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# THE IMPORTANCE OF THE MEMORY FACTOR IN ANALYZING THE RELIABILITY OF HEARSAY TESTIMONY: A LESSON SLOWLY LEARNT — AND QUICKLY FORGOTTEN

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> [There is a] want of coincidence between accounts of the same occurrences by different eyewitnesses, sometimes arising from imperfect memory . . . .
>
> — THUCYDIDES

## I. INTRODUCTION

The hearsay doctrine has been characterized as "that most characteristic rule of the Anglo-American law of evidence — a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure."[1] Several rationales justify the general rule excluding hearsay.[2] By modern consensus, however, the principal justification for the exclusionary rule is that hearsay testimony is suspect because it has not been subjected to the test of cross-examination.[3] The common law regards cross-examination as the "greatest legal engine . . . for the discovery of truth."[4] As hearsay testimony has not been tested by cross-examination, doubts arise about the trustworthiness of the testimony.

Cross-examination allows the opposing attorney to probe the testimony for latent deficiencies in the witness's perception, memory, narration, and sincerity.[5] At common law, a person must possess four testimonial qualities in order to be a competent witness: moral capacity and the mental capacities to observe, remember, and describe.[6] The common law competency standards are lax and disqualify persons as witnesses only when the persons have very severe deficits in a testimonial quality.[7] However, even when the person is generally competent

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1. 5 J. WIGMORE, EVIDENCE § 1364, at 28 (Chadbourn rev. ed. 1974).
2. C. MCCORMICK, LAW OF EVIDENCE § 245, at 726 (3d ed. 1984).
3. *Id.* § 245, at 728.
4. 5 J. WIGMORE, *supra* note 1, § 1367, at 32.
5. R. CARLSON, E. IMWINKELRIED & E. KIONKA, MATERIALS FOR THE STUDY OF EVIDENCE 467 (2d ed. 1986).
6. *Id.* at 122.
7. *Id.* at 127.

to serve as an in-court witness or hearsay declarant, one of the person's testimonial abilities may be deficient. As Professor Morgan pointed out, a hearsay declarant's perception, memory, narration, or sincerity may be deficient. Those defects[8] are the essential risks[9] inherent in uncross-examined hearsay testimony.

Although the general hearsay exclusionary rule exists both at common law and under the Federal Rules of Evidence ("Rules"),[10] courts often admit hearsay testimony under certain exceptions to the rule. Given the rationale for the rule, the existence and content of the hearsay exceptions ought to be dictated by the relative importance of the respective hearsay risks. If, for example, the primary risk is that the declarant will deliberately lie, courts and legislatures should formulate exceptions that admit demonstrably sincere statements. When the proponent can demonstrate the presence of a factor indicating the hearsay declarant's subjective sincerity and minimizing the risk of lying, the statement should be exceptionally admissible. Alternatively, assuming that the foremost risk is a factor such as imperfect memory, the exceptions should have an entirely different complexion; facts suggesting the hearsay declarant's subjective sincerity may not necessarily remove doubts about the quality of the declarant's memory.

As the next section of this article notes, the common law long assumed that the primary hearsay danger was the declarant's insincerity, and that the other hearsay risks such as imperfect memory were of only secondary importance.[11] That assumption had a decisive impact on the nature of the recognized exceptions to the hearsay rule. The common law courts traditionally recognized exceptions such as the excited utterance doctrine based on facts suggesting the declarant's truthfulness.[12] In contrast, until Congress enacted the Federal Rules of Evidence in the mid-1970s,[13] the courts balked at recognizing excep-

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8. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 200-04 (1948).

9. *Id.* at 192.

10. FED. R. EVID. art. VIII.

11. *See* Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 KY. L.J. 841 (1987).

12. The excited utterance exception is codified in Federal Rule of Evidence 803(2): "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FED. R. EVID. 803.

13. Act of Jan. 2, 1975, Pub. L. No. 93-595, §1, 88 Stat. 1926. The Federal Rules are in effect in the federal court system and in 31 states. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 5, at 23-24.

tions such as the present sense impression doctrine,[14] which remove doubt about the declarant's memory but fail to guarantee the declarant's subjective sincerity. Thus, the common law governing hearsay exceptions reflected the premise that the danger of insincerity outweighed the other risks in admitting uncross-examined testimony.

Psychologists have successfully exposed that premise as erroneous.[15] Like Thucydides, modern researchers have found that deficiencies in the memory factor are a far more important cause of testimonial error than subjective insincerity.[16] Based on that research, scientists have criticized the hearsay doctrine under both the common law and the Rules.[17] These critics argue that both the common law and the Rules slight the importance of misrecollection in evaluating the reliability of hearsay testimony.

One of the two theses of this article is that the criticism of the Rules is largely misplaced. This article attempts to establish that to an extent not previously appreciated, Article VIII of the Rules mandates that the courts focus on the memory factor in assessing the trustworthiness of hearsay testimony. This article argues that Congress partially learned the lesson psychologists have long attempted to teach evidence scholars. However, the other thesis of this article is that to date, courts construing the Rules have overlooked the congressional mandate. This article contends that in applying the Rules, courts frequently have admitted hearsay testimony in the face of glaring doubts about the caliber of the declarant's memory. These courts appear to have quickly forgotten the lesson Congress learned.

Part II of this article describes the common law hearsay doctrine. That section demonstrates the common law obsession with sincerity and the neglect of memory factors. Part III summarizes the psychologists' critique of the common law. Part IV advances the first thesis mentioned above. It argues that in large measure, Article VIII of the Rules responds to the psychologists' critique of the common

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14. Federal Rule of Evidence 803(1) sets out a version of the present sense impression hearsay exception: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FED. R. EVID. 803.

15. *See generally* Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and The Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1 (relating perception and memory to admissibility of testimony under hearsay exceptions).

16. *See infra* notes 57-63 and accompanying text.

17. Stewart, *supra* note 15, at 8-22.

law. This section canvasses and synthesizes the provisions of Article VIII that reflect greater concern about the memory factor. It urges that the statutory scheme of Article VIII demands that the courts pay more attention to the memory factor than at common law. By surveying the case law administering Article VIII, part V develops the second thesis of this article. As a result of the survey, part V concludes that in all too many cases, courts have ignored the memory factor. This article calls upon the courts to recognize the mandate implicit in Article VIII and to be more conscious of the memory factor in the future.

## II. THE COMMON LAW OBSESSION WITH SUBJECTIVE SINCERITY

The common law courts made a number of simplistic — and erroneous — assumptions about the relative importance of the sincerity and memory factors. Those assumptions were extremely influential in shaping the exceptions to the hearsay rule.

### A. *Psychological Assumptions About Sincerity and Memory*

The common law courts generally refused to acknowledge that the memory factor could pose serious hearsay dangers.[18] Common law judges knew little of the psychopathology of memory.[19] Instead, these judges subscribed to a naive, rationalistic conception of cognitive functioning.[20] They viewed the human memory as a passive photographic recorder[21] or mirror,[22] which automatically registered original sense impressions[23] and could later, they believed, reproduce mechanically[24] the original perception.[25]

In contrast, the courts presumed that insincerity, or deliberate deception, was the major source of testimonial error.[26] The hearsay

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18. *See* Morgan, *supra* note 8, at 204-05 (citing as illustrative cases involving testator's statements about allegedly revoked wills). The cases are collected in 6 J. WIGMORE, EVIDENCE §§ 1725-31 (Chadbourn rev. ed. 1976); Morgan, *supra* note 8, at 205 n.62.

19. *See* Kubie, *Implications for Legal Procedure of the Fallibility of Human Memory*, 108 U. PA. L. REV. 59, 61 (1959).

20. Stewart, *supra* note 15, at 8.

21. *Id.* at 9.

22. Levine & Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079, 1130 (1973).

23. *See* Kubie, *supra* note 19, at 61.

24. *See* Stewart, *supra* note 15, at 8.

25. *But see* Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391, 401 (1933) ("Memory is more than the re-instatement of the original perception . . . .").

26. Kubie, *supra* note 19.

rule crystallized in England between 1675 and 1690.[27] In 1676, Parliament passed the original Statute of Frauds.[28] In the preamble to the Statute,[29] Parliament voiced the widely held perception that there were "many fraudulent practices, which [were] commonly endeavoured to be upheld by perjury and subornation of perjury."[30] Earlier English statutes included preambles asserting that "perjury . . . horribly continues and daily increases in the kingdom."[31] Hence, the hearsay rule emerged at a time when the courts and legislators assumed that perjury, the epitome of insincerity, was rampant.

### B. *The Impact of Psychological Assumptions on the Hearsay Exceptions*

The common law courts reasoned quite logically from their assumptions about the relative importance of the hearsay dangers of sincerity and memory. In their minds, insincerity was the major danger to be guarded against. Consequently, in deciding whether to recognize a hearsay exception, the courts stressed the question of whether the foundation included a guarantee of the declarant's subjective sincerity.[32] When the circumstances created an inference that the declarant probably was speaking sincerely,[33] the primary danger was minimized;[34] the court could admit the hearsay declaration without offending the policy inspiring the hearsay rule.

That line of reasoning rationalized such hearsay exceptions as the dying declaration[35] and excited utterance[36] doctrines. The courts understandably held that sincere statements such as excited utterances need

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27. C. MCCORMICK, *supra* note 2, § 244, at 725.

28. An Act for Prevention of Frauds and Perjuries, 13 Car. 2, ch. 3 (1676) (effective June 20, 1677) (quoted in part in E. FARNSWORTH, CONTRACTS § 6.1, at 370 (1982)).

29. *Id.* (quoted in G. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS § 265, at 435 n.4 (J. Murray ed. 1965)).

30. *Id.*

31. *E.g.*, 38 Edw. 3, ch. 12 (1363); 34 Edw. 3, ch. 8 (1360); 5 Edw. 3, ch. 10 (1331) (cited in R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 5, at 551).

32. Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271, 280, 286 (1952); Morgan, *supra* note 8, at 203.

33. Ladd, *supra* note 32, at 280.

34. *Id.*

35. *Id.* at 281.

36. Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 243 (1961).

not be contemporaneous with the events the declarants described.[37] To be sure, the lack of contemporaneity raised concerns about the caliber of the declarant's memory; but those concerns struck the courts as too insubstantial to justify excluding the statements. So long as declarants spoke in the throes of startling events dictating their thought processes,[38] a circumstantial inference of subjective truthfulness arose. According to the conventional wisdom, that inference practically eliminated the principal hearsay danger of insincerity and warranted admitting the testimony.

The courts' decision to recognize hearsay exceptions for evidently sincere statements such as excited utterances was only one effect of the judicial assumptions about the relative importance of sincerity and memory. The same assumptions also explained the courts' refusal to adopt proposed exceptions such as the present sense impression doctrine. The proponents of that doctrine urged that a hearsay declarant's calm, contemporaneous statements about an event should be exceptionally admissible.[39] The proponents contended that the contemporaneous nature of the statements virtually eliminated any doubt about the declarant's memory.[40] In the minds of most common law courts, however, that contention missed the mark. The leading hearsay danger was insincerity, and the contemporaneity of the statement did not ensure the declarant's subjective sincerity. A long line of English[41] and American[42] decisions rejected the proposed exception. The over-

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37. Slough, *Res Gestae*, 2 U. KAN L. REV. 246, 256-57 (1954) (citing Vicksburg & Merridian R.R. v. O'Brien, 119 U.S. 99 (1908); Britton v. Washington Water Power Co., 59 Wash. 440, 110 P. 20 (1910)); Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661, 667-68 (1969).

38. Slough, *supra* note 36, at 243.

39. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 875 (1981).

40. Houston Oxygen Co. v. Davis, 139 Tex. 1, 6, 161 S.W.2d 474, 477 (1942) ("safe from any error from defect of memory of the declarant").

41. Thayer, Bedingfield's *Case — Declarations as a Part of Res Gestae*, 15 AM. L. REV. 1 (1881). The article analyzes the English decisional law culminating in the famous *Bedingfield's* decision. 14 Cox's Crim. Cas. 341 (Crown Ct. 1879).

42. Wrage v. King, 114 Kan. 539, 220 P. 259 (1923) is one of the leading American authorities. In Morgan, *Res Gestae*, 12 WASH. L. REV. 91, 98 (1937), the author notes the "trend toward unanimity in requiring the startling occurrence." However, Morgan also cautions that "[t]his is not to say that there is such great harmony in its application." *Id.* (citing Greener v. General Electric Co., 209 N.Y. 135, 102 N.E. 527 (1913); People v. Del Vermo, 192 N.Y. 470, 85 N.E. 690 (1908)).

whelming majority of courts[43] insisted upon proof of a startling event as the threshold condition for admissibility.[44]

This nearly unanimous[45] insistence on proof of a startling event was particularly remarkable in light of the scholarly support for the present sense impression exception. One of the giants of nineteenth century evidence law, Thayer, championed the exception.[46] In this century, the great evidence reformer, Morgan, took up the cause of the doctrine.[47] The drafters of both the Model Code of Evidence[48] and the Uniform Rules of Evidence[49] included a version of the present sense impression exception in their drafts. However, until Congress incorporated the exception in Article VIII of the Rules, the proposed exception languished.[50]

## III. THE PSYCHOLOGISTS' CRITIQUE OF THE COMMON LAW OBSESSION WITH SUBJECTIVE SINCERITY

Although the common law judges steadfastly adhered to their assumptions about the memory and sincerity factors, legal psychologists were highly critical of those assumptions.[51] They developed an extensive body of literature on the subject,[52] including the classic 1928 article, "Some Observations on the Law of Evidence" by Hutchins

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43. *See* Morgan, *supra* note 42, at 98; *see also* Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 432 (1928) (noting most courts require a startling event); Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 206 (1960); Comment, *The Present Sense Impression Exception to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 DICK. L. REV. 347, 351 (1977) (citing Wigmore's influence on courts requiring a startling event).

44. Quick, *supra* note 43, at 206-07 n.12 (citing Rainesco v. Grant Finishing Co., 133 N.J.L. 611, 45 A.2d 678 (1946)).

45. Morgan, *supra* note 42, at 98.

46. *See* Thayer, *supra* note 41, at 11-20.

47. Morgan, *supra* note 42, at 91; *see* Waltz, *supra* note 39, at 875 (citing Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236-37 (1922)).

48. MODEL CODE OF EVIDENCE Rules 512(a)-(b) (1942).

49. UNIF. R. EVID. 63(4)(a)-(b).

50. Waltz, *supra* note 39, at 875.

51. *See, e.g.*, Levine & Tapp, *supra* note 22, at 1088.

52. *See id.* at 1088-89; Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 105, 144-51 (M. Tonry & N. Morris, eds. 1981) (an eight-page list of references on the general topic); Monahan & Loftus, *The Psychology of Law*, 33 ANN. REV. PSYCHOLOGY 441, 468-75 (1982) (another extensive list of references on the topic).

and Slesinger.[53] After conducting numerous experiments[54] and amassing substantial empirical evidence[55] about the memory and sincerity factors, the legal psychologists concluded that the common law courts' assumptions about the factors were superficial and flawed.[56] In turn, based on that conclusion, the psychologists questioned the soundness of the law governing hearsay exceptions.[57]

### A. *The Sincerity Factor*

As the last section demonstrated, the common law courts assumed that insincerity was a major, if not the major, cause of testimonial error. The legal psychologists concluded that this assumption was invalid,[58] and began attacking it shortly after the turn of the century.[59] Convinced that most testimonial errors were unintentional,[60] they charged that the courts' concern with deliberate falsification was excessive.[61] "[W]itnesses are more often . . . mistaken than committing perjury."[62] The available empirical data indicated that perjury was relatively rare.[63] As a result, insincerity appeared to play a minor role in causing testimonial error.[64]

Moreover, psychological research demonstrated that in many cases, the emotions that seemingly ensured sincerity tended to distort the observer's perception and memory.[65] The common law facilely equated subjective sincerity and objective accuracy.[66] Legal psychologists pointed out that although emotional stress sometimes produced sincerity, stress also could lead to error and distortion.[67] Thus, emotionally

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53. Hutchins & Slesinger, *supra* note 43.
54. *Id.* at 437.
55. Stewart, *supra* note 15, at 8.
56. *See, e.g.*, Levine & Tapp, *supra* note 22, at 1080.
57. *See, e.g.*, Hutchins & Slesinger, *supra* note 43, at 437.
58. *E.g.*, Kubie, *supra* note 19, at 59.
59. Levine & Tapp, *supra* note 22, at 1088. One of the seminal works was H. MÜNSTERBERG, ON THE WITNESS STAND (1908). *Id.* at 1089.
60. *See, e.g.*, Gardner, *supra* note 25, at 391; Kubie, *supra* note 19, at 66; Stewart, *supra* note 15, at 9.
61. Stewart, *supra* note 15, at 8-9.
62. Ladd, *supra* note 32, at 286.
63. Kubie, *supra* note 19, at 59; Morgan, *supra* note 8, at 186.
64. Kubie, *supra* note 19, at 59.
65. Morgan, *supra* note 42, at 98.
66. *See* Hutchins & Slesinger, *supra* note 43, at 439.
67. Stewart, *supra* note 15, at 8, 28.

excited statements could contain a significant degree of error.[68] Rather than validating an equation between sincerity and accuracy, the empirical research suggested an inverse relationship between the declarant's excitement level and the declaration's objective accuracy.[69] Excited declarants lose at least as much in accurate perception and memory as they gain in sincerity.[70]

### B. *The Memory Factor*

Although legal psychologists have not reached consensus on every aspect of human memory,[71] most agree it is a much more subtle,[72] error-prone[73] process than the common law judges assumed. Psychologists found that testimonial error only rarely was caused by insincerity,[74] but frequently was traceable to defective memory. One authority declared that memory was "one of man's most fallible . . . instruments."[75] After summarizing the research, another authority asserted that honest errors in mental capacities such as memory were "the most important source of testimonial conflict."[76]

Psychologists also recognized the complexity of memory.[77] According to the common law conception, memory consisted of simple acts[78] of initially registering[79] and later reproducing[80] sensory perceptions. In sharp contrast, psychologists concluded that numerous factors affect the accuracy and retention of memory.[81] Some factors operate at the

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68. *Id.* at 19.

69. Quick, *supra* note 43, at 210; *see also* Levine & Tapp, *supra* note 22, at 1093 (citing research showing stress decreases accuracy of recall); Morgan, *supra* note 42, at 96 (citing research by Hutchins and Slesinger demonstrating diminished accuracy of perception with increased excitement).

70. Hutchins & Slesinger, *supra* note 43, at 439; Note, *The Present Sense Impression*, 56 TEX. L. REV. 1053, 1057 (1978).

71. *See* Gardner, *supra* note 25, at 391 (mentioning the differing views of objectivists, imagists, and Gestaltists); *see also* Levine & Tapp, *supra* note 22, at 1099 (describing three psychological conceptions of the memory function).

72. *See* Kubie, *supra* note 19, at 61-64.

73. *Id.* at 60-61.

74. *Id.* at 59.

75. *Id.* at 60; *see also* Levine & Tapp, *supra* note 22, at 1130 ("the dangers from fallible sense perception and memory . . . are overwhelming").

76. Stewart, *supra* note 15, at 9.

77. Kubie, *supra* note 19, at 61.

78. *Id.*

79. *Id.*

80. Levine & Tapp, *supra* note 22, at 1105.

81. Stewart, *supra* note 15, at 38.

time of the original perception, others come into play when the person attempts to remember the original perception, and still others are influential in the interim between original perception and the attempted recollection.

Several factors operating at the time of the original perception can affect the accuracy of the later recollection. One factor is the nature of the event or fact observed; the simpler the observation, the easier for the observer to retain the information in memory.[82] The risk of misrecollection increases as the information becomes more complex. Another consideration is the observer's attentiveness.[83] An observer who concentrates[84] intensely[85] is more likely to fixate details in memory.[86] A ready,[87] interested[88] observer can more easily impress the perceived sensory data upon memory.[89] Another consideration operating at the time of perception is the emotional association of the perceived data. Generally, observers can best remember[90] data that has positive emotional significance for them.[91] Most persons remember pleasant information with acuity.[92] Conversely, they quickly forget data with unpleasant associations.[93] The latter describes the phenomenon of repression.[94] Traumatic events[95] commonly generate the type of negative associations that trigger repression.

Other factors operate later when the observer attempts to remember the earlier perceptions. These factors include the type of information the person is trying to recall, the person's caution, and any suggestive influences on the person. To begin with, people ordi-

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82. United States v. Howard, 774 F.2d 838, 845-46 (7th Cir. 1985); Allen, *A Report on the Status of the Residual Exceptions to the Hearsay Rule*, 30 TRIAL LAW. GUIDE 265, 281 n.78 (1986).

83. Stewart, *supra* note 15, at 22.

84. Levine & Tapp, *supra* note 22, at 1097.

85. Gardner, *supra* note 25, at 394.

86. *Id.* at 394-95.

87. Levine & Tapp, *supra* note 22, at 1097.

88. Stewart, *supra* note 15, at 22.

89. Morgan, *supra* note 8, at 188.

90. Gardner, *supra* note 25, at 396.

91. Levine & Tapp, *supra* note 22, at 1104.

92. Kubie, *supra* note 19, at 63.

93. *Id.*; Levine & Tapp, *supra* note 22, at 1100.

94. *See* Kubie, *supra* note 19, at 68 ("The great Charles Darwin wrote that he had discovered that if he did not write down the observations which argued against his theories he always forgot them."); Stewart, *supra* note 15, at 19.

95. Levine & Tapp, *supra* note 22, at 1100.

narily can remember visual perceptions (recognition memory) more easily than they can verbal descriptions (recall memory).[96] Further, recollection usually is superior when the person consciously exercises caution in attempting to remember the information.[97] Administering an oath to the person can induce caution.[98] Additionally, external influences impact the quality of memory. Social psychology[99] has demonstrated that people are susceptible to suggestive influence.[100] If a third party interrogates the person about the earlier event, the form of the question[101] can supply cues[102] to the person answering it. The phrasing of the question might imply facts or suggest the questioner's expectations.[103] The suggestion can be especially powerful when the questioner is an authority figure.[104] A strong suggestion can "literally 'devastate[ ] memory.'"[105]

Finally, several relevant factors come into play between the original perception and the attempted recollection. The common law assumed that human memory was a passive recording mechanism[106] that registered[107] a permanent image of a perceived event. Contemporary psychology paints a radically different picture of memory as an active,[108] constructive[109] process. The memory process involves ongoing[110] subconscious[111] activity in which memories of similar experiences[112] tend to fuse and blend.[113] The tendency is particularly marked when

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96. *Id.* at 1086, 1095, 1101; Stewart, *supra* note 15, at 19.

97. Stewart, *supra* note 15, at 14-15.

98. *Id.* at 22.

99. Levine & Tapp, *supra* note 22, at 1087, 1103.

100. *Id.* at 1087; *see* Gardner, *supra* note 25, at 402; Stewart, *supra* note 15, at 12, 18.

101. Stewart, *supra* note 15, at 13; Gardner, *supra* note 25, at 403, 405.

102. Levine & Tapp, *supra* note 22, at 1118.

103. *Id.* at 1093.

104. *Id.* at 1113.

105. Gardner, *supra* note 25, at 402 (quoting H. MÜNSTERBERG, ON THE WITNESS STAND 67 (1908)).

106. Stewart, *supra* note 15, at 9.

107. Kubie, *supra* note 19, at 61-64.

108. Levine & Tapp, *supra* note 22, at 1099.

109. *Id.* at 1104; *see* Georges, *Don't Forget, Says Author: Memory Is a Creative Process*, 59 WASHINGTON 2 (1989) ("Memory is a creative process . . . . It is a product of desire, attention, [and] insight . . . . We do not retrieve memories but rather create them anew each time we remember.").

110. Levine & Tapp, *supra* note 22, at 1099.

111. *Id.*

112. Kubie, *supra* note 19, at 65, 68.

113. Stewart, *supra* note 15, at 17.

past experiences are associated with emotional prejudice.[114] Bias distorts memory, as people tend to remember what they wish had occurred or what they think should have occurred.[115] When the original perception is incomplete, bias frequently supplies the missing details later.[116]

While the inventive[117] process of memory often alters[118] details, the time between the original perception and the attempted recollection can eclipse details. Numerous experiments have demonstrated the alarmingly fast rate at which people forget.[119] In one study involving memory of syllables, within one day the subjects forgot an average of sixty-six percent of the information they had attempted to memorize.[120] In another study testing recollection of words, the typical subject forgot ninety percent of the information within a week.[121] By the time weeks have passed,[122] memory decay[123] is extensive; the average person will have forgotten a large part of the originally perceived data.[124]

Given the state of the research on sincerity and memory, legal psychologists were predictably unhappy with the state of the law governing hearsay exceptions. The controlling evidence law generally has been oblivious to the psychological findings on sincerity and memory.[125] The Hutchins and Slesinger article epitomizes psychologists' dissatisfaction with the current state of the law. By challenging the excited utterance exception,[126] the authors spoke for many psychologists who condemned these statements as "[t]he most unreliable type of evidence admitted under hearsay exceptions."[127] In their next breath, the authors praised the present sense impression excep-

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114. Levine & Tapp, *supra* note 22, at 1107.
115. Gardner, *supra* note 25, at 400, 405-06.
116. *Id.* at 400-01.
117. Levine & Tapp, *supra* note 22, at 1094.
118. *Id.* at 1092 (construing Gardner, *supra* note 25, at 409).
119. *See, e.g.*, Gardner, *supra* note 25, at 393.
120. *Id.*
121. *Id.*
122. *Id.* at 394; Stewart, *supra* note 15, at 13.
123. Stewart, *supra* note 15, at 16; Levine & Tapp, *supra* note 22, at 1100.
124. Gardner, *supra* note 25, at 394.
125. Stewart, *supra* note 15, at 24.
126. Hutchins & Slesinger, *supra* note 43, at 437.
127. Stewart, *supra* note 15, at 28; *see also* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(2)[01], at 803-86 (1988) (describing commentators' criticisms of the excited utterance exception).

tion that most courts rejected.[128] Stressing that the present sense impression doctrine eliminated most doubts about the declarant's memory,[129] they described present sense impressions as "the best evidence of all."[130] Hutchins and Slesinger's position on the present sense impression doctrine voiced the sentiments of many who regarded present sense impressions as a superior type of hearsay evidence.[131]

## IV. THE RESPONSE OF THE RULES TO THE PSYCHOLOGISTS' CRITIQUE: THE LESSON LEARNT

The last two sections of this article demonstrate that the common law governing hearsay exceptions rested on erroneous assumptions about the sincerity and memory factors. The debate over the Rules gave the drafters an opportunity to correct those errors and reform the law accordingly. Most commentators, however, have dismissed the "new" Rules as basically codifying the traditional approach to the hearsay doctrine.[132] More specifically, they have concluded that Article VIII of the Rules, dealing with the hearsay doctrine, leaves intact the common law misconceptions about the memory and sincerity factors.[133]

In some respects, that conclusion is correct. Some aspects of Article VIII preserve the common law stress on sincerity.[134] On closer

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128. Hutchins & Slesinger, *supra* note 43, at 439-40; *see* Note, *Spontaneous Exclamations in the Absence of a Startling Event*, 46 COLUM. L. REV. 430, 431 (1946).

129. Hutchins & Slesinger, *supra* note 43, at 439-40.

130. *Id.* at 439.

131. *E.g.*, Comment, *supra* note 37, at 677; Comment, *The Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 NW. U.L. REV. 666, 668 (1977).

132. *See generally* Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 53 (1987) (Federal Rules of Evidence emerged from Congress with most of the traditional limitations on hearsay intact).

133. *See* Stewart, *supra* note 15.

134. *Id.* at 37. One of the controversial issues in hearsay is whether the definition of hearsay should include so-called "Morgan hearsay." Wright v. Tatham, 7 Ad. & El. 313, 112 Eng. Rep. 488, 490 (Ex. 1837), is the classic illustration, excerpted in almost all evidence casebooks. *See, e.g.*, R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 5, at 469-71. In that case, the issue was whether the decedent was competent to execute a will. *Wright*, 7 Ad. & El. at 313, 112 Eng. Rep. at 489. The proponent of the will offered testimony that the decedent's acquaintances had written serious letters to him. *Id.* at 314-15, 112 Eng. Rep. at 489. The acquaintances' willingness to write serious letters to the decedent was circumstantially relevant to show their belief in his competence. *Id.* at 317, 112 Eng. Rep. at 490. In turn, the proponent offered the testimony to show the truth of the belief, arguing that if the writers were the decedent's acquaintances and knew him fairly well, their belief was some evidence of the dece-

scrutiny, however, Article VIII emphasizes the memory factor far more than the common law did. Many of the decisions of the Federal Rules Advisory Committee and Congress are explicable primarily in terms of the memory factor. The picture that emerges from an analysis of the statutory framework of Article VIII is that the article directs courts to increase their appreciation of the memory factor.

One inkling of the new stress on memory surfaces in the Advisory Committee Notes, the commentary prepared by the committee which helped draft the Rules.[135] Significantly, the notes to Article VIII rely on several of the leading authorities calling for greater stress on the memory factor. The very first authority cited in the note to Article VIII is an article by Professor Morgan, challenging the common law overemphasis on sincerity.[136] Later, the committee approvingly cites the Hutchins and Slesinger article decrying the common law neglect of the memory factor.[137] These citations indicate that the committee empathized with those who criticized the common law assumptions about sincerity and memory. More importantly, Article VIII shows that the drafters translated their empathy into textual language mandating a more careful evaluation of the memory factor in hearsay testimony. The text of Article VIII reflects a realization that memory failure is a widespread problem and that the caliber of memory should weigh heavily in deciding whether to admit hearsay.

### A. *The Widespread Problem of Memory Failure*

Article VIII recognizes two types of hearsay exceptions. Some exceptions, set out in Rule 803, do not require foundational proof of the declarant's unavailability at the time of trial.[138] On the other hand,

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dent's competence. *Id.* at 322, 112 Eng. Rep. at 492-93. In *Wright*, the English court ruled that the testimony was inadmissible hearsay. *Id.* at 384, 112 Eng. Rep. at 515.

Some modern commentators, including Professor Morgan, have supported that ruling. *E.g.*, Morgan, *supra* note 8, at 214, 217. Professor Morgan argued that there is a need to question the out-of-court actor about the perception or memory inspiring the belief. *Id.* at 217. However, the drafters of the Federal Rules of Evidence decided to exclude Morgan hearsay from the hearsay definition in Federal Rule 801(a). In justifying their decision, the drafters reasoned that "[t]he situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity." FED. R. EVID. 801 advisory committee's note.

135. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 913 (1978).

136. FED. R. EVID. art. VIII advisory committee's note (citing Morgan, *supra* note 8, at 177, 214, 217).

137. FED. R. EVID. 803(1) advisory committee's note (citing Hutchins & Slesinger, *supra* note 43, at 432).

138. FED. R. EVID. 803.

all exceptions recognized in Rule 804 demand a showing of the declarant's unavailability.[139] Rule 804(a)(3) provides that the definition encompasses situations in which "the declarant . . . testifies to a lack of memory on the subject matter of the declarant's statement."[140]

The inclusion of this provision in Rule 804 is revealing. The Advisory Committee acknowledged the existing contrary authority at common law.[141] A large body of case law held that the witness's purported lack of memory was an insufficient showing of unavailability.[142] One of the leading rationales for this holding was the fear that treating memory failure as a species of unavailability "would open the door to a perjured claim of forgetfulness."[143] In light of the common law psychological assumptions, that fear was both understandable and logical. If memory is a simple, mechanical process, memory failure should be rare. When a witness claims memory failure, that claim should be automatically suspect; specifically, the sincerity of the claim should be deemed questionable. Again, the common law operated on the assumptions that insincerity was the primary hearsay danger and that defective memory was merely a secondary risk. On those assumptions, a general rule rejecting memory failure as an adequate showing of unavailability is defensible.

Nonetheless, the drafters of Rule 804(a)(3) consciously repudiated that rule. This repudiation strongly suggests that they also rejected the underlying assumptions supporting that rule. The treatment of memory failure as an acceptable type of unavailability implies that the drafters believed that the problem of defective memory was more widespread than the common law courts assumed. Because defective memory remains a more pervasive problem, courts need not treat purported memory failure as automatically suspect. Both the Morgan and Hutchins and Slesinger articles point out that misrecollection is a common problem. Coupled with the drafters' citation to those articles, Rule 804(a)(3) evidences a realization that the quality of memory is a pervasive factor affecting the reliability of hearsay testimony.

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139. FED. R. EVID. 804.

140. FED. R. EVID. 804(a)(3).

141. FED. R. EVID. 804(a)(3) advisory committee's note.

142. *See, e.g.*, Rio Grande Southern Ry. v. Campbell, 55 Colo. 493, 136 P. 68 (1914); A.T. Stearns Lumber Co. v. Howlett, 239 Mass. 59, 131 N.E. 217 (1921); *see also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 234, at 494-95 (1954) (discussing failure of memory as grounds for unavailability).

143. *Id.* § 234, at 494.

### B. *Ensuring the Quality of the Hearsay Declarant's Memory*

Realizing that the memory factor often affects the trustworthiness of hearsay testimony is one thing. Deciding as a matter of policy to assign great weight to that factor is quite another matter. However, a careful reading of Article VIII reveals that the Advisory Committee and Congress reached that very decision. For instance, Rules 803(1) and (3) indicate that the presence of facts ensuring the quality of the declarant's memory weighs strongly in favor of admitting the declarant's hearsay statement.

#### 1. Rule 803(1): The Present Sense Impression

As previously stated, at common law only a minority of jurisdictions embraced the present sense impression exception admitting contemporaneous, unexcited statements.[144] However, the Advisory Committee proposed recognizing the exception. The proposal faced determined opposition during the congressional hearings on the Rules. During the House hearings, both the Association of Trial Lawyers of America (A.T.L.A.)[145] and the American Bar Association (A.B.A.)[146] opposed the Committee's draft of Rule 803(1). The opponents stressed that at common law, the exception was a distinct minority view.[147] In light of the state of the case law and the formidable opposition, Congress's decision to approve the Committee's draft of Rule 803(1) was a "novel, even radical, departure from conventional wisdom."[148]

Surely, the stated justifications for such a radical, considered decision are entitled to a good deal of weight in interpreting the overall scheme of Article VIII. To justify the decision, the Advisory Committee invoked both Morgan's writings and the Hutchins and Slesinger article in the note to Rule 803(1).[149] The note argues the merits of recognizing the present sense impression exception by pointing to the

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144. 4 J. WEINSTEIN & M. BERGER, *supra* note 127, ¶ 803(1)[01], at 803-71 ("barely . . . acknowledged by the courts"); Comment, *supra* note 37, at 678.

145. *Rules of Evidence (Supplement): Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 212-14 (1973) [hereinafter *House Hearings*] (position paper submitted by James F. Schaeffer and Professor Joe A. Moore).

146. *Id.* at 116, 119-20 (letter from Robert W. Meserve); *id.* at 337, 340 (letter from Kenneth J. Burns, Jr.).

147. *Id.* at 212-14 (position paper submitted by James F. Schaeffer and Professor Joe A. Moore).

148. Waltz, *supra* note 39, at 869.

149. FED. R. EVID. 803(1) advisory committee's note.

"substantial contemporaneity of event and statement."[150] During the Senate hearings on the proposed rules, Richard Keatinge, the chair of the California Law Revision Commission, spoke in favor of Rule 803(1).[151] The initial argument Mr. Keatinge advanced was that contemporaneous statements are "safe from any error from defect of memory of the declarant."[152] These arguments evidently persuaded Congress, since it adopted them resoundingly by approving the present sense impression doctrine as the very first hearsay exception enumerated in Article VIII.

2. Rule 803(3): Statements of Present Bodily Condition

Congress liberalized the admissibility of hearsay testimony by approving the new present sense impression exception in Rule 803(1). Similarly, Congress enlarged the admissibility of hearsay by broadening the scope of the existing exception for statements of present bodily condition, codified in Rule 803(3).[153] Although most common law jurisdictions recognized this exception,[154] they sharply limited its scope. On the one hand, they admitted statements of present bodily condition made by a declarant to a layperson[155] or treating physician.[156] On the other hand, many jurisdictions drew the line at statements made to physicians consulted for purposes of trial preparation.[157] They did so out of concern for the sincerity factor, fearing that "if the declarant anticipates that enhancement of his symptoms will inure to his benefit in the subsequent litigation, there is . . . an affirmative motive to falsify or at least exaggerate."[158]

Just as Congress deviated from conventional wisdom by sanctioning the present sense impression exception, it also broke with tradition

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150. *Id.*

151. *Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 127, 163 (1974) [hereinafter *Senate Hearings*] (testimony of Richard H. Keatinge).

152. *Id.* (quoting C. MCCORMICK, *supra* note 142, § 272, at 579).

153. In pertinent part, Rule 803(3) reads: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (3) . . . A statement of the declarant's then existing . . . sensation . . . or physical condition (such as . . . pain . . . and bodily health) . . . ." FED. R. EVID. 803.

154. C. MCCORMICK, *supra* note 2, §§ 291-92, at 838-41.

155. *Id.* § 291, at 838.

156. *Id.* § 292, at 839-41.

157. *Id.* § 293, at 841; Slough, *supra* note 36, at 225-26.

158. C. MCCORMICK, *supra* note 2, § 293, at 841.

by enlarging the exception for declarations of present bodily condition. On its face, Rule 803(3) applies to all statements of "then existing . . . physical condition."[159] That language sweeps away the common law limitation excluding statements made to experts consulted for trial preparation purposes.

The reasoning supporting the expansive wording of Rule 803(3) is pertinent here. In its note to the Rule, the Advisory Committee aptly describes Rule 803(3) as "essentially a specialized application of Exception (1),"[160] the present sense impression doctrine. A present sense impression declaration is a contemporaneous statement about an external reality, an event the declarant is then perceiving. In the same vein, a present bodily condition declaration is a contemporaneous statement about an internal reality, a sensation the declarant is then experiencing. Richard Keatinge reiterated that point during his Senate testimony.[161] In adopting the expanded version of the exception for bodily condition declarations, Congress necessarily discounted the probative danger of insincerity, which had prompted many common law courts to narrow the exception. Rather, Congress relied on the contemporaneity of the statement and the consequent assurance of the quality of the hearsay declarant's memory.[162] Although the conservative common law courts excluded statements made to trial consultants on the premise that the danger of insincerity outweighed the guarantee of the declarant's memory, Congress evidently decided to admit the same evidence on the theory that the memory guarantee was entitled to more weight.

### C. *Challenging the Quality of the Declarant's Memory*

As noted earlier,[163] the common law courts placed a dual stress on the sincerity factor. Not only would they recognize hearsay exceptions based on foundations including proof of the declarant's subjective sincerity; they also hesitated to admit hearsay testimony absent a convincing inference of the declarant's sincerity. The Rules reflect a parallel

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159. FED. R. EVID. 803(3).

160. FED. R. EVID. 803(3) advisory committee's note.

161. *Senate Hearings*, *supra* note 151, at 127, 164 (testimony of Richard Keatinge).

162. 4 J. WEINSTEIN & M. BERGER, *supra* note 127, ¶ 803(3)[01], at 803-105; *see also* Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236 (1922) (spontaneity and contemporaneity of statements accompanying nonverbal acts render such statements credible).

163. *See supra* notes 32-50 and accompanying text.

stress on the memory factor. This section already has demonstrated that in Rules 803(1) and (3), Congress treated contemporaneity, an assurance of the declarant's memory, as a factor weighing heavily in favor of admissibility. Congress's handling of Rules 803(2), 803(5), and the proposed rule for statements of recent perception, shows that Congress viewed a lack of contemporaneity as a factor cutting sharply against admissibility.

### 1. Rule 803(2): The Excited Utterance

At common law, courts disagreed about the scope of the excited utterance hearsay exception.[164] The prevailing view was that the excited statement must relate to the startling event inspiring the excitement.[165] However, a minority view expanded the exception to encompass related statements.[166] The leading cases espousing the minority view were District of Columbia decisions.[167]

The Advisory Committee was aware of the minority view and even cited some of the District of Columbia authorities in its note to Rule 803(2).[168] Nevertheless, the Committee decided to follow the majority view imposing the restriction. That decision is another indication of a concern with the memory factor. Courts favoring the minority view stressed the sincerity factor; they argued "that the declarant's nervous excitement induces a truth telling state of mind ensuring the sincerity of the declarant's statements, whether or not the statements relate directly to the event."[169] The majority view, however, attaches greater weight to the memory factor.[170] By excluding statements about events and facts preceding the startling event, the traditional restriction affords greater assurance of the caliber of the declarant's memory. The

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164. C. MCCORMICK, *supra* note 2, § 297, at 857-58.

165. *Id.* n.26 (citing Keefe v. State, 50 Ariz. 293, 72 P.2d 425 (1937); Cook v. Hall, 308 Ky. 500, 214 S.W.2d 1017 (1948); State v. Walton, 432 A.2d 1275 (Me. 1981); Bagwell v. McLellan Stores Co., 216 S.C. 207, 57 S.E.2d 257 (1949)).

166. *Id.* (citing Murphy Auto Parts Co. v. Ball, 249 F.2d 508, 511 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 932 (1958); Felder v. Pinckney, 244 A.2d 481 (D.C. 1969); Sawyer v. Miseli, 156 A.2d 141 (D.C. 1959)).

167. *See id.*

168. *See* FED. R. EVID. 803(2) advisory committee's note (citing *Murphy Auto Parts Co.*, 249 F.2d at 508; Sanitary Grocery Co. v. Snead, 90 F.2d 374 (D.C. Cir), *cert. denied*, 302 U.S. 703 (1937)).

169. R. CARLSON, R. IMWINKELRIED & E. KIONKA, *supra* note 5, at 503 (citing *Murphy Auto Parts Co.*, 249 F.2d at 508; *Felder*, 244 A.2d at 481; *Sawyer*, 156 A.2d at 141)).

170. *Id.*

Advisory Committee took the position that eliminating the restriction would raise intolerable doubts about the reliability of the hearsay, and Congress apparently concurred in that judgment.

### 2. Rule 803(5): The Past Recollection Recorded

Like the excited utterance doctrine, the past recollection recorded exception was well-recognized at common law.[171] Again, like the excited utterance doctrine, the past recollection recorded exception is codified in the Rules. Rule 803(5) prescribes the foundational requirements for the exception.[172] The parallel continues because, like the handling of the excited utterance exception, the treatment of this exception by the Advisory Committee signals a new stress on the memory factor.

The common law version of the past recollection recorded exception required that the record in question be prepared at or near the time of the event.[173] In Rule 803(5), the Advisory Committee phrased the test differently, couching the test expressly in terms of the quality of the declarant's memory.[174] The wording of the Rule requires that the proponent prove the declarant made the statement "when the matter

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171. C. MCCORMICK, *supra* note 2, § 299, at 864-65 (citing United States v. Sawyer, 607 F.2d 1190 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980); United States v. Arias, 575 F.2d 253 (9th Cir.), *cert. denied*, 439 U.S. 868 (1978); United States v. Williams, 571 F.2d 344 (6th Cir.), *cert. denied*, 439 U.S. 841 (1978); Acklen's Executor v. Hickman, 63 Ala. 494 (1879); Kinsey v. State, 49 Ariz. 201, 65 P.2d 1141 (1937); State v. Easter, 185 Iowa 476, 170 N.W. 748 (1919); Mathis v. Strickland, 201 Kan. 655, 443 P.2d 673 (1968); State v. Legg, 59 W. Va. 315, 53 S.E. 545 (1906)).

172. Federal Rule 803(5) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.

FED. R. EVID. 803.

173. 4 J. WEINSTEIN & M. BERGER, *supra* note 127, ¶ 803(5)[01], at 803-163 to -164; *see also* United States v. Patterson, 678 F.2d 774, 778-79 (9th Cir. 1981) ("A traditional rule, commonly applied before adoption of Rule 803(5), was that freshness is defined by contemporaneousness, i.e., the witness' recollection must have been recorded at or near the time of the event."), *cert. denied*, 459 U.S. 911 (1982).

174. *See* FED. R. EVID. 803(5) advisory committee's note; 4 J. WEINSTEIN & M. BERGER, *supra* note 127, ¶ 803(5)[01], at 803-163 to -164.

was fresh in the witness' memory . . . ."[175] The Rule thus directs the courts administering Rule 803(5) to focus squarely on the memory factor in deciding whether proffered hearsay testimony is trustworthy enough to be admitted as past recollection recorded.

3. The Proposed Exception for Statements of Recent Perception

When the Advisory Committee drafted Rule 804, it included a separate exception for statements of recent perception.[176] The proposed exception read:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.[177]

In several respects, the proposed exception was strikingly similar to the present sense impression doctrine. To begin with, like the present sense exception, the proposed exception was a distinct minority view when the Advisory Committee began its work. In the note accompanying the proposed exception, the Committee analogized to a handful of state statutes allowing the introduction of hearsay that was barred at common law.[178] In addition, during the congressional hearings on the Rules, the proposal suffered the same fate as the present sense impression exception. The A.B.A.[179] and A.T.L.A.,[180] the same groups that inveighed against the present sense impression doctrine, pointedly attacked the recent perception doctrine as well.[181] The A.T.L.A. urged the defeat of both proposed exceptions to the hearsay rule, but seemed more strongly opposed to the present sense impression doctrine.[182]

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175. FED. R. EVID. 803(5).

176. *See* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 254-55 (1989).

177. *Id.*

178. *Id.*

179. *See House Hearings, supra* note 145, at 337, 341 (letter of Kenneth J. Burns, Jr.).

180. *Id.* at 212-14 (position paper submitted by Mr. James F. Schaeffer and Professor Joe A. Moore).

181. *See supra* notes 145-47 and accompanying text.

182. *See House Hearings, supra* note 145, at 213. On behalf of the A.T.L.A., Mr. Schaeffer and Professor Moore asserted in their position paper:

At first blush, because so many commonalities existed between the present sense impression and recent perception doctrines, it perhaps should have been expected that Congress would either reject or accept both exceptions. Indeed, because the A.T.L.A. appeared more vehemently opposed to the present sense impression doctrine, the recent perception exception arguably had a better prospect for acceptance. Yet Congress did the seemingly unexpected: It chose to treat the two exceptions differently by accepting the present sense impression doctrine while jettisoning the recent perception proposal.[183]

That choice further indicates the importance that Congress assigned to the memory factor. Congress chose to admit statements of immediate perception but to exclude statements of recent perception.[184] Although the two types of hearsay statements share many characteristics, they are distinguishable in terms of the magnitude of the risk of defective memory.[185] Courts tend to confine the present sense impression exception to statements made seconds,[186] minutes,[187] or at most an hour or so[188] after the event observed. The strict enforcement of the contemporaneity requirement reduces the risk of defective memory to a negligible possibility;[189] as a practical matter, the immediacy of

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> It is submitted that Proposed Rule 803(1) is subject to the same criticism [as the proposed recent perception exception], and to a greater degree by reason of the fact that the requirement here is that the hearsay is admissible even though the alleged declarant is available as a witness at the trial. Under the now stricken [recent perception exception] the requirement of unavailability of the declarant was made, thus giving at least some semblance of need for the admission of the hearsay.

*Id.*

183. The House Judiciary Committee explained the rejection of the recent perception exception in this manner: "The Committee eliminated this Rule as creating a new and unwarranted hearsay exception of great potential breadth. The Committee did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness to justify admissibility. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 256 (1989).

184. *Cf.* Note, *supra* note 70, at 1061 (addressing the need for contemporaneity and spontaneity).

185. *See id.* at 1059-61, 1075.

186. United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982).

187. 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 438, at 488-90 n.77 (1980) (citing United States v. Blakey, 607 F.2d 779, 785-86 (7th Cir. 1979) ("between several and 23 minutes"); United States v. Cain, 587 F.2d 678, 681-82 (5th Cir. 1979) ("within a few minutes"); Hilyer v. Howat Concrete Co., 578 F.2d 422, 426 n.7 (D.C. Cir. 1978) ("at least fifteen minutes and possibly up to forty-five minutes after the accident")).

188. *Id.* § 439, at 181 (Supp. 1988) (citing United States v. Iron Shell, 633 F.2d 77, 85-86 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981)).

189. *Id.* § 438, at 483 (1980).

the statement[190] eradicates potential memory deficiencies.[191] In the case of a present sense impression statement, the hearsay risk of misrecollection is almost nonexistent.

When the statement is one of recent perception, however, the time lapse can be much lengthier. The recent perception exception would probably apply to statements made the day after the event in question.[192] The greater time lapse increases the risk of memory impairment.[193] There is a difference in degree in the risk; and given the rapid rate of forgetting documented by psychological researchers,[194] the difference is significant.

In summary, the text of Article VIII of the Rules, the accompanying Advisory Committee Notes, and the relevant passages from the congressional hearings all point to the same conclusion: under Article VIII, courts must scrutinize the memory factor in proffered hearsay testimony much more closely than they did at common law. The congressional concern over the memory factor is evident in such provisions as Rules 803(1)-(3), 803(5), and 804(a)(3). Courts certainly must attend to the memory factor in applying those provisions of the statutory scheme.

More broadly, however, sensitivity to the memory factor was a recurring motif in the deliberations over the proposed hearsay exceptions. That overarching concern should not only guide courts in applying provisions such as Rule 803(5), which expressly direct the courts to factor memory into their admissibility analyses; but it also should infuse the courts' administration of hearsay provisions such as 803(6)[195]

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190. *Id.* § 438, at 482 (1980).

191. United States v. Narisco, 446 F. Supp. 252, 285 (E.D. Mich. 1977).

192. 4 J. WEINSTEIN & M. BERGER, *supra* note 127, ¶ 804(b)(5)[04], at 804-199.

193. Note, *supra* note 70, at 1075.

194. *See supra* notes 119-24 and accompanying text.

195. Federal Rule 803(6) codifies the business entry exception:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

FED. R. EVID. 803.

and 803(8).[196] Those provisions codify the business entry[197] and official record[198] hearsay exceptions, respectively. Both provisions confer on the trial judge discretion to determine whether the hearsay evidence is sufficiently reliable to be admissible.[199] The Advisory Committee and Congress considered the memory factor to be an important index to the reliability of hearsay testimony. Thus, trial judges should weigh that factor in exercising their discretion under Article VIII. For example, they should consider whether the business entry[200] or official record[201] was prepared in a timely fashion, minimizing the risk of misrecollection.

## V. JUDICIAL APPLICATION OF THE HEARSAY EXCEPTIONS: THE LESSON FORGOTTEN

Part III of this article noted that since the turn of the century, psychologists have criticized the common law assumptions about memory. The preceding section of this article demonstrated that at long last, when Congress passed Article VIII of the Federal Rules of Evi-

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196. Rule 803(8) embodies the official record hearsay exception:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8).

197. C. MCCORMICK, *supra* note 2, §§ 304-14, at 870-87.

198. *Id.* §§ 315-20, at 888-98.

199. The first sentence of Rule 803(6) concludes with the clause, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." FED. R. EVID. 803(6). Rule 803(8) contains a similar clause. *See* FED. R. EVID. 803(8); *see also* FED. R. EVID. 803(7) ("unless the sources of information or other circumstances indicate lack of trustworthiness").

200. *See* 4 D. LOUISELL & C. MUELLER, *supra* note 186, § 446, at 661-62; Stewart, *supra* note 15, at 24; *see also* United States v. Lemire, 720 F.2d 1327, 1350-51 (D.C. Cir. 1983) (corporate memorandum was not prepared in a timely fashion), *cert. denied*, 467 U.S. 1226 (1984).

201. *See In re* Paducach Towing, Inc., 692 F.2d 412 (6th Cir. 1982); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125 (D. Pa. 1980); Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264 (S.D. Ohio 1979). The California Evidence Code explicitly requires that the record be "made at or near the time of the act, condition, or event . . . ." CAL. EVID. CODE § 1280(b) (West 1989).

dence in 1975,[202] the legal system responded constructively to the criticism. Several provisions of Article VIII require courts to analyze the risk of misrecollection. Other provisions mandate a discretionary determination of the trustworthiness of proffered hearsay testimony. Courts can and should consider the risk of deficient memory in making that determination.

Two questions then naturally arise: Have the courts recognized their new duty to be attentive to the memory factor in passing on the admissibility of hearsay? Do the cases applying Article VIII exhibit a heightened awareness of the hearsay risk of memory? Unfortunately, in many cases, courts have been blind to this duty. In a number of cases decided under the excited utterance, past recollection recorded, and residual hearsay exceptions, courts have neglected their duty and overlooked substantial memory risks.

### A. *Excited Utterance Cases*

*United States v. Napier*[203] is illustrative. A grand jury indicted Napier for interstate kidnapping in violation of the Lindbergh Act. The alleged victim, Mrs. Caruso, had been kidnapped in Oregon and transported to Washington, where she was found unconscious with severe head injuries. Expert testimony indicated that she had suffered such extreme brain damage that she was incapable of testifying at trial. She was hospitalized for seven weeks after the assault, and underwent two brain operations during that time.[204] Approximately one week after she returned home from the hospital, her sister showed her a newspaper article about her case. The article contained a photograph of the defendant.[205] The sister testified that when Mrs. Caruso looked at the photograph, her "immediate reaction was one of great distress and horror and upset."[206] According to her sister, Mrs. Caruso "pointed to [the photograph] and she said very clearly, 'He killed me, he killed me.'"[207] Over defense objection, the trial judge admitted the sister's testimony about Mrs. Caruso's statement; the judge ruled that the statement qualified as an excited utterance under Rule 803(2).[208]

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202. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926.
203. 518 F.2d 316 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975).
204. *Id.* at 317.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 317-18.

Even if *Napier* were a common law case, it would be an extreme decision on its facts. It is true that at common law there were no hard-and-fast rules as to how long the declarant's state of nervous excitement could last. However, in *Napier*, Mrs. Caruso made her hearsay declaration roughly two months after the attack. In practice, common law courts rarely admitted statements made that long after the event under the excited utterance exception.[209]

But *Napier* was not a common law case; it was decided under the Federal Rules of Evidence.[210] The *Napier* decision was rendered in mid-1975, shortly after the Rules took effect.[211] *Napier* ignored the mandate of Article VIII and forewent any analysis of the memory factor. After a vague reference to unspecified evidence indicating that Mrs. Caruso's memory was intact, the court analyzed the admissibility of the evidence solely in terms of the sincerity factor. As the court framed the issue, the question was whether viewing a photograph could be a sufficiently startling event to induce nervous excitement in Mrs. Caruso's mind.[212] The Ninth Circuit sustained the trial court's admission of the testimony because "suddenly and unexpectedly confront[ing]" the photograph could produce enough excitement in her mind to "safeguard[ ] against reflection and fabrication."[213]

The *Napier* court plainly missed the point. The facts raised grave doubts about the quality of the declarant's memory, a factor the court should have considered under Article VIII. As noted previously, observers are inclined to forget details about events with negative associations.[214] The attack on Mrs. Caruso was a traumatic experience for her, the very type of experience that can trigger the phenomenon of repression.[215] Further, a substantial amount of time elapsed between

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209. *See generally* 4 D. LOUISELL & C. MUELLER, *supra* note 187, § 438, at 490; *id.* § 439, at 505-07; Stewart, *supra* note 15, at 28; Comment, *supra* note 37, at 671-72 ("In most cases in which excited utterances have been admitted, the time element involved has been less than fifteen minutes . . . ."); Annot., *Time Element as Affecting Admissibility of Statement or Complaint Made by Victim of Sex Crime as Res Gestae, Spontaneous Exclamation, or Excited Utterance*, 89 A.L.R.3d 102, 113-14, 170-71 (1979) (time element as it affects *res gestae* in sex crime cases); Annot., *Time Element as Affecting Admissibility of Statements By Victim of Sex Crimes as Res Gestae*, 19 A.L.R.2d 579, 583, 603 (1951) ("Statements made a day or several days or more after commission of the offense are generally regarded as not part of the res gestae.").

210. *Napier*, 518 F.2d at 317-18.

211. *Napier* was rendered on June 13, 1975. The Federal Rules of Evidence took effect in early 1975. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926.

212. *Napier*, 518 F.2d at 318.

213. *Id.*

214. *See supra* notes 90-95 and accompanying text.

215. *See id.*

the event and the hearsay declaration, an exceptional lapse even by common law standards. Psychological research documents the rapid rate at which memory fades.[216] Finally, the facts of the case strongly imply external suggestion at the time of the hearsay statement. Mrs. Caruso evidently realized that she was looking at a newspaper article about her attack. As far as one can tell from reading the opinion, the article contained a single photograph — the photograph of the defendant. In other contexts, courts repeatedly have remarked that presenting the victim with a single person in a showup[217] or a solitary photograph is inherently suggestive.[218] In *Napier*, these factors — the traumatic event, the lengthy time lapse, and the implicit suggestions made at the time of Mrs. Caruso's statement — accumulated to create a serious memory risk. Yet the *Napier* court altogether ignored that risk.

### B. *Past Recollection Recorded Cases*

*Napier* is not an isolated phenomenon. *United States v. Patterson*,[219] decided in 1982, fits into the same pattern. In *Patterson*, the defendant was indicted for receiving stolen property and transporting stolen property in interstate commerce. The property in question consisted of three forklifts stolen from different California companies. One of the witnesses at the grand jury hearing was James McKay, the defendant's nephew. Before the grand jury hearing, the prosecution granted McKay immunity.[220] This was in all probability a limited grant of use and derivative use immunity,[221] protecting McKay only

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216. *See supra* notes 119-24 and accompanying text.

217. Sanchell v. Parratt, 530 F.2d 286 (8th Cir. 1976); Jenkins v. Warrington, 530 F. Supp. 121 (D. Mont. 1982), *aff'd*, 714 F.2d 152 (9th Cir. 1983); Wadley v. State, 634 S.W.2d 658 (Tenn. Crim. App. 1982); Durrough v. State, 672 S.W.2d 860 (Tex. Ct. App. 1984).

218. Bloodworth v. Hopper, 539 F.2d 1382 (5th Cir. 1976); United States v. Kimbrough, 528 F.2d 1242 (7th Cir. 1976); Israel v. Odom, 521 F.2d 1370 (7th Cir. 1975); Wicks v. Lockhart, 569 F. Supp. 549 (E.D. Ark. 1983). Some courts have gone so far as to condemn the use of showups, demanding that police agencies abandon the practice. *See, e.g.*, *Wadley*, 634 S.W.2d at 658; *Durrough*, 672 S.W.2d at 860.

219. 678 F.2d 774 (9th Cir. 1982).

220. *Id.* at 777.

221. There are two types of immunity: the broader transactional immunity, and limited use and derivative use immunity. E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, COURTROOM CRIMINAL EVIDENCE § 1733, at 476-77 (1987) [hereinafter E. IMWINKELRIED & P. GIANNELLI]. Transactional immunity protects the grantee from any prosecution for the immunized acts. In contrast, use and derivative use immunity protects the grantee only from the use of the compelled disclosure as testimony against the grantee at a trial or as an investigative lead. In Kastigar v. United States, 406 U.S. 441 (1972), the Supreme Court held that use

from the testimonial or investigative use of his compelled testimony, rather than from any prosecution for his crimes. McKay testified before the grand jury that he had had an earlier conversation with the defendant about several forklifts in the defendant's possession. McKay also testified that in the conversation, the defendant told him that the forklifts came from California and that they were stolen. At least ten months elapsed between the alleged conversation and McKay's grand jury testimony.[222]

Approximately four months later at trial, McKay professed that he could not remember any conversation with the defendant.[223] After attempting unsuccessfully to refresh McKay's memory with the transcript of his grand jury testimony,[224] the prosecutor offered the transcript as substantive evidence under Rule 803(5) governing the past recollection recorded doctrine.[225] The trial judge admitted the transcript over defense objection.[226]

On appeal, the Ninth Circuit sustained the trial judge's decision;[227] the court relied in part on the Seventh Circuit's opinion in *United States v. Senak*.[228] The *Patterson* court acknowledged that *Senak* was a "pre-Rules" case.[229] In *Senak*, the three-year time lapse between the event and the statement was even greater than in *Patterson*.[230] After discussing *Senak*, the *Patterson* court emphasized that the trial judge has broad discretion in determining the freshness of the declarant's memory.[231] The extent of the court's factual analysis was limited to pointing to McKay's trial testimony that he remembered the conversation at the time of the grand jury hearing.[232] Based on that analysis, the court declared that "it was well within the discretion of the trial judge"[233] to rule that McKay's memory was fresh at the time of the

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and derivative use immunity is sufficient to supplant the fifth amendment privilege against self-incrimination. The common, contemporary practice is to grant only use and derivative use immunity. E. IMWINKELRIED & P. GIANNELLI, *supra*, § 1733, at 478.

222. *Patterson*, 678 F.2d at 779.

223. *Id.* at 777.

224. *See* FED. R. EVID. 612.

225. *Patterson*, 678 F.2d at 777.

226. *Id.*

227. *Id.* at 780.

228. *Id.* at 779 (citing United States v. Senak, 527 F.2d 129 (7th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976)).

229. *Id.*

230. *Senak*, 527 F.2d at 136.

231. *Patterson*, 678 F.2d at 779.

232. *Id.*

233. *Id.*

grand jury hearing. In concluding, the court stated that even if the ruling was erroneous, the error was harmless.[234]

Like *Napier*, the *Patterson* decision is dubious. When *Patterson* was decided, one commentator, Professor Schmertz, voiced disagreement with the decision.[235] In particular, he found fault with the court's analysis of the memory factor:

> [I]t would seem preferable to rely upon a more objective test of memory freshness based on accepted psychological findings on the general patterns of human forgetting rather than rely to a large degree on the credibility of the witness as to the state of his memory four months before as to a conversation ten months before that.[236]

Professor Schmertz's criticism of *Patterson* is well-taken. One flaw in the opinion is the court's assumption that pre-Rules cases are still good law on the question of freshness of memory. The court cited *Senak* and, in effect, argued that if a three-year time lapse was acceptable in *Senak*, a ten-month lapse should be acceptable in *Patterson*. That argument is unsound. As the preceding section of this article demonstrates, Article VIII of the Rules requires courts to adopt a more critical attitude toward the memory factor than they had at common law. When Congress passed on the proposed Rules, it rejected the exception for recent perception declarations.[237] That exception probably would have permitted the admission only of statements made within a few days after the perceived event.[238] Yet Congress concluded that the statements qualifying under that exception posed unacceptably high hearsay risks, notably memory impairment.[239] Congress's decision to reject the recent perception exception raises doubts about the admissibility of hearsay statements made any appreciable length of time after the event.[240] The *Patterson* court thus erred in treating *Senak* as apposite authority under the Rules.

*Patterson* compounded its error with a superficial analysis of the facts. The court's entire analysis consisted of noting McKay's trial testimony that he recalled the conversation at the time of the grand

234. *Id.* at 780.
235. 7 FED. RULES EVID. NEWS 82-95 (1982).
236. *Id.*
237. 4 J. WEINSTEIN & M. BERGER, *supra* note 127, ¶ 804(b)(5)[04], at 804-202.
238. *Id.* ¶ 804(b)(5)[04], at 804-199.
239. *See* Note, *supra* note 70, at 1075.
240. *Id.*; *see also* Robinson v. Shapiro, 646 F.2d 734, 742 n.6 (2d Cir. 1981).

jury hearing. Even assuming McKay's sincerity and the truthfulness of his trial testimony, the court misunderstood the memory problem. By their very nature, misrecollection errors are unintentional; the declarant honestly but mistakenly believes that his or her memory is accurate. The court should not accept the declarant's profession of accurate memory at face value. Rather, it is incumbent upon the court to engage in a particularized analysis of the psychological factors affecting the accuracy of memory.

In *Patterson*, those factors make the quality of the declarant's memory questionable. Between the alleged conversation and the grand jury testimony about the conversation, several factors worked to lower the quality of the memory. As in *Napier*, a considerable amount of time elapsed. Moreover, bias came into play. McKay likely had only use and derivative use immunity.[241] If so, he was still vulnerable to the possibility of prosecution for his involvement in the crimes. Hence he had a potent motivation to curry the prosecution's favor; he may have realized that if his grand jury testimony disappointed the prosecutor, the prosecutor might become angry enough to conduct the investigation needed to unearth independent evidence of McKay's guilt.[242] Bias can induce witnesses to remember what they wish had happened rather than what actually happened.[243] Lastly, again as in *Napier*, the danger of suggestion was present at the time of the hearsay statement. In the typical grand jury hearing, a prosecutor interrogates the witnesses. Because the prosecutor is an authority figure, there is a risk that witnesses will follow any suggestive leads in the prosecutor's questions. In *Patterson*, that risk was abnormally high. The prosecutor's role at the hearing enhanced the danger created by McKay's bias. During McKay's appearance before the grand jury, the prosecutor would be a constant reminder to McKay of his immunity and the need to cooperate with the prosecution.

Unfortunately, *Patterson* does not stand alone. Other past recollection recorded cases slight the memory factor as well. In *United States v. Williams*,[244] a prosecution witness gave a written statement to a secret service agent. Like McKay's testimony in *Patterson*, the written statement described a conversation between the witness and the defen-

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241. *See supra* note 221 and accompanying text.

242. *Cf.* E. IMWINKELRIED & P. GIANNELLI, *supra* note 221, § 1734, at 478-81.

243. *See supra* notes 114-16 and accompanying text.

244. 571 F.2d 344 (6th Cir.), *cert. denied*, 439 U.S. 841 (1978). *Williams* is briefly mentioned in 4 D. LOUISELL & C. MUELLER, *supra* note 187, § 445, at 639 n.59.

dant. The alleged conversation occurred "approximately six months" before the witness signed the statement.[245] As in *Patterson*, at trial the witness acknowledged making the hearsay statement.[246] The witness's trial testimony, however, contradicted some of the passages in the earlier written statement.[247] The witness added that before he gave the agent the statement, the agent had threatened him with prosecution.[248] Nevertheless, the prosecutor offered the statement into evidence as past recollection recorded under Rule 803(5). The defense objected, but the trial judge overruled the objection.[249] Citing the witness's acknowledgment of the statement, the Sixth Circuit affirmed the lower court's ruling.[250]

The *Williams* court's reasoning was strikingly similar to that in *Patterson*. Like *Patterson*, the *Williams* court cited *Senak*, a pre-Rules decision, as authority.[251] The opinion reflects no appreciation that the Rules place greater stress on the memory factor than did common law decisions such as *Senak*. The court's factual analysis of the memory issue was as superficial as that in *Patterson*. The trial judge admitted the statement in the face of a half-year gap between the event and the hearsay statement. Because the person who solicited the statement was an authority figure, a secret service agent, the risk of suggestion was present. According to the declarant's own trial testimony, the risk was more than theoretical; the declarant himself testified that the agent accused the declarant of criminal wrongdoing before requesting the declarant's "cooperation."[252] Although the substantial memory risks deserved extended analysis, the court made short shrift of the memory issue.

### C. *Residual Hearsay Exception Cases*

Neglect of the memory factor is not confined to the cases decided under the excited utterance and past recollection hearsay exceptions, but has spilled over into the case law applying the residual hearsay exceptions. After a heated debate,[253] Congress decided to include re-

245. *Williams*, 571 F.2d at 348.
246. *Id.* at 346.
247. *Id.* at 347-48.
248. *Id.* at 348.
249. *Id.*
250. *Id.* at 350.
251. *Id.* at 349.
252. *Id.* at 346.
253. *See generally* Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239, 240 (1978) (noting congressional debate over whether to include residual exceptions).

sidual exceptions at the end of Rules 803[254] and 804.[255] Rule 804(b)(5) provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (5) . . . A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.[256]

During the first few years after passage of the Federal Rules, courts applied the residual exceptions cautiously and rarely invoked them.[257] In recent years, however, courts have interpreted the residual exceptions more expansively.[258]

Courts have been especially willing to use Rule 804(b)(5) as a basis for admitting the grand jury testimony of declarants who are unavailable at trial.[259] Although the *Patterson* court resorted to the past recollection recorded doctrine to justify admitting grand jury testimony, a federal court today is more likely to employ the residual exceptions as the basis for introducing the testimony. Professor Jonakait has thoroughly studied this use of Rule 804(b)(5)'s residual exception.[260] His study reveals that as in the case of the excited utterance and past recollection recorded exceptions, the cases applying the residual exceptions often slight the memory factor.[261]

*United States v. Garner*,[262] a 1978 decision by the Fourth Circuit, is one of the seminal cases applying the residual exception to grand

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254. FED. R. EVID. 803(24).

255. FED. R. EVID. 804(b)(5).

256. *Id.*

257. E. IMWINKELRIED & P. GIANNELLI, *supra* note 221, §1230, at 326, § 1313, at 347.

258. *Id.*

259. *Id.* § 1313, at 347; *see* Annot., *Admissibility of Testimony Before Grand Jury of Unavailable Witness Under Rule 804(b)(5), Federal Rules of Evidence, Providing for Admission of Hearsay Statement not Covered by Any Specific Exception but Having Equivalent Circumstantial Guarantees of Trustworthiness*, 50 A.L.R. Fed. 848 (1980).

260. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431 (1986).

261. *Id.* at 450-51.

262. 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978).

jury testimony. Garner and his codefendants were charged with importing heroin from Europe. At trial, some of the prosecution's most crucial evidence was the grand jury testimony of Warren Robinson. At the grand jury hearing, Robinson testified that the defendants recruited him to help in their heroin importation scheme and that he accompanied them on several overseas trips to carry out the scheme.[263]

After the overseas trips but before his grand jury appearance, Robinson was incarcerated[264] and indicted for other offenses.[265] Facing the prospect of "very heavy penalties,"[266] he entered a plea agreement. The agreement required him to testify against the defendants before the grand jury. Robinson fulfilled that requirement at a grand jury hearing, which evidently occurred "more than a year" after the overseas trips.[267] After the hearing and before the defendants' trial, however, Robinson indicated his reluctance to testify at trial. Despite his lawyer's advice, Robinson persisted in his refusal to testify. He remained uncooperative even though the court granted him use immunity and threatened him with contempt.[268]

At trial, Robinson answered only a few of the questions put to him. One of the things he did testify to was that "his grand jury testimony was inaccurate."[269] In addition to attempting to elicit Robinson's live testimony, the prosecution offered documentary evidence of airline tickets, customs declarations, passport endorsements, and hotel registrations.[270] The documentary evidence contradicted portions of Robinson's grand jury testimony.[271] Undaunted, the prosecutor offered the grand testimony transcript as evidence under Rule 804(b)(5). The trial judge accepted the offer,[272] and over a dissent,[273] the Fourth Circuit sustained the admission of the transcript.[274]

The appellate court reasoned that admission was proper because ample corroboration existed for Robinson's grand jury testimony. One source of corroboration was the trial testimony of one Ms. McKee,[275]

263. *Id.* at 1143.
264. *Id.* at 1142.
265. *Id.* at 1142-43.
266. *Id.* at 1143.
267. *Id.* at 1145.
268. *Id.* at 1143.
269. *Id.*
270. *Id.* at 1144.
271. *Id.* at 1144-45.
272. *Id.* at 1143.
273. *Id.* at 1147 (Widener, J., concurring and dissenting).
274. *Id.*
275. *Id.* at 1144.

whose motivation to cooperate with the prosecution is unclear.[276] She admitted her participation in criminal acts,[277] and may have struck a deal with the prosecution before trial.[278] In any event, she testified at trial that she had accompanied Robinson and Garner on one of the overseas trips.[279] Her trial testimony described events that occurred more than a year earlier.[280] After mentioning McKee's testimony, the court conceded that Robinson's grand jury testimony and the prosecution's documentary evidence clashed.[281] Nonetheless, the court dismissed the importance of the discrepancy. By way of explanation, the court stated that "[t]estifying from his recollection more than a year later, Robinson may have been confused about [the details]."[282]

The *Garner* opinion is cast in the same mold as *Napier* and *Patterson*. All three depreciate the importance of the memory factor in evaluating the reliability of hearsay testimony. The memory factor in Robinson's grand jury appearance was suspect on several grounds. The most obvious ground was the significant time lapse between Robinson's grand jury appearance and the events he described. However, there were several other reasons to be skeptical of the trustworthiness of his grand jury testimony. As in *Patterson*, the bias factor operated in the interim between the events and the grand jury hearing; like McKay, Robinson entered an agreement with the prosecutor. Moreover, a risk of suggestion existed at the hearing itself, since a prosecutorial agent undoubtedly elicited Robinson's testimony. Worse still, the prosecution's documentary evidence and Robinson's trial testimony contradicted several statements in his grand jury testimony.

The memory factor in McKee's corroborating testimony was suspect for some of the same reasons: possible bias and a lengthy time gap.[283] In discounting the conflicts between the documentary evidence and Robinson's grand jury testimony, the *Garner* court indicated that because he was testifying about events which had occurred more than a year earlier,[284] Robinson's misrecollection was understandable. Inexplicably, the court ignored that McKee's corroborating testimony

276. Jonakait, *supra* note 260, at 450.
277. *Garner*, 574 F.2d at 1144.
278. Jonakait, *supra* note 260, at 450.
279. *Garner*, 574 F.2d at 1144.
280. Jonakait, *supra* note 260, at 450.
281. *Garner*, 574 F.2d at 1144-45.
282. *Id.* at 1145.
283. Jonakait, *supra* note 260, at 450.
284. *Garner*, 574 F.2d at 1145.

was vulnerable to the same memory deficiency. The facts in *Garner* created a tremendous danger of faulty memory.[285]

Professor Jonakait is properly critical of the *Garner* court's failure to appreciate the memory flaws in Robinson's grand jury testimony.[286] Moreover, he recognizes a growing trend to admit unavailable declarants' grand jury testimony[287] even when the testimony presents significant memory risks.[288] He perceives the case law as moving toward the routine admission of grand jury testimony of unavailable declarants.[289]

Jonakait finds this trend troublesome. He argues that admitting grand jury testimony that presents such risks violates the legislative intent of Article VIII.[290] As evidence of the legislative intent, he points to Congress's rejection of the proposed hearsay exception for statements of recent perception.[291] Although he rests his case against the routine admission of grand jury testimony primarily on the sincerity factor in hearsay analysis,[292] the memory factor greatly strengthens his case. By its terms, Rule 804(b)(5) instructs courts to admit hearsay under the residual exception only when the hearsay has guarantees of trustworthiness "equivalent" to those underlying the specifically enumerated hearsay exceptions.[293] The rule provides that courts may invoke the residual exception only if doing so would serve "the general purposes of these rules . . . ."[294] The preceding section of this article demonstrated that Article VIII places greater stress on the memory factor. Accordingly, it does not serve "the general purposes" of Article VIII to admit testimony posing major memory risks. Quite to the contrary, doing so violates the mandate of Article VIII that courts be more sensitive to the memory factor.

## VI. CONCLUSION

On the one hand, this article does not call for the formulation of fixed, arbitrary rules for determining which time lapses between per-

285. Jonakait, *supra* note 260, at 451-52.
286. *See id.* at 452.
287. *Id.* at 456; *see also* United States v. Yonkers Contracting Co., 701 F. Supp. 431, 436 (S.D.N.Y. 1988).
288. Jonakait, *supra* note 260, at 476-77.
289. *Id.*
290. *Id.* at 477-78.
291. *Id.*
292. *Id.* at 481.
293. FED. R. EVID. 804(b)(5).
294. FED. R. EVID. 804(b)(5)(C).

ception and attempted recollection are acceptable.[295] As part II of this article points out, one cause of the early neglect of the memory factor in hearsay analysis was the drastically oversimplified common law assumptions about the operation of human memory. The memory function is much more complex than the common law assumed,[296] and that complexity precludes developing hard-and-fast rules about the length of the memory interval. The law stands to gain nothing by replacing one set of simplistic assumptions with an equally arbitrary set.

On the other hand, it is desirable and now legislatively mandated that the courts focus more intensely on the memory factor in hearsay analyses. Modern psychology has provided important insights into the memory function. Courts can improve the quality of their hearsay analysis by capitalizing on those insights. More to the point, not only should they take advantage of those insights, but Article VIII of the Federal Rules requires them to do so. The history of Article VIII — its text, the Advisory Committee notes, and the relevant congressional materials — evidences concern about the memory factor. Courts should bear that concern in mind when they apply the provisions of Article VIII, such as Rule 803(5), the past recollection recorded exception, expressly referring to the memory factor. The same concern should guide the courts' exercise of discretion that provisions such as Rule 803(8), the official record exception, confer on them.

Unfortunately, the judicial response to the mandate of Article VIII has been disappointing. Like their common law predecessors, courts construing Article VIII have tended to focus on the sincerity factor to the neglect of the more important memory factor. As the last section of this article demonstrates, that neglect is evident in a number of cases decided under the excited utterance, past recollection recorded, and residual exception doctrines. Some commentators have charged that the same neglect is now infecting the courts' administration of the present sense impression exception.[297] In all too many cases decided under the Federal Rules of Evidence, courts have been content with the same superficial analysis of the memory factor that pervaded the common law. At least when a significant memory interval is coupled with other psychological factors tending to cause misrecollec-

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295. *See* 4 D. LOUISELL & C. MUELLER, *supra* note 187, § 445, at 639 ("Wooden rules of thumb — such as the memory remains fresh for a few weeks, but that the passage of several years precludes a decision that memory is still fresh — are not helpful.").

296. Kubie, *supra* note 19, at 61.

297. *See, e.g.*, Comment, *supra* note 131, at 670.

tion, courts should engage in a careful, in-depth evaluation of the memory risks posed by proffered hearsay testimony. In 1952, one of the great reformers of American evidence law, Dean Mason Ladd, criticized the overemphasis of the common law on the sincerity factor.[298] He counseled the courts that the impressive evidence of the importance of the memory factor "requires [more] thought upon the hearsay we admit."[299] Almost four decades later, his counsel is still wise.

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298. Ladd, *supra* note 32, at 280-81, 286.
299. *Id.* at 288.