these objectives.

If human psychology is a weak foundation upon which to build hearsay rules, genuine hearsay reform should focus on alternatives to a reliability filter for the admission of hearsay evidence. Indeed, this is precisely the philosophical shift attempted by the *Crawford* revolution: movement from a malleable reliability test to a more procedural assessment of the availability of the hearsay declarant and the opportunity for prior cross-examination.²⁴⁰ Rather than merely transferring responsibility for assessing the reliability of hearsay evidence from the categorical hearsay exceptions to trial judges, a truly progressive approach would eliminate questionable assumptions of reliability as the gatekeeper for hearsay evidence altogether.

Many talented scholars have theorized about alternate models for the admission of hearsay evidence.²⁴¹ As one example, Professor Michael L. Seigel proposed a “best evidence hearsay rule” that would admit all hearsay evidence that is “the best evidence available to the offering party from a particular declarant source, or if the best evidence has been or will be presented to the trier of fact.”²⁴² Professor Seigel critiqued contemporary hearsay doctrine for requiring a “determination of the reliability of hearsay evidence on an absolute basis,” which he

237. From a pragmatic perspective, if reformers fail to gain support for alterations to existing categorical exceptions, it is difficult to imagine sufficient support to achieve a complete redesign of hearsay doctrine. See Bellin, *Case for eHearsay*, *supra* note 8, at 1326 (“[T]he passage of time has likely made it more difficult as a practical matter to abolish a class-based hearsay framework . . .”). But see Sklansky, *Hearsay’s Last Hurrah*, *supra* note 6, at 82 (explaining why “the hearsay rule has long been in decline around the globe” and “why its days are likely numbered in the United States, as well”).

238. This assumes a continued general rule against hearsay, yet a “new” approach to exceptions to that rule. See Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CALIF. L. REV. 495, 518 (1987) (finding justification for the continuation of a hearsay prohibition in some form).

239. See Bellin, *Case for eHearsay*, *supra* note 8, at 1326 (noting “ever-expanding dockets and increasing reliance on settlements and guilty pleas”).

240. *Crawford* introduced its own amorphous “testimonial” hearsay category as a threshold question to applying that test. 541 U.S. 36, 51 (2004) (describing the “core class of ‘testimonial’ statements” with which the Sixth Amendment confrontation right is concerned).

241. See sources cited *supra* note 9.

242. Seigel, *supra* note 9, at 930.

characterized as “an impossible task.”²⁴³ He opined that “the only serious ‘hearsay danger’ [is] the ability of a skillful advocate to make strategic decisions to present inferior hearsay evidence as a means of disguising factual weaknesses in her case.”²⁴⁴ Therefore, Professor Seigel viewed an optimal hearsay rule as one that would not exclude hearsay evidence “unless it is intended to be offered as a substitute for better evidence.”²⁴⁵

While providing a predictable roadmap for assessing the admissibility of hearsay as the “best evidence,” Professor Seigel’s proposal does not entail slippery assessments of declarant reliability as a gateway to admissibility. Nor does it rely upon assumptions about human psychology and credibility. Rather, this proposal emphasizes alternative evidence available to prove the points conveyed by hearsay. Importantly, it accounts for hearsay evidence currently admitted through the admissions doctrine as well as business and public records exceptions that should remain admissible regardless of the availability of contributors to the records.²⁴⁶ Although this proposed approach to rationalizing hearsay promises to expand the admissibility of hearsay evidence, Judge Posner expressly noted that he was not seeking to exclude more hearsay evidence.²⁴⁷ If the goal is increased rationality in hearsay rules, then proposals such as Professor Seigel’s that avoid a reliability filter altogether are more likely to achieve the goal than alternatives that merely transfer a reliability determination to trial judges.²⁴⁸

Again, this Article does not advocate abandonment of the existing categorical hearsay scheme or the embrace of an alternative approach to hearsay evidence. Rather, this Article seeks to illustrate that there are many potential responses to Judge Posner’s critique of existing hearsay

243. *Id.* at 935.

244. *Id.* at 897.

245. *Id.* at 930.

246. One of the chief concerns with expanding the admissibility of hearsay through Professor Seigel’s best evidence proposal remained the Confrontation Clause rights of criminal defendants. *Id.* at 944 (noting that hearsay reform “might include special rules for criminal cases” and describing “adjustments to the best evidence hearsay rule necessitated by confrontation principles” as a “topic to be addressed another day”). The Supreme Court’s *Crawford* precedent subsequently articulated in 2004 serves the crucial role of protecting the criminally accused from facing un-cross-examined testimonial hearsay evidence outside of the evidence rules. 541 U.S. 36 (2004).

247. *United States v. Boyce*, 742 F.3d 792, 802 (7th Cir. 2014).

248. The unpopular and less refined approach to hearsay taken by the Model Code of Evidence in 1942 represents another hearsay paradigm freed from considerations of “folk psychology” and “reliability.” The Model Code’s vision has its obvious and well-documented imperfections. *See supra* notes 56–57. Even if a Model Code approach could be modified to account for its failings, as Professor Seigel has labored to do with his “best evidence” proposal, there is strong reason to doubt the political viability of a sea change met with “hostility” and “anger” in its last iteration. *Id.*

doctrine that would not tax the litigation process with uncertainty and inconsistency and that would represent more targeted responses to the criticisms raised.²⁴⁹ Any alteration of the recognized hearsay regime should make forward progress in the development of hearsay law, rather than revert to the inefficiencies of pre-Rules practice. After many decades of debate regarding the appropriate level of judicial discretion in administering hearsay doctrine, this Article suggests retiring once and for all any proposal to allow case-by-case trial judge decision-making regarding the admissibility of hearsay evidence.

CONCLUSION

The recent Seventh Circuit opinion in *United States v. Boyce* highlights long-standing dissatisfaction with the categorical hearsay model reflected in the Federal Rules. Opining that many of the categorical hearsay exceptions are grounded in empirically bankrupt folk psychology, Judge Posner called for purely discretionary consideration of the reliability of particular hearsay statements by trial judges. Notwithstanding the potential legitimacy of the critique of certain existing hearsay exceptions, this Article illustrates the inferiority of the purely discretionary approach to hearsay evidence from a cost-benefit perspective.

Further, this Article denounces a reactionary retreat from advances in hearsay doctrine made by the Federal Rules. The common law approach to hearsay that controlled prior to the Federal Rules created problems of access, clarity, and consistency. The categorical hearsay exceptions ultimately embodied in the Federal Rules were designed to ameliorate such shortcomings in pre-Rules hearsay doctrine. After forty years of living with the Federal Rules, it is not surprising that judges, litigants, and scholars have experienced frustration and dissatisfaction with the Federal Rules' categorical approach to the complex hearsay doctrine. This Article suggests that potential revisions to the hearsay rules should proceed from a holistic perspective that seeks to address specific concerns and criticisms without sacrificing much-needed efficiencies achieved under the Federal Rules. To borrow from the law of products liability, a design change that addresses existing product dangers but introduces others of equal or greater magnitude is not superior under the law.²⁵⁰ The Posnerian hearsay model represents just such a poor design alternative.

249. Indeed, the evidence advisory committee is embarking upon a "systematic review of the entire category of prior statements of testifying witnesses" to determine whether such statements should be defined as hearsay. See Memorandum, *supra* note 198, at 3.

250. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998) ("When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by

The redesign of the entire hearsay regime is certainly beyond the modest ambitions of this Article. Nor is it the goal of this Article to resolve concerns about any specific hearsay exception within the existing framework. Rather, this Article seeks to demonstrate the 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. While the purely discretionary alternative to the existing hearsay regime proposed by Judge Posner in his *Boyce* concurrence may be unworkable, many criticisms of the existing regime may be legitimate. Thus, the question remains whether there are alternative alterations to the current categorical hearsay structure that could alleviate valid concerns without imposing costs on the trial process that eclipse any gains in rationality. This Article ultimately concludes that although many alternatives merit exploration, we must slay the hearsay discretion dragon once and for all.

the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude.”).