

# Goldilocks and the Rule 803 Hearsay Exceptions

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## GOLDILOCKS AND THE RULE 803 HEARSAY EXCEPTIONS

LIESA L. RICHTER\*

### ABSTRACT

*Criticism of the hearsay exceptions embodied in the Federal Rules of Evidence has reached a fever pitch in recent years. With scholars calling for the abrogation of the entire hearsay regime or of individual exceptions within it and the Advisory Committee on Evidence Rules exploring hearsay amendments, the time for genuine hearsay soul-searching may be at hand. This Article suggests that aggressive proposals to scuttle existing doctrine entirely in favor of alternative approaches to hearsay are overly broad, rejecting the benefits of significant portions of existing doctrine that are functioning well and threatening costly consequences that could make matters worse for hearsay. On the opposite end of the spectrum, narrow proposals to amend individual hearsay exceptions one at a time accomplish too little and may undermine the utility of long-standing and rational hearsay exceptions that permit the flow of helpful information into the trial process.*

*As an alternative to these proposals at opposite ends of the spectrum, this Article reveals a ready hearsay reform right under our noses that hits that sweet spot in between a sweeping, aggressive reform and an unduly narrow, limited fix. The Article suggests borrowing the trustworthiness exception that is a current feature of the business and public records exceptions and extending its application to additional hearsay exceptions in Federal Rule of Evidence 803. This change would make hearsay statements falling within the existing requirements of the Rule 803 exceptions presumptively admissible, but would afford the opponent of those hearsay statements the opportunity to show that the particular circumstances*

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*surrounding the statements render them untrustworthy and inadmissible. Fleshing out this concept first advanced in my previous work, this Article explains why an expanded trustworthiness exception could be the silver bullet that takes an important step toward rationalizing hearsay doctrine.*

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## INTRODUCTION

The hearsay regime embodied in the Federal Rules of Evidence has long been a favorite target for criticism. Scholars, judges, and lawyers alike have lamented the complexity, inefficiency, and irrationality of the hearsay prohibition and its multifarious exceptions. Although criticizing the existing hearsay regime is as easy as shooting fish in a barrel, finding a cure for what ails hearsay doctrine has proved a much harder task. Although complaints about the inadequacy of hearsay doctrine have continued unabated, there has been no significant overhaul of the hearsay regime since the enactment of the Federal Rules of Evidence in 1975.

Two recent trends have placed hearsay reform back in the limelight. First, the rapid evolution of communication norms that has generated an avalanche of electronic hearsay, or e-hearsay, has led to a reexamination of hearsay doctrine.<sup>1</sup> Coinciding with the rise of e-hearsay is a modern emphasis on data-driven, empirically supported legal constructs that has pulled hearsay doctrine back into the spotlight, or the crosshairs as it were.<sup>2</sup> In light of these trends, scholars have advanced many intriguing proposals for reform. Some have suggested a complete overhaul of hearsay doctrine that would scrap the long-standing and arcane hearsay regime in search of a brave new hearsay world.<sup>3</sup> On the opposite end of the spectrum, others have advanced narrow proposals to modify,

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1. See generally Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331 (2012) [hereinafter Bellin, *Facebook*] (advocating corroboration limitation on present sense impression exception to control flow of electronic hearsay); Jeffrey Bellin, *The Case for eHearsay*, 83 FORDHAM L. REV. 1317 (2014) [hereinafter Bellin, *Case for eHearsay*] (responding to scholars' concerns about proposed e-hearsay exception to the existing hearsay regime to allow for increased flow of electronic communications into the trial process); Liesa L. Richter, *Don't Just Do Something!: E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657 (2012).

2. See *United States v. Boyce*, 742 F.3d 792, 800-01 (7th Cir. 2014) (Posner, J., concurring); Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 643 (2016) (conducting an empirical analysis of juror reactions to hearsay).

3. See *Boyce*, 742 F.3d at 802; see also Sevier, *supra* note 2, at 648 (proposing a "procedural justice" overhaul of hearsay rules).

abolish, or create specific hearsay exceptions only within the existing, complex hearsay structure.<sup>4</sup>

In the wake of recent vocal and high-profile criticism of hearsay,<sup>5</sup> real hearsay reform is finally under consideration. Defying critics' constant refrain that genuine hearsay reform is unlikely due to incuriosity and a reluctance to reconsider ancient dogma,<sup>6</sup> the Advisory Committee for the Federal Rules of Evidence has signaled serious interest in making significant modifications to the hearsay model contained in Article Eight of the Rules, proposing and obtaining amendments to hearsay provisions in 2010, 2014, and 2015.<sup>7</sup> Further, the Advisory Committee is considering more widespread and significant modifications to hearsay doctrine. Among other proposals, the Committee has raised the possibility of expanding the hearsay exception for prior inconsistent statements of testifying witnesses<sup>8</sup> and has considered expanding the residual or catchall exception to allow for more liberal admission of hearsay outside the standard categorical exceptions.<sup>9</sup> The Committee has even examined the possibility of returning to a drafting alternative

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4. See Bellin, *Facebook*, *supra* note 1, at 375; Bellin, *Case for eHearsay*, *supra* note 1, at 1318-19, 1326-27; see also Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U. L. REV. 111 (2017) (proposing abrogation of the excited utterance exception); Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 758 (2015) (proposing a Rule that requires corroboration of excited utterances, as well as declarant unavailability).

5. See, e.g., Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1466, 1471 (2016).

6. Cf. Panel Discussion, *Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323, 1327-28 (2016) (comments of the Honorable Jeffrey S. Sutton).

7. FED. R. EVID. 804(b)(3) advisory committee's note to 2010 amendments; FED. R. EVID. 803(6)-(8) advisory committee's notes to 2014 amendments; FED. R. EVID. 801(d)(1)(B) advisory committee's note to 2014 amendments; see also SUPREME COURT OF THE UNITED STATES, PROPOSED FEDERAL RULE OF EVIDENCE 803 (2017), [http://www.uscourts.gov/sites/default/files/2017-04-27-congressional\\_package\\_rev\\_4-25\\_final\\_final\\_with\\_signed\\_letters\\_and\\_orders\\_o.pdf](http://www.uscourts.gov/sites/default/files/2017-04-27-congressional_package_rev_4-25_final_final_with_signed_letters_and_orders_o.pdf) [<https://perma.cc/T4A8-9KRT>].

8. Memorandum from Daniel J. Capra, Reporter to the Advisory Comm. on Evidence Rules, to the Advisory Comm. on Evidence Rules 1-2, 4 (Oct. 1, 2016) [hereinafter Capra Memorandum on Possible Amendment, 2016], <http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf> [<https://perma.cc/B3T7-4WJK>] (regarding possible amendment to the Federal Rules of Evidence 801(d)).

9. Memorandum from Daniel J. Capra, Reporter to the Advisory Comm. on Evidence Rules, to the Advisory Comm. on Evidence Rules 2, 6 (Oct. 1, 2016) [hereinafter Capra Memorandum on Expanding the Residual Exception], <http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf> [<https://perma.cc/B3T7-4WJK>] (regarding expanding the residual exception to the hearsay rule).

that the original drafters of the Rules left on the cutting room floor: using the categorical hearsay exceptions merely as illustrations or guidelines that trial judges may follow—or not—in their significant discretion.<sup>10</sup> In short, an era of genuine hearsay reform may finally be at hand.

If, at long last, significant alterations are to be made to the time-honored and byzantine hearsay rules, it is critical that we avoid a false step that would condemn hearsay doctrine to a future of continued dysfunction and criticism. This Article suggests that aggressive proposals to scuttle existing doctrine entirely in favor of alternative approaches to hearsay are overly broad, rejecting the benefits of significant portions of existing doctrine that are functioning well, and threatening costly consequences that could make matters worse for hearsay. On the opposite end of the spectrum, narrow proposals to amend individual hearsay exceptions one at a time accomplish too little and may undermine the utility of long-standing and rational hearsay exceptions that permit the flow of helpful information into the trial process.

As an alternative to these proposals at opposite ends of the spectrum, this Article reveals a ready hearsay reform right under our noses that hits that sweet spot in between a sweeping, aggressive reform and an unduly narrow, limited fix. The Article suggests borrowing the trustworthiness exception that is a current feature of the business and public records exceptions and extending its application to other hearsay exceptions in Rule 803. This change would make hearsay statements falling within the existing requirements of the Rule 803 exceptions presumptively admissible, but would afford the opponent of those hearsay statements the opportunity to show that the particular circumstances surrounding the statements render them untrustworthy and inadmissible. After fleshing out this concept first advanced in my previous work,<sup>11</sup> this Article explains why expanding the trustworthiness exception would represent an important step toward rationalizing hearsay doctrine.

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10. See Memorandum from Daniel J. Capra, Reporter to the Advisory Comm. on Evidence Rules, to the Advisory Comm. on Evidence Rules 1-2 (Apr. 29, 2016), [http://www.uscourts.gov/sites/default/files/2016-04-evidence-agenda\\_book\\_final\\_0.pdf](http://www.uscourts.gov/sites/default/files/2016-04-evidence-agenda_book_final_0.pdf) [<https://perma.cc/L8AY-HH9F>] (regarding changing the categorical hearsay exceptions to guidelines).

11. See Liesa L. Richter, *Reality Check: A Modest Modification to Rationalize Rule 803 Hearsay Exceptions*, 84 *FORDHAM L. REV.* 1473 (2016).

Notwithstanding the numerous and varied attacks on existing hearsay doctrine, all roads lead back to the Rule 803 exceptions. Hysteria over the present sense impression and excited utterance exceptions, in particular, has formed a launching pad for some reform proposals, as well as a landing place for others.<sup>12</sup> Expanding the trustworthiness exception that already exists in the Rule 803 hearsay exceptions for business and public records efficiently launches a single silver bullet at numerous purported reliability deficiencies in the remaining Rule 803 hearsay exceptions.<sup>13</sup> Importantly, it would do so without altering the presumptive admissibility of hearsay falling within the well-understood Rule 803 categories and without sacrificing critical certainty and predictability in the litigation process.<sup>14</sup> Finally, expanding the trustworthiness exception would bring much-needed systemic symmetry to the Article Eight hearsay regime, providing an escape valve to exclude unreliable hearsay that satisfies preordained hearsay exceptions to match the residual exception in Rule 807 that allows the admission of trustworthy hearsay not captured by those same exceptions.<sup>15</sup> Accomplishing all of this with a known and understood feature of the business and public records exceptions would not wreak the havoc on our hearsay model that paradigm-shifting reforms are sure to bring.<sup>16</sup>

Part I of this Article will briefly describe common criticisms of the hearsay regime found in the Federal Rules of Evidence, as well as recent proposals for reform. Part I will also identify significant flaws in existing proposals for hearsay reform. In Part II, the Article will explain the operation of the trustworthiness exception currently part of the business and public records exceptions. Part II will demonstrate that expanding this trustworthiness exception to additional Rule 803 hearsay exceptions is in keeping with the values underlying the hearsay rule and is superior to the alternatives for rationalizing hearsay doctrine. Part III will explore the mechanics

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12. See *United States v. Boyce*, 742 F.3d 792, 799, 802 (7th Cir. 2014) (Posner, J., concurring) (describing Judge Richard Posner's critique of the Rules, a critique which begins and ends with the Rule 803 exceptions).

13. See *infra* Part II.C.2.

14. See *infra* Part II.C.2.

15. See *infra* Part II.C.4.

16. See *infra* Part II.C.6.



of expanding the trustworthiness exception and will propose potential amendments to Federal Rule of Evidence 803. The Article will then briefly conclude.

### I. THE FEDERAL HEARSAY REGIME AND ITS HATERS

Hearsay is defined by Federal Rule of Evidence 801 as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing” that “(2) a party offers in evidence to prove the truth of the matter asserted in the statement.”<sup>17</sup> The hearsay regime embodied in the Rules imposes a broad ban on the admission of hearsay evidence,<sup>18</sup> only to turn around and articulate thirty-seven circumstances in which hearsay statements may indeed be admitted for their truth.<sup>19</sup> The hearsay exceptions within Article Eight of the Rules follow a “categorical” approach, admitting statements that meet certain defined requirements and that fit into preordained categories.<sup>20</sup>

Hearsay exceptions covering statements made by testifying witnesses satisfy core hearsay concerns by requiring an opportunity for declarant cross-examination,<sup>21</sup> while the exceptions for statements of party-opponents are based upon notions of adversarial fairness.<sup>22</sup> The hearsay exceptions in Rule 803 predominantly rest upon the assumption that human statements made in certain defined contexts enjoy inherent reliability,<sup>23</sup> while the Rule 804 exceptions

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

18. *See* FED. R. EVID. 802 (excluding hearsay evidence unless the Federal Rules provide otherwise).

19. FED. R. EVID. 801(d) (listing eight conditions under which a statement is not hearsay); FED. R. EVID. 803 (listing twenty-three statement categories that “are not excluded by the rule against hearsay”); FED. R. EVID. 804(b) (listing five statement types that “are not excluded by the rule against hearsay if the declarant is unavailable as a witness”); FED. R. EVID. 807 (creating one “residual exception” that enables a court to admit a hearsay statement under certain circumstances “even if the statement is not specifically covered by” the other thirty-six hearsay exceptions listed elsewhere in the Rules).

20. *See* 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:66 (4th ed. 2013) (discussing the prescriptive nature of categorical exceptions).

21. *See* FED. R. EVID. 801(d)(1) (requiring that declarant be “subject to cross-examination about a prior statement”).

22. FED. R. EVID. 801(d)(2) advisory committee’s note to 1972 proposed rules (indicating adversarial fairness as the key to party-opponent statements).

23. *See* FED. R. EVID. 803 advisory committee’s note to 1972 proposed rules (creating limited hearsay exceptions because “under appropriate circumstances a hearsay statement

rest on both the reliability of certain hearsay statements and the necessity of resorting to those hearsay statements in the case of a declarant unavailable to testify at trial.<sup>24</sup> Finally, Rule 807 rounds out the list with a discretionary catchall exception available in cases of trustworthy and necessary hearsay not covered by the other categorical exceptions.<sup>25</sup>

The mixed messages of the hearsay prohibition and its many exceptions, as well as the patchwork quilt of particular hearsay statements allowable in evidence, have been attacked from all quarters since the adoption of the Rules in 1975. Critiques of contemporary hearsay doctrine and proposals for reform have been almost too numerous to tally over the past forty-plus years.<sup>26</sup> Although the long-standing dissatisfaction with the treatment of hearsay by the Rules is well documented, there appears to be a recently renewed enthusiasm for revisiting the fundamentals of the hearsay regime. Recent critiques and proposals for change have been driven partly by the advent of ubiquitous technology and the metamorphosis in methods of human communication.<sup>27</sup> In addition, a contemporary call for data-driven, empirically sound legal principles has drawn hearsay doctrine back into the limelight.<sup>28</sup>

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may possess circumstantial guarantees of trustworthiness”).

24. FED. R. EVID. 804(b) (allowing hearsay statements to be admitted only if the declarant is unavailable to testify).

25. See FED. R. EVID. 807.

26. See, e.g., Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 724 (1992) (suggesting a hearsay model based upon a determination about which party should bear the cost of producing the hearsay declarant); Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723, 774 (1992) (proposing the broadening of admissible hearsay with procedural protections); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 54 (1987) (proposing expanded admissibility of hearsay in civil cases); Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 896-97 (1992) (proposing a hearsay framework designed to determine when hearsay evidence constitutes the best available evidence); Sevier, *supra* note 2, at 648 (proposing a “procedural justice” model of hearsay reform); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1341-43 (1987) (suggesting the admission of more factual information to assist juries in evaluating hearsay in place of the restrictive exclusion of hearsay evidence).

27. See *supra* note 6.

28. See, e.g., Baicker-McKee, *supra* note 4.

*A. Contemporary Calls for Change*

In response to evolving methods of communication and our increasing faith in empirically supported standards, there have been several recent calls to reinvent the hearsay regime embodied in the Federal Rules of Evidence. While some scholars have called for a complete overhaul of the hearsay scheme, others have proposed more targeted refinements to particular hearsay exceptions.

Judge Richard Posner dropped a bombshell on traditional hearsay doctrine in a 2014 concurrence in *United States v. Boyce*.<sup>29</sup> *Boyce* was a routine appeal of a felon-in-possession conviction, in which the Seventh Circuit Court of Appeals reviewed the lower court's admission of statements made to a 911 operator through the present sense impression and excited utterance exceptions to the hearsay rule found in Federal Rule of Evidence 803.<sup>30</sup> Although the panel unanimously upheld the admission of the statements through the excited utterance exception,<sup>31</sup> Judge Posner seized upon the opportunity to discredit the rationales supporting both the present sense impression and excited utterance exceptions to the hearsay ban.<sup>32</sup>

Specifically, Judge Posner questioned the assumption inherent in the present sense impression that contemporaneous observation and speech negate deliberate misrepresentation, pointing to studies suggesting that most lies are spontaneous rather than planned<sup>33</sup> and “that less than one second is required to fabricate a lie.”<sup>34</sup> Judge Posner concluded his discussion of the present sense impression by stating that the exception “has neither a theoretical nor an empirical basis; and it’s not even common sense—it’s not even good folk

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29. 742 F.3d 792, 799-802 (7th Cir. 2014) (Posner, J., concurring).

30. *Id.* at 793, 796-99 (majority opinion); see also Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1876-81 (2015).

31. *Boyce*, 742 F.3d at 799.

32. *Id.* at 799-802 (Posner, J., concurring).

33. *Id.* at 800-01 (citing Monica T. Whitty et al., *Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication*, 63 J. AM. SOC'Y INFO. SCI. & TECH. 208, 208-09, 214 (2012)). Judge Posner also noted judicial opinions broadly interpreting the timing requirement of the present sense impression “to encompass periods as long as 23 minutes.” *Id.* at 800 (citing *United States v. Blakey*, 607 F.2d 779, 785-86 (7th Cir. 1979)).

34. *Id.* at 801 (quoting *Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir. 2004)).

psychology.”<sup>35</sup> Judge Posner expressed similar disdain for the excited utterance exception, noting that even the advisory committee notes supporting the exception are equivocal with respect to the effect of excitement upon fabrication.<sup>36</sup> Assuming that the excitement produced by a startling event minimizes self-interest and reflection, Judge Posner highlighted scholarship questioning whether “the distorting effect of shock” might undermine the reliability of excited utterances.<sup>37</sup> According to Judge Posner, once stripped of their purported justifications, the present sense impression and excited utterance exceptions are nothing more “than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas.”<sup>38</sup> Driven by this scathing indictment of the present sense impression and excited utterance exceptions, Judge Posner offered his vision for improving contemporary hearsay doctrine. Echoing a proposal rejected by the original drafters of the Rules, Judge Posner suggested that allowing the existing “[r]esidual” or catchall exception to swallow and displace the categorical exceptions would constitute a superior and workable approach to hearsay evidence.<sup>39</sup> This approach would require discretionary, statement-by-statement reliability determinations by the trial judge to assess the admissibility of all hearsay.<sup>40</sup>

In 2016, Professor Justin Sevier critiqued the hearsay regime’s reliance on notions of reliability and “decisional accuracy,” and proposed transformation of hearsay doctrine to emphasize “a procedural justice rationale.”<sup>41</sup> In keeping with burgeoning empirical

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35. *Id.* at 801.

36. *Id.* (emphasizing that the advisory committee’s notes provide only that excitement “may ... produce[] utterances free of *conscious* fabrication”).

37. *Id.* at 801-02 (quoting 2 MCCORMICK ON EVIDENCE § 272 (Kenneth S. Broun ed., 7th ed. 2014)).

38. *Id.* at 802.

39. *Id.* Judge Posner later revised his call to toss out all hearsay exceptions in *Boyce*, still keeping Rule 803 exceptions like the present sense impression and excited utterance exceptions in his cross-hairs. Posner, *supra* note 5, at 1467, 1470-71 (“I can imagine benefits from allowing Rule 807 ... to swallow much of Rules 801 through 806” but expressly calling for abrogation of the present sense impression, excited utterance, and dying declarations exceptions).

40. See FED. R. EVID. 807(a)(1) (providing a court discretion to admit a hearsay statement with “equivalent circumstantial guarantees of trustworthiness” as those statements covered “in Rule 803 or 804”).

41. See Sevier, *supra* note 2, at 648.

inquiries in legal scholarship, Professor Sevier conducted a survey of laypeople cast as jurors in hypothetical trial scenarios involving variations in the use of hearsay.<sup>42</sup> Based upon survey responses, Professor Sevier concluded that juror rejection of hearsay stemmed from concerns over fairness or “procedural injustice” when hearsay declarants were able to implicate various litigants without subjecting themselves to cross-examination.<sup>43</sup> Conversely, lay jurors expressed little concern for the reliability or “decisional accuracy” of hearsay evidence, according to Professor Sevier.<sup>44</sup> Based upon the reactions of lay jurors to hearsay evidence, therefore, Professor Sevier recommended “[p]opularizing [h]earsay” and reforming the doctrine to satisfy notions of procedural justice that arise from in-court cross-examination and to depart from any reliability rationale for hearsay doctrine.<sup>45</sup> Although Professor Sevier did not articulate a comprehensive and concrete proposal for reform, he suggested eliminating the “dubious” hearsay exceptions in Rule 803, in keeping with Judge Posner’s critique of those exceptions.<sup>46</sup>

Other proposals for hearsay reform have targeted specific hearsay exceptions more directly. For example, in 2012, Professor Jeffrey Bellin called for the amendment of the present sense impression exception to add a corroboration requirement.<sup>47</sup> Professor Bellin ably illustrated the rapid revolution in modern human communication and suggested that the original reliability assumptions underlying the present sense impression exception were threatened by contemporary and unforeseen e-hearsay.<sup>48</sup> Professor Bellin posited that the addition of a corroboration component to the existing requirements of the present sense impression exception would restore the reliability originally intended by drafters of the exception.<sup>49</sup> In a similar vein, in 2015, Professor Alan Williams proposed an amendment to the excited utterance exception, suggesting that the

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42. *Id.* at 652 (citing Justin Sevier, *Testing Tribe’s Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 903-15 (2015)).

43. *Id.* at 677-78.

44. *Id.* at 678.

45. *Id.* at 688-90.

46. *Id.* at 662-63.

47. See Bellin, *Facebook*, *supra* note 1, at 338.

48. *Id.* at 337-38.

49. *Id.*

exception be transplanted into Rule 804, where declarant unavailability is required, and that a corroborating circumstances requirement be added.<sup>50</sup> Going one step further, Professor Steven Baicker-McKee recently proposed the abrogation of the excited utterance exception altogether.<sup>51</sup>

Recent concern over the contemporary viability and legitimacy of hearsay doctrine has not been confined to academics and scholars, however. The Advisory Committee for the Federal Rules of Evidence has demonstrated a renewed interest in updating and refining the federal hearsay regime. In 2010, the declarations against interest hearsay exception was modified to expand its “corroborating circumstances requirement ... to all declarations against penal interest offered in criminal cases.”<sup>52</sup> In 2014, the business and public records exceptions were amended to clarify that “the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness” once the proponent of the hearsay establishes the stated requirements of the hearsay exceptions.<sup>53</sup> Also in 2014, the Advisory Committee secured an amendment to Rule 801(d)(1)(B),<sup>54</sup> resolving the long-standing debate over the underinclusive operation of the hearsay exception for prior consistent statements.<sup>55</sup> In 2015, the Advisory Committee proposed the abolition of the “ancient documents” hearsay exception, emphasizing the tidal wave of stored electronic communications that would quickly become admissible through the exception and the absence of any inherent reliability based solely on the age of hearsay.<sup>56</sup> The Advisory Committee

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50. Williams, *supra* note 4, at 757-58.

51. Baicker-McKee, *supra* note 4.

52. See FED. R. EVID. 804(b)(3) advisory committee’s note to 2010 amendments.

53. FED. R. EVID. 803(6) advisory committee’s note to 2014 amendments (amending the business records exception); FED. R. EVID. 803(8) advisory committee’s note to 2014 amendments (amending the public records exception).

54. FED. R. EVID. 801(d)(1)(B) advisory committee’s note to 2014 amendments.

55. Liesa L. Richter, *Seeking Consistency for Prior Consistent Statements: Amending Federal Rule of Evidence 801(d)(1)(B)*, 46 CONN. L. REV. 937, 941-42 (2014) (proposing revisions to amended hearsay exception for prior consistent statements).

56. See Memorandum from Daniel J. Capra, Reporter to the Advisory Comm. on Evidence Rules, to the Advisory Comm. on Evidence Rules 1 (Apr. 29, 2016) [hereinafter Capra Memorandum on Proposal to Eliminate the Ancient Documents Exception], [http://www.uscourts.gov/sites/default/files/2016-04-evidence-agenda\\_book\\_final\\_0.pdf](http://www.uscourts.gov/sites/default/files/2016-04-evidence-agenda_book_final_0.pdf) [<https://perma.cc/9RSD-3XJ6>] (describing a proposal to eliminate the ancient documents exception to the

revised that proposal in light of public comment in 2016, recommending that the ancient documents exception be preserved only for documents created before January 1, 1998—a date chosen to reflect the advent of ubiquitous electronically stored information.<sup>57</sup> In 2016 and 2017, the Committee also explored the possibility of amending the hearsay exception covering prior inconsistent statements of testifying witnesses,<sup>58</sup> as well as the residual or catchall exception to the hearsay rule.<sup>59</sup> With scholars pushing for the modernization of hearsay doctrine and the Advisory Committee on Evidence Rules rolling up its sleeves to explore the feasibility of meaningful change, the time is ripe for genuine hearsay soul-searching and updates to the time-honored hearsay regime embodied in the Rules.

### *B. Fatal Flaws in Recent Reform Proposals*

Many of the recent scholarly proposals for hearsay reform highlight legitimate concerns about the federal hearsay regime and articulate thought-provoking innovations to modernize that regime. Still, many of these critiques exaggerate the shortcomings of the existing hearsay exceptions and suggest reforms that promise to create as many problems as they resolve.

Judge Posner's proposal for the discretionary treatment of hearsay evidence is a prime example.<sup>60</sup> Although the assumptions regarding human communication and motivation underlying some of the hearsay exceptions within the Rules may be imperfect, Judge

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hearsay rule).

57. See COMM. ON RULES OF PRACTICE AND PROCEDURE, MEETING OF JUNE 6, 2016 MINUTES 3 (2016), [http://www.uscourts.gov/sites/default/files/st06-2016-min\\_0.pdf](http://www.uscourts.gov/sites/default/files/st06-2016-min_0.pdf) [<https://perma.cc/NJ8K-DQQV>] (describing a proposed revision to a Rule 803(16) amendment and unanimously approving it “for submission to the Judicial Conference”).

58. See Memorandum from Daniel J. Capra, Reporter to the Advisory Comm. on Evidence Rules, to the Advisory Comm. on Evidence Rules (Oct. 1, 2017) [hereinafter Capra Memorandum on Possible Amendment, 2017], [http://www.uscourts.gov/sites/default/files/a3\\_0.pdf](http://www.uscourts.gov/sites/default/files/a3_0.pdf) [<https://perma.cc/GMK6-L5U5>] (describing continuing consideration of potential amendments to Rule 801(d)(7)(A)).

59. See Capra Memorandum on Expanding the Residual Exception, *supra* note 9 (exploring potential amendments to the residual exception). The Advisory Committee proposed an amendment to Rule 807 in 2017, which was published for notice and comment in August 2017. See Capra Memorandum on Possible Amendment, 2017, *supra* note 58, at 1.

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

Posner's broad assertion that they lack *any* rational foundation appears overblown.<sup>61</sup> Furthermore, Judge Posner's proposed fix—abolishing all of the categorical hearsay exceptions in favor of a purely discretionary approach to all hearsay evidence—threatens to impose prohibitive costs on the trial process.<sup>62</sup> As explored in depth in my previous work, Judge Posner's proposal wields a sledgehammer where a scalpel could suffice, eliminating *all* categorical hearsay exceptions due to articulated concerns regarding only a few.<sup>63</sup> In addition, a single discretionary standard would undermine the crucial ability of litigants to predict the admissibility of hearsay evidence in advance as they craft a litigation strategy.<sup>64</sup> Such an approach also threatens to create unfair inconsistency in the admissibility of hearsay evidence “across cases and courtrooms.”<sup>65</sup> The discretionary administration of hearsay doctrine would likely increase transaction costs associated with hearsay evidence, requiring motions in limine, pretrial hearings, and briefings to ascertain the admissibility of evidence currently dictated by the categorical exceptions.<sup>66</sup> Finally, after displacing our entire system of well-understood hearsay exceptions, a discretionary reform would still utilize empirically suspect judicial determinations of “reliability” to determine admissibility.<sup>67</sup> In sum, scrapping all of the categorical hearsay exceptions in favor of a single discretionary standard is a game that is not worth the candle.

Replacing the reliability-based hearsay exceptions with a procedural test that emphasizes declarant cross-examination is a tempting alternative that could simplify our notoriously complex hearsay system.<sup>68</sup> That said, Professor Sevier's recent proposal to abandon the reliability or “decisional accuracy” rationale that underscores many of our existing hearsay exceptions in favor of a “procedural justice” model presents other difficulties.<sup>69</sup> Dismantling

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61. See Richter, *supra* note 30, at 1867.

62. See *id.* at 1882-86.

63. See *id.* at 1895-96.

64. *Id.* at 1884.

65. *Id.* at 1894.

66. *Id.* at 1882-83.

67. *Id.* at 1892-94.

68. See *id.* at 1905 (suggesting that a procedural hearsay test that discards reliability could provide consistency).

69. See Sevier, *supra* note 2.



suspect pieces of the larger hearsay puzzle may be child's play, but constructing a viable and comprehensive alternative hearsay regime is a tall order. While Professor Sevier makes a few concrete suggestions to eliminate the "dubious" Rule 803 exceptions and to ban testimonial hearsay in civil cases,<sup>70</sup> he offers no comprehensive description of a new hearsay order defined by procedural justice alone. Do we eliminate the crucial business records exception in the absence of a declarant who can be cross-examined on the content of the records? If Professor Sevier would retain the business records exception, as he suggests he might,<sup>71</sup> how do we justify its continued existence without relying on notions of reliability?

Truly adopting a strict "procedural justice" focus for hearsay rules is problematic in other respects. The rejected Model Code version of hearsay doctrine reflected a procedural emphasis on the availability of cross-examination, allowing hearsay to be admitted whenever the declarant could be cross-examined at trial or when the declarant was truly unavailable to testify subject to cross-examination.<sup>72</sup> This proposal was, of course, met with a severely negative reaction based largely on concerns regarding the reliability of the hearsay statements that would be admitted in such a scheme.<sup>73</sup> If we update the Model Code construct to allow all hearsay of testifying witnesses, but none from declarants who fail to appear for cross-examination, we will still have reliability concerns surrounding some hearsay statements of testifying witnesses, as well as a net loss of probative evidence from absent declarants that may ultimately undermine our ability to resolve disputes.

Of even more fundamental concern is Professor Sevier's ultimate call to "popularize" hearsay by relying on lay jurors' assessments of evidentiary values to construct our modern hearsay regime.<sup>74</sup> Distrust of jurors' abilities to make rational and fair decisions about

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70. *Id.* at 662, 664.

71. *See id.* at 663.

72. MODEL CODE OF EVIDENCE r. 503 (AM. LAW INST. 1942).

73. *See* Michael Ariens, *A Short History of Hearsay Reform, with Particular Reference to Hoffman v. Palmer, Eddie Morgan, and Jerry Frank*, 28 IND. L. REV. 183, 222-26 (1995); David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 20 ("[The] professional reception [for the Model Rules] ... varied between chilliness and heated antagonism." (omission in original) (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 153 (1947))).

74. *See* Sevier, *supra* note 2, at 688.

the value of evidence is at the very heart of our Rules.<sup>75</sup> To turn the reins over to jurors in deciding whether and why to consider hearsay evidence is to put the fox in charge of the hearsay henhouse.<sup>76</sup> Of course, empirical work that assesses the extent to which jurors rely upon hearsay is very helpful in exploring the long-debated issue of whether jurors are capable of evaluating hearsay evidence and could be used to justify admitting more hearsay.<sup>77</sup> But that is a different question from the recent question explored by Professor Sevier, which is *why* jurors dislike hearsay.<sup>78</sup> Modifying our hearsay regime to conform to the preferences and values of lay jurors is a controversial concept that threatens the existence of evidence rules.

The fundamental problem with this approach can be illustrated by extending Professor Sevier's hearsay proposal to other areas of evidence. Studies could assess lay jurors' reactions to the admissibility of past convictions; other crimes, wrongs, or acts; or even simple character evidence. If lay jurors largely favor broad consideration of all of this evidence in aiding in their full and fair consideration of a case, Professor Sevier's analysis suggests that we should admit it all.<sup>79</sup> Indeed, it is common for members of the public to feel a sense of outrage following an unpopular verdict after learning that a jury was not informed of information lay persons consider relevant and fair.<sup>80</sup> Because evidence rules are designed to eliminate what might be the "popular" approach to certain types of evidence, reforms that take hearsay doctrine wherever lay jurors wish to go are ill advised.

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75. See Williams, *supra* note 4, at 718.

76. Legitimacy is, of course, an important component of evidentiary doctrine, if not the sole consideration. See Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 395 (1992) (noting that "rules of procedure and evidence should provide reason for confidence that courts reach correct outcomes by fair means" and explaining that "the [hearsay] doctrine reflects a kind of common sense to which lay people can relate").

77. See Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 893-96 (2015) (discussing over a dozen studies that challenge the proposition that juries overvalue hearsay evidence).

78. See Sevier, *supra* note 2, at 648.

79. See *id.* at 688.

80. See *Conference on Possible Amendments to Federal Rules of Evidence 404(b), 807, and 801(D)(1)(a)*, 85 FORDHAM L. REV. 1517, 1522 (2017) (remarks of Judge David Hamilton concerning developments in Rule 404(b)) ("I would always talk with jurors after every verdict and every jury in every criminal case had the same first question: 'Has he done this before?' That's what they wanted to know to reinforce the guilty verdict.").

In addition to the specific drawbacks inherent in each of these proposals to remake hearsay doctrine, there is a more generalized concern that plagues many transformative proposals to discard existing doctrine entirely in favor of a brave new world. Such reactionary reforms often result in a pendular approach to legal problems that ultimately may prove deleterious. Law reform that swings wildly between competing philosophies may squander benefits offered at both ends of the spectrum, forcing a painful process of correcting toward the middle. Examples in legal evolution abound. In the products liability arena, proindustry doctrine was replaced with the proconsumer strict liability concepts in section 402A of the *Restatement (Second) of Torts*.<sup>81</sup> The *Restatement (Third) of Torts on Products Liability* offered important corrective clarifications, restoring negligence-based principles in connection with claims of failure to warn<sup>82</sup> and defective design.<sup>83</sup> In 1938, the Federal Rules of Civil Procedure ushered in liberal “notice pleading” as a reaction to the highly detailed factual content required in the code pleading era.<sup>84</sup> As interpreted under *Conley v. Gibson*, this forgiving notice pleading standard provided that a plaintiff’s “complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>85</sup> The Supreme Court famously retired the liberal *Conley* standard in deciding the *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* cases in 2007 and 2009, respectively, requiring sufficient, well-pleaded factual allegations to demonstrate a “plausible” claim for

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81. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965) (allowing strict seller liability for unreasonably dangerous consumer products).

82. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (AM. LAW INST. 1998) (imposing liability for failure to warn “when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings ..., and the omission of the instructions or warnings renders the product not reasonably safe”).

83. *Id.* § 2(b) (imposing liability for design defects only for “foreseeable risks of harm,” if a “reasonable alternative design” was available, “and the omission of the alternative design renders the product not reasonably safe”).

84. See FED. R. CIV. P. 8(a)(2) (requiring only “a short and plain statement of a claim showing that the pleader is entitled to relief”).

85. 355 U.S. 41, 45-46 (1957) (citing *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944); *Cont'l Collieries v. Shober*, 130 F.2d 631 (3d Cir. 1942); *Leimer v. State Mut. Life Assurance Co.*, 108 F.2d 302 (8th Cir. 1940)).

relief.<sup>86</sup> In both of these examples, reformers sought to reject an imperfect status quo by substituting an opposite regime, only to work back toward a compromise position.<sup>87</sup>

Although some natural corrective adjustments may be unavoidable in moving the law forward, as illustrated by the above examples, hearsay reformers could avoid wild swings and time-consuming efforts to backtrack by amending only the hearsay provisions that operate suboptimally, while leaving the remainder of the hearsay regime intact. The many benefits achieved by the highly successful Federal Rules of Evidence would be retained and specific points of constant friction could be corrected. Rather than discarding all of hearsay doctrine, reformers could implement important tweaks to Rule 803 and allow time to attain experience with those modest reforms before proceeding more aggressively.

In contrast to proposals to overhaul the entire hearsay scheme in Article Eight, the past few years have seen some intriguing proposals to reform only single hearsay exceptions within Rule 803.<sup>88</sup> Where broad proposals to overhaul the entire hearsay regime may be difficult to craft and may create unintended consequences, the single exception approach to hearsay reform can offer only a partial and incomplete resolution of hearsay flaws while producing problems of its own.<sup>89</sup> For example, adding a corroboration requirement to the present sense impression exception to resolve reliability concerns regarding the admissibility of e-hearsay fails to address similar concerns in the admission of e-hearsay through the excited utterance and state of mind exceptions.<sup>90</sup> Similarly, adding corroboration and unavailability requirements to the excited utterance

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86. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-57 (2007) (“Factual allegations must be enough to raise a right to relief above the speculative level.” (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1216 (3d ed. 2004))); *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (requiring plaintiffs to “plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating”).

87. See *Iqbal*, 556 U.S. at 677-87; *Twombly*, 550 U.S. at 554-63.

88. See generally Baicker-McKee, *supra* note 4; Bellin, *Facebook*, *supra* note 1; Bellin, *Case for eHearsay*, *supra* note 1; Williams, *supra* note 4.

89. See Victor Gold, *The Three Commandments of Amending the Federal Rules of Evidence*, 85 *FORDHAM L. REV.* 1615, 1624-25 (2017) (noting risks of focusing on amendments to single rules of evidence).

90. See Richter, *supra* note 1, at 1707.

exception may respond to criticisms of the reliability assumptions underlying that one exception, but does nothing to answer similar concerns that plague other hearsay exceptions, such as the present sense impression or the dying declaration.<sup>91</sup> It is costly and inefficient to amend hearsay exceptions one at a time to address reliability concerns common to many of them.<sup>92</sup> In addition, single exception reforms increase the already-derided complexity of the hearsay regime, adding multiple exception-specific requirements to memorize, interpret, and apply.<sup>93</sup>

Finally, many of the proposed single exception reforms would add limitations that would drastically limit the utility of the hearsay exceptions in routine core applications to address concerns in rare cases they seek to improve. As explored in my previous work, requiring corroboration of all present sense impressions could severely curtail important and common applications of the exception, particularly in the domestic violence context.<sup>94</sup> Similar concerns would attend limiting the admission of excited utterances to circumstances where there is sufficient corroboration and demonstrable unavailability of the declarant. Many of the single exception reforms pose solutions that would kill the patient to prevent a moderate infection. Indeed, Professor Williams aptly titled his proposal to add corroboration and unavailability requirements to the excited utterance exception: *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*.<sup>95</sup>

Of the many intriguing and thought-provoking proposals to improve a rather arcane hearsay regime operating in a contemporary context, none has offered a silver bullet that promises to help more than it hurts. Dismantling the entire hearsay regime in search of a brave new world will surely cause damaging disruption in the litigation process and may generate more systemic concerns than it will resolve. Conversely, applying band-aids to single hearsay exceptions one at a time may do little to assuage broader concerns and may even undermine the legitimate value of those exceptions.

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91. *See id.*

92. *See id.* at 1706.

93. *See id.* at 1706, 1708-09.

94. *Id.* at 1701-03.

95. *See Williams, supra note 4; see also Baicker-McKee, supra note 4.*

A reform that lands somewhere in between these two extremes may be the cure for what ails hearsay doctrine. With all of the criticism largely coalescing around the Rule 803 hearsay exceptions, amendment efforts should focus on the Rule 803 exceptions as a class. Expanding the trustworthiness exception that currently exists within the business records and public records hearsay exceptions to the remaining Rule 803 exceptions would not drastically disrupt the existing, well-known hearsay regime. Nor would it accomplish too little. By targeting the entire class of hearsay exceptions that has drawn the most fire from judges and academics, expanded trustworthiness in Rule 803 may indeed be “just right.”

## II. JUST RIGHT: ALL WE NEED IS TRUSTWORTHINESS

The requirements of the Rule 803 hearsay exceptions are largely based upon assumptions about the reliability of human statements made under certain circumstances.<sup>96</sup> For example, the Rule 803(1) present sense impression exception presumes that a person is likely to be accurate and unlikely to lie if she describes an event as it is happening or immediately thereafter.<sup>97</sup> Similarly, the excited utterance exception assumes that a person still “under the stress of excitement” caused by a “startling event” is unlikely to have the capacity to lie about facts relating to that event.<sup>98</sup> Rule 803(4) assumes that a person is unlikely to lie about medical history or causation that is reasonably pertinent to medical treatment when seeking such treatment.<sup>99</sup> Accordingly, these hearsay exceptions have long been interpreted to mandate admission of hearsay statements that satisfy their requirements, with no discretion for the trial judge to exclude particular compliant hearsay based on reliability concerns.<sup>100</sup>

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96. See FED. R. EVID. 803 advisory committee’s note to 1972 proposed rules.

97. See FED. R. EVID. 803(1) advisory committee’s note to 1972 proposed rules.

98. FED. R. EVID. 803(2) advisory committee’s note to 1972 proposed rules.

99. FED. R. EVID. 803(4) advisory committee’s note to 1972 proposed rules.

100. See, e.g., *United States v. DiMaria*, 727 F.2d 265, 272 (2d Cir. 1984) (“[I]f a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge, save for the ‘catch-all’ exceptions of Rules 803(24) and 804(b)(5) and the business records exception of Rule 803(6).”).

Criticism of this categorical approach to hearsay is long standing.<sup>101</sup> Prior to the enactment of the Rules, critics complained that preordained hearsay categories could never accurately capture reliable human communications.<sup>102</sup> Professor Charles McCormick famously questioned a “categorical” approach to hearsay: “[T]he values of hearsay declarations or writings, and the need for them, in particular situations cannot with any degree of realism be thus minutely ticketed in advance.... Too much worthless evidence will fit the categories, too much that is vitally needed will be left out.”<sup>103</sup>

Of course, Rule 807 responds to the concern that categorical exceptions may overlook reliable hearsay needed to resolve a case. Pursuant to the Rule 807 residual exception, trial judges have the discretion to *admit* hearsay that does not fit within the preordained categories so long as it enjoys equivalent “guarantees of trustworthiness.”<sup>104</sup> But concerns about “worthless evidence” fitting within the categories of admissible hearsay have never been addressed within the Rules.<sup>105</sup> This concern animates most of the recent attacks on the Rule 803 hearsay exceptions. Judge Posner has suggested that the present sense impression and excited utterance exceptions

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101. See, e.g., Milich, *supra* note 26, at 774-78; Sklansky, *supra* note 73, at 1 (opining that lawyers sometimes develop a “fondness for the oddities of hearsay law, but [that] it is the kind of affection a volunteer docent might develop for the creaky, labyrinthine corridors of an ancient mansion, haphazardly expanded over the centuries”).

102. See Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 337 (1961) (“Wigmore’s rationale ... makes admissible a *class* of hearsay rather than *particular* hearsay for which, in the circumstances of the case, there is need and assurance of reliability.” (emphasis added)).

103. Charles T. McCormick, *Tomorrow’s Law of Evidence*, 24 A.B.A. J. 507, 512 (1938) (advocating a discretionary approach to hearsay evidence and criticizing “sharp categories” of hearsay exceptions as “strange”).

104. See FED. R. EVID. 807.

105. See Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 1, 38-47 (AM. LAW INST. 1942) (describing how much probative evidence the hearsay rule excludes and how much unreliable evidence of low probative value the categorical hearsay exceptions permit); Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545, 552 (1998) (“I think few lawyers are satisfied with the cracker-barrel psychology that underlies exceptions like the one for excited utterances.”); Weinstein, *supra* note 102, at 339 (“[A] series of independent letters written by disinterested ministers who were eyewitnesses to an event and who are shown to have acute vision, sound memories, and clear powers of communication might well be given more weight than many dying declarations or implied admissions which may be made by a party having no knowledge of the event or may have been made many years before by a predecessor in interest who had every motive to lie.” (footnotes omitted)).

represent nothing more than baseless “folk psychology” and laments a judge’s obligation to admit them.<sup>106</sup> Professor Sevier called for the abolition of the “dubious” Rule 803 exceptions.<sup>107</sup> Professor Bellin has provocatively opined that Twitter is a present sense impression engine capable of creating and preserving thousands of unreliable but admissible hearsay statements.<sup>108</sup> Professor Williams has highlighted the risk of excited utterances made by fabricating or impaired declarants.<sup>109</sup>

Any amendments to the hearsay regime should, therefore, be targeted. They should deal directly with the familiar refrain about the potential unreliability of hearsay admitted through the Rule 803 exceptions. Just as Rule 807 addresses the potential underinclusiveness of the categorical hearsay exceptions, a particularized trustworthiness exception should be added to additional Rule 803 exceptions to deal with circumstances in which those exceptions are overinclusive and may pave the way for the admission of unreliable hearsay. The familiar “trustworthiness exception” currently embodied in the business and the public records hearsay exceptions<sup>110</sup> is a ready-made vehicle for curing what ails the Rule 803 exceptions.

#### *A. The History of the Trustworthiness Exception*

Rules 803(6), (7), and (8) all include a “trustworthiness exception” to the admissibility of the hearsay statements that they describe.<sup>111</sup> For example, the business records exception in Rule 803(6) provides that records of regularly conducted business activities that are routinely made at or near the time of events they record, from information provided by someone with personal knowledge, are admissible for their truth.<sup>112</sup> Business records satisfying the basic requirements of the exception are admissible, so long as “the opponent does not show that the source of information or the

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

107. *See Sevier*, *supra* note 2, at 662.

108. *See Bellin, Facebook*, *supra* note 1, at 335.

109. *See Williams*, *supra* note 4, at 734-45.

110. *See* FED. R. EVID. 803(6), (8).

111. *See* FED. R. EVID. 803(6)(E), (7)(C), (8)(B).

112. *See* FED. R. EVID. 803(6). The exception demands that all of its threshold requirements be shown by the testimony of a qualified witness or through a certification. *Id.*



method or circumstances of preparation indicate a lack of trustworthiness.”<sup>113</sup> Therefore, the opponent of a business record has an opportunity to challenge the inherent trustworthiness of the record and to exclude it on that basis. The absence of business records and the public records exceptions contain similar provisos.<sup>114</sup>

As described in my previous work, the trustworthiness exception in Rule 803(6) was born of the United States Supreme Court’s opinion in *Palmer v. Hoffman*.<sup>115</sup> In that case, decided decades prior to the enactment of the Rules, the Court upheld the exclusion of an accident report made by a deceased train engineer.<sup>116</sup> The Court reasoned that admitting “employees’ versions of their accidents” as records made in the regular course of business would constitute “a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy.”<sup>117</sup> In crafting the business records exception for the Rules, the Advisory Committee noted that the record in *Palmer* was excluded primarily due to the railroad engineer’s incentives to falsify his account of the accident.<sup>118</sup> Because it is impossible to define in advance specific business records that will be free of motivational defects in all cases, the Advisory Committee elected to draft an exception that would admit all records routinely made in the course of a regularly conducted activity “subject to authority to exclude if ‘the sources of information or other circumstances indicate lack of trustworthiness.’”<sup>119</sup>

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113. FED. R. EVID. 803(6)(E).

114. See FED. R. EVID. 803(7)(C), (8)(B).

115. 318 U.S. 109, 113 (1943); see Richter, *supra* note 11, at 1476-78; see also Ariens, *supra* note 73 (detailing the controversial history of the Supreme Court’s decision in *Palmer* that characterized the common law meaning of the term “regular course of business” as precluding admission of a record tainted by bias or improper motivation).

116. See *Palmer*, 318 U.S. at 111.

117. *Id.* at 113.

118. FED. R. EVID. 803(6) advisory committee’s note to 1972 proposed rules (“While the [*Palmer*] opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate.”).

119. *Id.* (“The formulation of specific terms which would assure satisfactory results in all cases is not possible.”); see also Ariens, *supra* note 73, at 226 (“[T]he Advisory Committee’s inclusion in Rule 803(6) of the ‘trustworthiness’ guarantee element accepted Frank’s view that the jury could not be trusted to assess evidence in which there was some motive to falsify.”).

Thus, the trustworthiness exception to the business records exception reflects a pragmatic view of business records. Rule 803(6) depends upon the assumption that the vast majority of records routinely made in the regular course of business are reliable due to the strong business incentives to document accurately.<sup>120</sup> Still, the Rule acknowledges the reality that some records with all of the requisite attributes may nonetheless lack reliability due to motivational problems or other suspicious factual circumstances.<sup>121</sup> In drafting the Rules, therefore, the Advisory Committee employed the trustworthiness exception in the context in which the Supreme Court recognized it and included it as part of the hearsay exceptions governing both business and public records. In 2014, the business and public records exceptions were “amended to clarify that if the proponent has established the stated requirements of the exception[s,] ... then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.”<sup>122</sup>

### *B. The Operation of the Trustworthiness Exception*

Federal courts have proved equal to the task of regulating trustworthiness under the business and public records exceptions. Courts have recognized that records satisfying all of the requirements of the business and public records exceptions are presumptively admissible.<sup>123</sup> Both before and after the 2014 amendments to Rules 803(6) and (8), courts have called upon the opponents of hearsay evidence satisfying the business and public records exceptions to point to circumstances demonstrating a lack of trustworthiness.<sup>124</sup> In assessing the trustworthiness of public records, courts

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120. FED. R. EVID. 803(6) advisory committee’s note to 1972 proposed rules.

121. *Id.*

122. FED. R. EVID. 803(6) advisory committee’s note to 2014 amendments. Although many courts previously placed the “burden on the opponent [with respect to the trustworthiness exception], some ha[d] not.” *Id.*

123. *See, e.g., Ellis v. Int’l Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984) (noting that admissibility is “assumed” if a record meets the requirements of the hearsay exception).

124. *See, e.g., id.* at 300-01; *see also* FED. R. EVID. 803(6), (8) advisory committee’s notes to 2014 amendments (noting that “[t]he opponent ... is not necessarily required to introduce affirmative evidence of untrustworthiness,” but may point more generally to circumstances undermining reliability).

have utilized four factors suggested by the Advisory Committee notes: “(1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a hearing was held and the level at which conducted; [and] (4) possible motivation problems”<sup>125</sup>—although not all of these factors are relevant in every case.

Federal courts have carefully analyzed litigants’ challenges to both business and public records and have admitted those records in the absence of specific circumstances revealing a lack of trustworthiness. In *Dortch v. Fowler*, for example, the Sixth Circuit rejected the plaintiff’s challenge to the admission of a police report pursuant to Rule 803(8).<sup>126</sup> The plaintiff in *Dortch* was gravely injured in a head-on collision with a tractor-trailer.<sup>127</sup> At issue in the case was whether the collision occurred in the plaintiff’s lane.<sup>128</sup> At trial, the defendant sought to introduce a police report, authored by an officer who arrived on the accident scene within thirty-five minutes of the collision, through Rule 803(8).<sup>129</sup> The report concluded that the accident occurred in the defendant truck driver’s lane, thus signaling the plaintiff’s negligence in causing the accident.<sup>130</sup>

Although the report satisfied the threshold requirements of the public records exception to the hearsay rule, the plaintiff claimed that it lacked trustworthiness for several reasons. First, the plaintiff claimed—and the defendant acknowledged—that the officer had not performed a full accident reconstruction at the scene before arriving at the conclusions in the report.<sup>131</sup> In addition, the plaintiff claimed that the officer obtained and relied upon statements at the scene by the defendant in reaching the conclusions in the report, but was unable to speak with the plaintiff due to her debilitating injuries.<sup>132</sup> Furthermore, the plaintiff argued that the conclusion in the report

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125. FED. R. EVID. 803(8) advisory committee’s note to 1972 proposed rules (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944); Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363 (1957)) (“Other [factors] no doubt could be added.”).

126. 588 F.3d 396, 405 (6th Cir. 2009). Although she did not author the opinion, retired Supreme Court Justice Sandra Day O’Connor sat by designation with the panel. *Id.* at 397.

127. *See id.* at 398.

128. *See id.* at 398, 400.

129. *See id.* at 398, 402.

130. *Id.* at 398.

131. *Id.* at 403.

132. *Id.* at 402.

was contradicted by testimony given by the officer both in a deposition and at trial concerning the location of a tire mark from the defendant's vehicle.<sup>133</sup>

In affirming the trial court's ruling admitting the report, the Sixth Circuit noted that the trial judge had analyzed the trustworthiness factors listed in the advisory committee notes to Rule 803(8).<sup>134</sup> The Sixth Circuit found that the district court did not abuse its discretion in admitting the accident report when: (1) the officer had extensive experience in investigating accident scenes; (2) the officer arrived on the scene and performed an evaluation of the scene within thirty-five minutes of the accident; (3) the report did not include any statements made by the defendant driver; (4) the officer testified that the conclusions in the report were based primarily upon his own observations; and (5) the officer had no motivational problems that could have impacted his conclusions.<sup>135</sup> With respect to the plaintiff's concern about portions of the report potentially conflicting with the officer's deposition and trial testimony, the Sixth Circuit noted that the plaintiff had ample opportunity to cross-examine that conflicting testimony.<sup>136</sup> Therefore, the Sixth Circuit held that the district court did not err in admitting the police report over the plaintiff's trustworthiness objection.<sup>137</sup>

In *Ellis v. International Playtex, Inc.*, a husband sued Playtex for the wrongful death of his wife, alleging that she died as a result of toxic shock syndrome contracted from a Playtex tampon.<sup>138</sup> At trial, the district court refused to allow the plaintiff to admit a toxic shock syndrome study produced by the Center for Disease Control (CDC) under Rule 803(8), citing a lack of trustworthiness.<sup>139</sup> The CDC study contained epidemiological data concerning the connection between tampon use and toxic shock syndrome and was based on

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133. *Id.* at 403.

134. *Id.* at 402-03 (citing *Miller v. Field*, 35 F.3d 1088, 1090-91 (6th Cir. 1994); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 558-59 (6th Cir. 1978); FED. R. EVID. 803(8) advisory committee's notes).

135. *Id.* at 403-04.

136. *Id.* at 403.

137. *Id.* at 404, 406.

138. 745 F.2d 292, 296 (4th Cir. 1984).

139. *Id.* at 297.

doctor interviews with patients who suffered from toxic shock syndrome.<sup>140</sup> Following a jury verdict for the defense, the plaintiff appealed the exclusion of the CDC study, and the Fourth Circuit Court of Appeals reversed.<sup>141</sup> In so doing, the Fourth Circuit noted that “[a]dmissibility in the first instance’ is assumed [for public records] because of the reliability of the public agencies usually conducting the investigation, and ‘their lack of any motive for conducting the studies other than to inform the public fairly and adequately.’”<sup>142</sup> Consistent with the recent amendment to Rules 803(6) and (8), the Fourth Circuit also found that “the burden is on the party opposing admission to demonstrate that the report is not reliable.”<sup>143</sup> According to the Fourth Circuit, such a public report should be excluded only when “sufficient negative factors” demonstrate a lack of trustworthiness.<sup>144</sup>

The Fourth Circuit concluded that the CDC study was presumptively admissible pursuant to the threshold requirements of Rule 803(8) because the CDC was a branch of the U.S. Department of Health and Human Services, which conducted the study “pursuant to authority granted by law,” and because the study itself reflected the “factual findings” of the CDC.<sup>145</sup> The court then explored the defendant’s challenge to the trustworthiness of the study. Specifically, the defense argued that the CDC study “constituted unpublished ‘preliminary epidemiological data’ and not ‘final findings of fact.’”<sup>146</sup> The defense also argued that the CDC investigators conducting the study lacked “firsthand knowledge of the interviewee’s symptoms,” further undermining the trustworthiness of the study.<sup>147</sup> In addition, the defense emphasized that some of the interviews were conducted months after the occurrence of patients’ toxic shock symptoms, and that interviewee patients were biased as a result of their motivation to litigate claims against tampon

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140. *Id.* at 299-300.

141. *Id.* at 296.

142. *Id.* at 300 (quoting *Kehm v. Proctor & Gamble*, 724 F.2d 613, 618-19 (8th Cir. 1983)).

143. *Id.* at 301 (citing *Kehm*, 724 F.2d at 618; *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 558 (6th Cir. 1978)).

144. *See id.* at 300 (quoting FED. R. EVID. 803(8)(C) advisory committee’s notes).

145. *See id.* at 301 (quoting FED. R. EVID. 803(8)).

146. *Id.*

147. *Id.* at 302.

manufacturers.<sup>148</sup> Finally, the defense criticized the CDC study for failing to identify the formal procedures or methodologies pursued for gathering data from patients.<sup>149</sup>

The Fourth Circuit rejected each of the defense's challenges to trustworthiness, noting that the CDC is "highly skilled in the study of epidemiology,"<sup>150</sup> that the CDC had "no conceivable motive for carrying out the studies in any other manner than to inform the public fairly and accurately,"<sup>151</sup> that the CDC study was eventually published and was not preliminary (although publication is not a necessary condition of trustworthiness),<sup>152</sup> that "allegations of [patient] bias [we]re purely speculative,"<sup>153</sup> and that "patient[s] afflicted with a serious disease ... ha[ve] a strong incentive to speak candidly with ... doctor[s]."<sup>154</sup> In sum, the court emphasized that the burden was on the defense to demonstrate methodological flaws in the CDC study that would justify exclusion and that the defense had failed to satisfy this burden.<sup>155</sup> Because the CDC study was central to the plaintiff's proof of causation, the court found that the district court's error in excluding the CDC study was not harmless and reversed for a new trial.<sup>156</sup>

Federal courts similarly have rejected litigants' attempts to undermine the trustworthiness of business records admissible through Rule 803(6). In *United States v. McGill*, a defendant appealed his conviction of income tax evasion based in part on the admission of

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148. *Id.*

149. *Id.*

150. *Id.* at 301.

151. *Id.*

152. *Id.* at 302.

153. *Id.* at 303.

154. *Id.*

155. *Id.* at 302-03.

156. *Id.* at 296; see also *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 268-69 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (holding that the district court abused its discretion when it concluded that government investigatory report's factual findings were untrustworthy); *In re Bear Stearns Cos., Sec., Derivative, & ERISA Litig.*, No. 08 MDL 1963 (RWS), 2016 WL 4098385, at \*3-4 (S.D.N.Y. July 25, 2016) (overruling trustworthiness objections to report by SEC Office of the Inspector General offered pursuant to Rule 803(8)(b)); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 159-60 (D. Conn. 2009) (denying defendant's motion to strike "European Commission Statement of Objections" and finding the document sufficiently trustworthy to be admitted through Rule 803(8)).

bank business records he argued lacked trustworthiness.<sup>157</sup> In that case, the prosecution admitted deposit tickets filled out by bank employees upon receipt of interest income coupons from depositors.<sup>158</sup> The prosecution produced a foundation witness establishing the routine practice of bank employees in transcribing taxpayer identification information from deposit envelopes received from depositors onto deposit tickets.<sup>159</sup> The defendant argued that the deposit tickets lacked trustworthiness because some of the tickets omitted the required taxpayer identification information.<sup>160</sup> The First Circuit rejected the defendant's trustworthiness objection and affirmed the district court's admission of the deposit tickets, finding that errors or deviations in practice are inadequate to demonstrate lack of trustworthiness.<sup>161</sup>

In *United States v. Reyes*, the Second Circuit Court of Appeals rejected a defendant's trustworthiness challenge to a prison logbook admitted at his trial as a business record pursuant to Rule 803(6).<sup>162</sup> The defendant was accused of running a drug organization from prison and ordering a cooperating prosecution witness to commit murders on his behalf.<sup>163</sup> The prosecution introduced the prison logbooks through the business records exception to prove that their cooperating witness did visit the defendant in prison and on dates close in time to the murders.<sup>164</sup> The defendant objected to the admission of the logbooks, arguing that they failed to satisfy the threshold requirements of the business records exception and, alternatively, that the logbooks should be excluded due to a lack of trustworthiness.<sup>165</sup> Specifically, the defendant argued that the logbooks were not trustworthy because they "reflect[ed] irregularities, such as missing names, missing addresses, different names in the same handwriting, etc." and because "prison visitors, who must

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157. 953 F.2d 10, 13 (1st Cir. 1992).

158. *Id.* at 13-14.

159. *Id.* at 14.

160. *Id.* at 15.

161. *Id.* ("The mere fact that errors or deviations have occurred from time to time does not destroy the inference of underlying trustworthiness which a judge may choose to draw from proof of a general practice.")

162. 157 F.3d 949, 953 (2d Cir. 1998).

163. *Id.* at 950.

164. *Id.* at 951.

165. *Id.* at 951, 953.

realize that the logbook is or can be used to monitor contacts with inmates, have an incentive to provide misinformation.”<sup>166</sup> The Second Circuit affirmed the trial court’s decision to admit the logbooks based upon testimony by the prison officials describing processes followed to verify the information in the logbooks.<sup>167</sup> Therefore, federal courts have evaluated challenges to trustworthiness thoughtfully and have admitted business and public records over such objections in the absence of demonstrable shortcomings in trustworthiness.

Federal courts have required specific indicators of unreliability before excluding business and public records that otherwise satisfy the requirements for admissibility. In *City of New York v. Pullman, Inc.*, the City of New York sued suppliers of subway cars to the City.<sup>168</sup> At trial, the defendants sought to introduce a report prepared by the staff of the Urban Mass Transit Administration pursuant to Rule 803(8) regarding methods for correcting safety problems in an effort to prove that the City failed to mitigate damages.<sup>169</sup> The district court excluded the report as untrustworthy and the defendants appealed following a \$72 million verdict for the City.<sup>170</sup> On appeal, the Second Circuit found that the district court did not abuse its discretion in excluding the report.<sup>171</sup> The appellate court emphasized that “the ... report was not the final report or finding of a government agency,” but instead represented “the tentative results of an incomplete staff investigation.”<sup>172</sup> Further, the court noted that the report “w[as] not based on independent testing by the UMTA,” or even upon testing verified by the UMTA, but was derived instead from data and information supplied by the

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166. *Id.* at 953.

167. *Id.*; *see also* *United States v. Bonomolo*, No. 13-386-cr, 2014 U.S. App. LEXIS 9195, at \*6 (2d Cir. May 19, 2014) (finding spreadsheets trustworthy for purposes of Rule 803(6)); *Wheeler v. Sims*, 951 F.2d 796, 802-03 (7th Cir. 1992) (rejecting plaintiff’s effort to exclude prison records regarding his medical status offered pursuant to Rule 803(6) on the grounds that they were made in anticipation of litigation and untrustworthy (1) when there was no evidence that the prison expected the plaintiff to sue, and (2) when the only demonstrated motivation of the prison medical director in making the report was to “fulfill[] ... his medical responsibilities”).

168. 662 F.2d 910, 912 (2d Cir. 1981).

169. *See id.* at 913-14.

170. *See id.* at 912.

171. *Id.* at 914-15.

172. *Id.*



defendants themselves *after* the safety concerns with the subway car arose.<sup>173</sup> These factors were therefore sufficient to justify the trial court's exclusion of the report as untrustworthy.<sup>174</sup>

In *Nachtsheim v. Beech Aircraft Corp.*, the plaintiff sued the manufacturer of a plane for wrongful death following a plane crash.<sup>175</sup> At issue in the case was whether the crash resulted from pilot disorientation and error or from the dangerous buildup of ice on the plane's stabilizing elevator.<sup>176</sup> The trial court excluded multiple items of evidence proffered by the plaintiff pursuant to Rule 803(8) due to a lack of trustworthiness.<sup>177</sup> At trial, the court permitted the plaintiff to admit an incident report of a United States Forestry Service pilot pursuant to Rule 803(8), but required redaction of a statement in the report describing "considerable ice packed in the gap between the elevator and the horizontal stabilizer" due to a lack of trustworthiness.<sup>178</sup> In addition, the trial court excluded a United States Forestry Service Bulletin describing dangers of flying the relevant aircraft in icing conditions due to a lack of trustworthiness.<sup>179</sup> Finally, the trial judge excluded a Bureau of Flight Standards Release issued by the Federal Aviation Administration (FAA) as untrustworthy.<sup>180</sup> After a jury verdict in favor of the defendant manufacturer, the plaintiff appealed, arguing that all three exclusionary rulings were erroneous.<sup>181</sup>

The Seventh Circuit Court of Appeals upheld all three findings of untrustworthiness.<sup>182</sup> With respect to the pilot's report, the court noted that he had not included the description of ice packing in his incident report and was not sure who did.<sup>183</sup> Based upon the uncertain authorship of the statement, the appellate court found that the trial judge was justified in redacting the statement pursuant to the

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173. *See id.* at 915.

174. *Id.* at 914-15.

175. 847 F.2d 1261, 1263 (7th Cir. 1988).

176. *Id.* at 1265-66.

177. *Id.* at 1272-75.

178. *Id.* at 1271-73.

179. *Id.* at 1273-74.

180. *Id.* at 1274-75.

181. *Id.* at 1263.

182. *Id.*

183. *Id.* at 1272-73.

trustworthiness limitation in Rule 803(8).<sup>184</sup> With respect to the United States Forestry Service Bulletin, the court noted the complete lack of information regarding the author of the bulletin, his qualifications, the procedures followed in releasing the bulletin, and its accuracy.<sup>185</sup> Accordingly, the court found no error in the exclusion of the bulletin.<sup>186</sup> With respect to the FAA Bureau of Flight Standards Release, the appellate court noted the trial judge's finding that the release had been cancelled by the FAA almost ten years prior to the manufacture of the plane at issue in the case.<sup>187</sup> For this reason, the appellate court found that the trial judge did not abuse his discretion in excluding the release for a lack of trustworthiness.<sup>188</sup>

Federal courts have also excluded documents proffered as business records pursuant to Rule 803(6) due to a demonstrated lack of trustworthiness. In particular, when opponents of business records have demonstrated a litigation motive for their preparation, courts have routinely excluded them.<sup>189</sup>

Therefore, courts presume the reliability and admissibility of records satisfying the threshold requirements of the business and the public records exceptions and look to the opponent of such hearsay to point to specific circumstances undermining that presumed reliability. Courts frequently reject trustworthiness challenges to business and public records and exclude evidence under this exception only when circumstances surrounding the records

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184. *Id.* at 1273.

185. *Id.* at 1274.

186. *Id.*

187. *Id.* at 1275.

188. *Id.*; *see also* *Palmer v. Lampson Int'l, LLC*, No. 11-CV-199-J, 2012 WL 10918920, at \*1 (D. Wyo. Nov. 28, 2012) (excluding a Mine Safety and Health Administration Report and Citation because circumstances indicated a lack of trustworthiness).

189. *See, e.g., Jordan v. Binns*, 712 F.3d 1123, 1136 (7th Cir. 2013) (excluding an adjuster's report when plaintiffs "carried their burden of showing that [it] was an untrustworthy document prepared in anticipation of litigation"); *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000) ("Litigants cannot evade the trustworthiness requirement of Rule 803(6) by simply hiring an outside party to investigate an accident and then arguing that the report is a business record because the investigator regularly prepares such reports as part of his business. If that were the case, parties that face litigious situations could always hire such nonaffiliated firms and investigators to prepare a report and then seek to admit the document over hearsay objection.").

demonstrate a lack of trustworthiness.<sup>190</sup> Obvious motives to misrepresent or serious mistakes in the preparation of the records are necessary to justify exclusion of otherwise admissible records.<sup>191</sup>

### *C. Trustworthiness Expansion: A Superior Alternative*

The familiar trustworthiness exception within the business and the public records exceptions, with which federal judges and litigants have substantial experience, should be expanded to additional hearsay exceptions in Rule 803 of the Federal Rules of Evidence. Some of the most heated recent criticisms of hearsay doctrine have targeted the hearsay exceptions in Rule 803, most notably the present sense impression exception and the excited utterance exception.<sup>192</sup> Several of these attacks have questioned the *uniform* reliability of hearsay statements falling within these exceptions, suggesting that some unreliable hearsay could potentially satisfy all of the requirements for admissibility under these exceptions.<sup>193</sup> Rather than discarding all categorical hearsay exceptions or even the “dubious [Rule 803] exceptions,”<sup>194</sup> the trustworthiness exception or escape clause currently embodied in the business and the public records exceptions could be applied with precision to exclude only those hearsay statements with a demonstrated and particularized lack of trustworthiness.

#### *1. Rule 803: The Weak Link in the Chain*

Proposed hearsay amendments that upend the entire hearsay regime are overbroad in attacking well-established elements of the hearsay scheme that are currently functioning well.<sup>195</sup> Rather than tilting at windmills, a proposal that is “just right” would repair only

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190. See 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:83 (describing rare circumstances leading to the exclusion of business records based on the trustworthiness exception).

191. See *id.* § 8:92 (“Raising mere possibilities of untrustworthiness, without convincing proof or argument making such risks palpable and clear, are not enough to require exclusion of evidence that fits the exception.”).

192. See *supra* Part I.A.

193. See, e.g., *United States v. Boyce*, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J., concurring).

194. See *Sevier*, *supra* note 2, at 662.

195. See *supra* Part I.B.

the portions of hearsay doctrine that are arguably broken to some extent.<sup>196</sup> For all the hue and cry over the hearsay rule and its exceptions generally, much of the criticism ends up at the doorstep of Rule 803. Judge Posner's recent call to eliminate all of the categorical hearsay exceptions originated with a rant over the irrationality of the present sense impression and excited utterance exceptions found in Rule 803.<sup>197</sup> One of the most concrete reform proposals in Professor Sevier's recent advocacy of a "procedural justice" model of hearsay is the repeal of the "dubious [Rule 803] exceptions."<sup>198</sup> Indeed, the Rule 803 hearsay exceptions have consistently drawn the most fire and present long-standing reliability concerns that remain unaddressed.<sup>199</sup> Categorical hearsay exceptions in other rules are either not premised upon reliability at all, include necessity justifications beyond reliability, or have been amended and improved to correct perceived inadequacies. For this reason, proposals that would alter the entire hearsay regime and all five categories of hearsay exceptions within it threaten to undermine hearsay doctrine that is functioning well in the vast majority of cases. Rather than throwing all of hearsay doctrine into disarray with a true paradigm shift, amendments to the hearsay regime should provide a repair at the true point of weakness—Rule 803.

Rule 801(d)(1) provides hearsay exceptions or exemptions covering prior hearsay statements made by declarants who testify as witnesses at trial.<sup>200</sup> The three exceptions in this category are working well, and any concerns regarding their operation have been, and are being, addressed through proposals narrowly tailored to those concerns. Indeed, the Advisory Committee on Evidence Rules has carefully reviewed these exceptions in order to propose amendments needed to correct any flaws unique to the operation of these provisions. Rule 801(d)(1)(B) was amended in 2014 to resolve the

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196. See Gold, *supra* note 89, at 1619 (stating that the first commandment of amending the Rules is, "If It Ain't Broke, Don't Fix It").

197. See Boyce, 742 F.3d at 800.

198. Sevier, *supra* note 2, at 662.

199. See James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203 (1995) (recommending abolition of all res gestae hearsay exceptions due to insufficient reliability).

200. FED. R. EVID. 801(d)(1) (requiring that "[t]he declarant testif[y] and [be] subject to cross-examination about a prior statement").

mysteriously underinclusive nature of the original provision that permitted substantive admissibility of some prior consistent statements made by testifying witnesses, but not other similarly situated prior consistencies.<sup>201</sup> In 2015, the Advisory Committee on Evidence Rules began considering modifications to Rule 801(d)(1)(A) governing substantive admissibility of prior inconsistent statements in light of the favorable experience of some states with broader hearsay exceptions for those witness statements.<sup>202</sup> Furthermore, the Rule 801(d)(1) provisions do not rest solely on problematic considerations of reliability decried by recent hearsay critics, but are supported by the presence of in-court cross-examination of the declarant-witness at the trial or hearing in which the hearsay is offered.<sup>203</sup> Thus, the rationality and procedural justice criticisms of the hearsay rule are largely inapplicable in this context, and any flaws in these provisions are being addressed with targeted amendments.

The various statements of party opponents admissible through Rule 801(d)(2) are not premised at all on assumptions about reliability that have drawn recent criticism. Rather, the hearsay of a party opponent is admissible due to notions of adversarial fairness that require a litigant to be answerable for the statements she makes or for those made by agents, employees, or co-conspirators with whom she associates.<sup>204</sup> Indeed, the requirement that a declarant possess personal knowledge of the information relayed in a statement—critical for reliability—is not required for hearsay statements admissible through the Rule 801(d)(2) exceptions.<sup>205</sup> Thus, criticisms of the hearsay rules for relying at all on notions of reliability or of the particular assumptions about reliability they reflect are inapplicable to the Rule 801(d)(2) exceptions. Therefore,

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201. See FED. R. EVID. 801(d)(1)(B) (permitting substantive admissibility of prior consistent statements offered to rehabilitate a declarant-witness “when attacked on another ground”); *id.* 801(d)(1)(B) advisory committee’s note to 2014 amendments. See generally Richter, *supra* note 55.

202. See Capra Memorandum on Possible Amendment, 2016, *supra* note 8, at 1, 7-11.

203. FED. R. EVID. 801(d)(1) (requiring that the declarant testify at trial subject to cross-examination concerning the statement).

204. FED. R. EVID. 801(d)(2) advisory committee’s note to 1972 proposed rules.

205. 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:44 (“Such an admission is not ... excludable merely because the speaker lacks personal knowledge.”).

none of the recent concerns regarding the existing hearsay regime justifies any alteration of the hearsay provisions in Rule 801(d)(2).

Nor is there any pressing need to amend or eliminate the Rule 804 hearsay exceptions due to concerns over questionable reliability. First and foremost, these hearsay exceptions depend on strong considerations of necessity, as well as assumptions about reliability, because all of the Rule 804 exceptions require the demonstrated unavailability of the declarant.<sup>206</sup> Therefore, the hearsay statements within this Rule are disfavored and admitted only when live trial testimony cannot be had.

Furthermore, the reliability critiques that have been launched against the Rule 803 exceptions<sup>207</sup> have less relevance in the Rule 804 context. The former testimony exception in Rule 804(b)(1) is a time-honored hearsay exception that affords the opponent a prior opportunity to cross-examine the hearsay declarant<sup>208</sup> that has been deemed constitutionally adequate, even when used against a criminal defendant.<sup>209</sup> The procedural protection for the opponent provided by prior cross-examination underscores this exception—not notions about the inherent reliability of the previous statements. The forfeiture by wrongdoing exception in Rule 804(b)(6) likewise makes no assumptions about the reliability of the hearsay that it admits. It is the intentional misconduct of the opponent of the hearsay evidence in making the declarant unavailable that justifies the admission of this hearsay—reliable or not.<sup>210</sup> Hearsay admitted through the narrow exception for statements of personal or family history in Rule 804(b)(4) has never been questioned, particularly in light of the unavailability requirement.<sup>211</sup>

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206. See FED. R. EVID. 804(b) (“The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness.”).

207. See *supra* Part I.A.

208. FED. R. EVID. 804(b)(1)(B) (allowing admission of former testimony if the party against whom it is offered had “an opportunity and similar motive to develop it by direct, cross-, or redirect examination”).

209. See *also* Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding that the Confrontation Clause requires opportunity for cross-examination of testimonial hearsay before trial, in the case of an absent and unavailable declarant).

210. FED. R. EVID. 804(b)(6) (allowing hearsay of an unavailable declarant to be admitted against a party only if that party wrongfully and intentionally caused or acquiesced in causing the declarant’s unavailability).

211. See FED. R. EVID. 804(b)(4); 5 MUELLER & KIRKPATRICK, *supra* note 20, § 8:133.

The declarations against interest exception in Rule 804(b)(3) does depend on the inherent reliability of hearsay statements that are so contrary to the interests of the declarant that no reasonable person would make such statements unless they were true.<sup>212</sup> Although an exception grounded in assumptions about human motivations and reliability could potentially draw criticism similar to that leveled at the Rule 803 hearsay exceptions, concerns about Rule 804(b)(3) have already been significantly addressed through both case law and rules amendments. In *Williamson v. United States*, the Supreme Court interpreted the declarations against interest exception narrowly to require that *all* parts of a hearsay statement admitted through the exception be against the speaker's own interest at the time of its making.<sup>213</sup> This interpretation prevents the admission of collateral statements of questionable reliability that may not deserve the declarant.<sup>214</sup> The use of the declarations against interest exception in criminal cases has long been cause for concern, leading to a requirement in the original rule that a criminal defendant show corroborating circumstances that clearly indicate the trustworthiness of a statement against penal interest offered to exculpate the accused.<sup>215</sup> Concerns over the uneven and unfair application of this provision to criminal defendants only led to a 2010 amendment expanding the corroborating circumstances requirement to the prosecution in criminal cases as well.<sup>216</sup> Thus, the declarations against interest exception is limited to circumstances where the declarant is unavailable to provide live testimony, has been narrowly construed to apply only to statements that are themselves against the speaker's interest, and requires corroborating circumstances in

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212. FED. R. EVID. 804(b)(3)(A) (allowing “[a] statement that ... a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s ... interest”).

213. 512 U.S. 594, 599-600 (1994).

214. *See id.*

215. *See* FED. R. EVID. 804(b)(3) advisory committee’s note to 1972 proposed rules (explaining need for corroboration when an accused seeks to admit third party declarations against interest to exculpate the accused).

216. *See* FED. R. EVID. 804(b)(3)(B) (now requiring corroboration for all declarations against interest offered by either the prosecution or defense in a criminal case if those statements tend to expose the declarant to criminal liability); *id.* 804(b)(3) advisory committee’s note to 2010 amendments (“Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases.”).

the criminal context.<sup>217</sup> Any dangers posed by this exception have been addressed through Supreme Court and Advisory Committee oversight.

Last, but hardly least, is the dying declarations exception in Rule 804(b)(2), which allows statements made by a declarant about the cause and circumstances of his death “while believing [that his] death [is] imminent.”<sup>218</sup> This Rule 804 exception assumes that a dying individual is unlikely to misrepresent, intentionally or otherwise, the cause and circumstances leading to his demise as he departs the world.<sup>219</sup> This exception, of course, could be argued to suffer from the same questionable assumptions about the reliability of human communications that plague the Rule 803 exceptions. Just as skeptics question whether excitement and stress lead to reliability for purposes of the excited utterance exception,<sup>220</sup> they could similarly question whether a dying person can be trusted to speak reliably about the cause and circumstances of his or her impending death. As our society becomes increasingly secular, some of the religious overtones of the common law exception disappear.<sup>221</sup> Like the Rule 803 exceptions, the dying declarations exception is cabined by limitations, requiring a finding that the declarant had a settled hopeless expectation of imminent death at the time of the statement, allowing only statements about the cause or circumstances of that impending death, and limiting the use of the exception in criminal cases to homicide prosecutions, where they are most likely needed.<sup>222</sup>

The most important distinction between the dying declarations exception and Rule 803 exceptions like the excited utterance

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217. Of course, the Sixth Amendment applies another layer of protection for criminal defendants in the unlikely event that a testimonial hearsay statement could be found “against interest” and admissible against a criminal defendant. *Cf.* FED. R. EVID. 804(b)(3) advisory committee’s note to 1974 enactment.

218. FED. R. EVID. 804(b)(2) (allowing “a statement that the declarant ... ma[kes] about [the] cause or circumstances” of his death “while believing ... death to be imminent” “[i]n a prosecution for homicide or in a civil case”).

219. *See* 5 MUELLER & KIRKPATRICK, *supra* note 20, § 8:124.

220. *See, e.g.*, *United States v. Boyce*, 742 F.2d 792, 801-02 (7th Cir. 2014) (Posner, J., concurring).

221. *See* 5 MUELLER & KIRKPATRICK, *supra* note 20, § 8:124 (discussing contemporary challenges to the rationale for dying declarations exception).

222. FED. R. EVID. 804(b)(2); *id.* 804(b)(2) advisory committee’s note to 1974 enactment.



exception, however, is that the former resides in Rule 804. In addition to all of the limitations on the types of statements admissible through the exception, this provision operates only to admit the hearsay of unavailable, usually deceased, declarants.<sup>223</sup> The exception is therefore invoked less often than the Rule 803 exceptions and only in cases of greatest need.<sup>224</sup> The exception is already so limited that the only potential reform to address reliability concerns might be the elimination of the exception altogether. Efforts to repeal the dying declarations exception would run squarely against tradition.<sup>225</sup> Dying declarations have such a pedigree that even Justice Antonin Scalia thought they might escape the *Crawford* revolution.<sup>226</sup> In sum, therefore, there is no pressing need for hearsay reform in connection with the Rule 804 categorical exceptions.

Nor is there a current crisis in the operation of the residual hearsay exception in Rule 807. This exception was included by the Advisory Committee in recognition of the impossibility of devising categorical hearsay exceptions capable of capturing and admitting all reliable human hearsay statements.<sup>227</sup> Congress added limitations to the Advisory Committee's draft rule to protect against frequent and unbridled use of the catchall exception, demanding that the hearsay admitted through the exception have guarantees of trustworthiness "equivalent" to the categorical exceptions, be "offered as evidence of a material fact," be "more probative ... than any other evidence that the proponent can obtain," and be admitted only when it will serve "the interests of justice."<sup>228</sup> Notwithstanding all of this restrictive language, there were early concerns about liberal use of the exception, particularly in criminal cases.<sup>229</sup> In

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223. See 5 MUELLER & KIRKPATRICK, *supra* note 20, § 8:124.

224. See FED. R. EVID. 804(b)(2) advisory committee's note to 1974 enactment; 5 MUELLER & KIRKPATRICK, *supra* note 20, § 8:124.

225. See FED. R. EVID. 804(b)(2) advisory committee's note to 1972 proposed rules.

226. See *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

227. See DANIEL J. CAPRA, ADVISORY COMMITTEE NOTES TO THE FEDERAL RULES OF EVIDENCE THAT MAY REQUIRE CLARIFICATION 48 (1998) ("It would ... be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system.").

228. FED. R. EVID. 807; see also CAPRA, *supra* note 227, at 48.

229. See, e.g., Myrna S. Raeder, Commentary, *A Response to Professor Swift: The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507, 514-19 (1992) (arguing that the catchall exception to the hearsay rule has eroded the prohibition on hearsay evidence).

2004, *Crawford v. Washington* eliminated concerns of uncross-examined testimonial hearsay being admitted through Rule 807 against criminal defendants.<sup>230</sup> More recent research into the operation of Rule 807 in federal courts reveals sparing underuse of Rule 807 and a reluctance of federal judges to admit even highly reliable hearsay through the exception.<sup>231</sup> Indeed, the Advisory Committee for the Federal Rules of Evidence is currently studying potential tweaks to Rule 807 that would enhance its intended operation.<sup>232</sup> Thus, perceived failings in hearsay doctrine are not focused on the rarely utilized catchall exception in Rule 807.

It is the hearsay being admitted through the Rule 803 exceptions and the assumptions about human behavior and motivations within those exceptions that have caused the most significant contemporary concern about the hearsay regime.<sup>233</sup> Many of these concerns regarding the Rule 803 exceptions have not been addressed by modern fixes like those that have been or are being made to other hearsay rules. Never a proponent of rushing in to correct the functional, I recognize and accept the highly persuasive argument that the Rule 803 hearsay exceptions should be left well enough alone.<sup>234</sup> Noted experts have argued that these exceptions work well in the vast majority of cases and are essential to predictability for trial lawyers and parties.<sup>235</sup> Any imperfections in the reliability of hearsay admitted through the Rule 803 exceptions may be addressed to the fact-finder as issues of weight. Still, criticism of the Rule 803 hearsay exceptions has reached a crescendo in recent years, and some remedial action may be inevitable.<sup>236</sup> To the extent that a decision is made to amend the hearsay rules to respond to these modern criticisms of the hearsay regime, the appropriate fix for what ails contemporary hearsay doctrine ought to be addressed

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230. See 541 U.S. at 57-59.

231. See Capra Memorandum on Expanding the Residual Exception, *supra* note 9, at 17-22 (cataloguing Rule 807 cases and finding a restrictive approach to the residual exception).

232. See *id.* at 5-8.

233. See *supra* Part I.A.

234. Richter, *supra* note 1, at 1726-27.

235. See Panel Discussion, *supra* note 6, at 1364-68 (remarks of Professor Stephen A. Saltzburg describing reliability, necessity, and foundational rationales for hearsay exceptions and advocating their retention); see also Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 *FORDHAM L. REV.* 1485, 1488-89 (2016).

236. See *supra* Part I.A.

to these Rule 803 exceptions, rather than to the hearsay scheme as a whole.

## 2. *A Silver Bullet*

Once the focus shifts to Rule 803, the question becomes how best to fix the perceived failings of the hearsay exceptions in that category. There have been many calls over the years to reform particular hearsay exceptions within Rule 803 through amendments to only single hearsay exceptions.<sup>237</sup> Reforming hearsay exceptions one by one raises multiple concerns. First, it takes many years to amend a federal rule, requiring long periods of public comment and consideration by the Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, and the United States Supreme Court, followed by submission to Congress.<sup>238</sup> Amending problematic hearsay exceptions within Rule 803 one at a time could take decades to achieve comprehensive reform. In addition, considering amendments to a single hearsay exception can produce amendments that have collateral consequences for other exceptions that remain inadequately explored in light of the narrow scope of the amendment.<sup>239</sup> Although the Advisory Committee on Evidence Rules exercises its substantial peripheral vision in considering any amendment, amending exceptions one at a time increases the risk that newly added language or requirements could have implications for other unexamined rules.<sup>240</sup> To address deficiencies in each increases the likelihood of fixing one problem only to generate new interpretive problems in other exceptions due to the relationship among individual exceptions. Finally, individual amendments that add new requirements specific to each exception within Rule 803 add to the complexity of the hearsay regime that has drawn so much criticism.<sup>241</sup>

Expanding a trustworthiness exception to additional Rule 803 categories represents a hearsay update that is “just right” because

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237. *See supra* Part I.A.

238. 28 U.S.C. §§ 2073-2074 (2012).

239. *See Gold, supra* note 89, at 1622-23, 1622 n.47.

240. *See id.*

241. *See, e.g., Richter, supra* note 1, at 1706.

it utilizes a single tool to resolve potential reliability problems across a variety of the Rule 803 exceptions and avoids a piecemeal approach to hearsay reform that alters exceptions one at a time. A trustworthiness escape clause is a natural solution to alleged imperfections in the reliability assumptions supporting the Rule 803 hearsay exceptions. Indeed, both the business and the public records exceptions assume the trustworthiness of records regularly created and relied upon by businesses or public agencies.<sup>242</sup> The escape clause in those exceptions permits an opponent of an otherwise admissible hearsay statement to demonstrate that something about “the source of the information [in the statement] or the method or circumstances of [its] preparation,” undermines the general assumptions of reliability for a particular record.<sup>243</sup> If the opponent can meet its burden of demonstrating a lack of trustworthiness for the particular statement at issue, the statement will be excluded.<sup>244</sup>

Adding a similar trustworthiness exception to other Rule 803 hearsay exceptions that embody similar generalized assumptions about reliability could address many of the perceived flaws in the operation of those exceptions. For example, recent criticisms of the present sense impression exception in Rule 803(1) highlight the possibility that potentially unreliable hearsay statements could satisfy its requirements.<sup>245</sup> The present sense impression exception permits hearsay statements describing or explaining an event or condition at the very time that the declarant perceives it or immediately thereafter.<sup>246</sup> Critics have suggested that the timing requirement in the present sense impression is an imperfect guarantor of reliability because humans are capable of lying instantaneously and because unverifiable and potentially unreliable social media e-hearsay—such as a tweet—could fit within the parameters of the exception.<sup>247</sup> An amendment that maintains the

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242. See 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:77 (describing reliability rationale for business records exceptions). Of course, both exceptions also rest on notions of necessity and efficiency in avoiding time-consuming testimony by business and public agency employees. *See id.*

243. FED. R. EVID. 803(6)(E), (8)(B).

244. *See id.*

245. *See United States v. Boyce*, 742 F.2d 792, 799-801 (7th Cir. 2014) (Posner, J., concurring).

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

247. *See Boyce*, 742 F.3d at 796 (majority opinion); Bellin, *Facebook*, *supra* note 1, at 362.

existing requirements of the present sense impression exception and adds a trustworthiness escape clause could allow the exception to continue to admit the vast majority of hearsay squarely within its reliability rationale, while permitting opponents in certain cases to demonstrate that particular statements are undeserving of the presumption of reliability it affords. For example, in a case where a declarant would have had and recognized an immediate motive to misrepresent an event like an accident, the opponent of that statement could demonstrate “that the source of information”<sup>248</sup> in the statement is not trustworthy and have it excluded.<sup>249</sup> Assuming that an unverified tweet could meet the admissibility requirements of Rule 803(1) in the first place,<sup>250</sup> the opponent of that tweet could demonstrate that the “circumstances of preparation indicate a lack of trustworthiness”<sup>251</sup> and seek exclusion.

The excited utterance exception in Rule 803(2) has also been criticized for admitting particular hearsay statements of doubtful reliability.<sup>252</sup> This exception admits statements made by a declarant who is under the stress of excitement caused by a startling event when she speaks, so long as the “statement[s] relat[e] to [that] startling event.”<sup>253</sup> Questions arise as to whether the stress and excitement required by the rule eliminate the ability to misrepresent, and also whether high levels of stress detract from perception, memory, and narration in significant ways that undermine the reliability of excited utterances.<sup>254</sup>

A trustworthiness escape clause applicable to Rule 803(2) could assuage some of these concerns as well. In circumstances where a particular declarant has a clear motive to fabricate, notwithstanding

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248. See FED. R. EVID. 803(6)(E), (8)(B).

249. See, e.g., *Starr v. Morsette*, 236 N.W.2d 183, 186 (N.D. 1975) (noting that the driver said moments after an accident that her passenger “grabbed the wheel, causing the pickup to go into the ditch and overturn”).

250. It seems extremely unlikely, however, that a tweet, uncorroborated by any other circumstances, would satisfy the timing and personal knowledge requirements of Rule 803(1). See Richter, *supra* note 1, at 1689-90.

251. See generally FED. R. EVID. 803(6)(E), (8)(B).

252. See, e.g., *Boyce*, 742 F.3d at 801-02 (Posner, J., concurring); see also Baicker-McKee, *supra* note 4 (extensively cataloguing potential reliability shortcomings in excited utterances).

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

254. See *id.* 803(2) advisory committee’s note to 1972 proposed rules (noting that the excited utterance exception “has been criticized on the ground that excitement impairs accuracy of observation”); see also Baicker-McKee, *supra* note 4.

a state of excitement, or where a declarant is under so much stress as to appear incoherent, the opponent of the excited utterance could argue for its exclusion.<sup>255</sup> Instead of abrogating the exception in its entirety and losing all hearsay statements within its reach, a trustworthiness exception would allow the excited utterance exception to continue playing a key role in important contexts (like the domestic violence arena) while affording opponents some opportunity to challenge the reliability assumptions within the exception for certain suspect statements.

The state of mind exception is another Rule 803 exception that has raised concerns about the trustworthiness of the hearsay that it admits. Rule 803(3) admits hearsay “statements of [a] declarant’s [own] then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health).”<sup>256</sup> The rationale underlying the state of mind exception is that there is no better evidence of a person’s own mental condition than that person’s own contemporaneous description.<sup>257</sup> No other witness or declarant will have information on this subject that is superior, and trial testimony by the declarant himself as to a former state of mind will always be inferior to statements made at the relevant time. So, while these state of mind assertions may not be inherently reliable, they are more reliable than other evidence we could obtain on this point.

The problem that has arisen with Rule 803(3) relates to patently self-serving statements. Perhaps a declarant injured in an accident is aware of the possibility of litigation when she claims that she is experiencing significant pain. In another example, a declarant well aware that he may be suspected of a crime describes his then-existing, benign intentions. Notwithstanding these clear motivational defects, these statements satisfy the straightforward requirements of Rule 803(3). Courts have struggled with statements like these, but have concluded that the hearsay regime mandates

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255. *See, e.g.*, *United States v. Davis*, 577 F.3d 660, 664 (6th Cir. 2009) (affirming admission of excited utterance by teenage declarant who admitted exaggerating her statement to encourage a prompt police response).

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

257. *Id.* 803(3) advisory committee’s note to 1972 proposed rules (noting that Rule 803(3) is a “specialized application” of Rule 803(1)); *see also* Saltzburg, *supra* note 235, at 1489-94 (discussing necessity rationale for exceptions like the state of mind exception).

admissibility of hearsay statements that satisfy the categorical exceptions.<sup>258</sup> Under the existing categorical regime, if a statement fits a hearsay exception, a court must admit it over a hearsay objection.<sup>259</sup>

A trustworthiness escape would resolve the natural tension between the logical rationale for admitting these hearsay statements as the best evidence in most circumstances and the capacity of the exception to admit blatantly self-serving hearsay. It would free the hands of courts and allow exclusion of particular statements that suffer from demonstrable motivational defects. Indeed, these situations are very reminiscent of the exclusion of business records made in anticipation of litigation.<sup>260</sup> Although many businesses routinely investigate and record information related to incidents that could give rise to liability, courts recognize the inherent motivational difficulties inherent in such records.<sup>261</sup> When a business seeks to admit its own record prepared at a time when litigation could have been anticipated against an opponent, opponents of the records can utilize the trustworthiness exception to exclude the self-serving business records.<sup>262</sup> Rule 803(3) presents the same problem in a different context. It follows that the same remedy can be used to reach a more rational result for self-serving state of mind hearsay statements.

Rule 803(4) admits hearsay statements made for the purpose of seeking medical treatment or diagnosis and extends to all statements of symptoms, medical history, or causation that are reasonably pertinent to such treatment or diagnosis.<sup>263</sup> This hearsay exception recognizes the strong motivation of patients, or loved ones

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258. See, e.g., *United States v. DiMaria*, 727 F.2d 265, 272 (2d Cir. 1984) (“[I]f a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge, save for the ‘catch-all’ exceptions of Rules 803(24) and 804(b)(5) and the business records exception of Rule 803(6).”).

259. See 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:71 (“[C]ourts should be at least hesitant to exclude statements that otherwise fit [Rule 803(3)] .... The scheme of categorical exceptions reinforces this point (satisfying express requirements is enough)—only a few, such as the catchall and the ones for business and public records, include broad-brush references to trustworthiness.”).

260. See FED. R. EVID. 803(6) advisory committee’s note to 1972 proposed rules.

261. See *id.*

262. See FED. R. EVID. 803(6)(E).

263. FED. R. EVID. 803(4).

seeking treatment on their behalf, to be as accurate as possible when relaying information pertinent to treatment or diagnosis in an effort to obtain such treatment or diagnosis.<sup>264</sup> A failure to relate a symptom accurately or to explain causation honestly could lead to harmful, improper, or ineffective care.

Although the medical context provides obvious and powerful incentives to speak accurately, situations may arise in which competing motivations could serve to undermine the reliability of such statements. For example, a parent's statements to emergency room physicians describing a fall that injured a minor child fits squarely within the requirements of the hearsay exception. An abusive parent responsible for the child's injuries would have a powerful incentive to misrepresent facts about causation pertinent to treatment to avoid culpability, making her description of events highly unreliable.<sup>265</sup> In addition, Rule 803(4) was expanded beyond the common law hearsay exception to cover statements made for purposes of "medical diagnosis" without any corresponding treatment.<sup>266</sup> The rationale for this expansion was to allow substantive use of patient statements made to physicians testifying as expert witnesses, on the assumption that such patient statements would be revealed to the fact-finder as part of the foundation for the expert's testimony in any event.<sup>267</sup> Rule 803(4), therefore, would cover a plaintiff's statements about symptoms and causation to a physician for the purpose of obtaining a "diagnosis" that might be helpful in anticipated litigation.<sup>268</sup> The powerful incentives to report accurately that exist in the treatment context may not extend to a diagnosis made in anticipation of litigation.

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264. See *id.* 803(4) advisory committee's note to 1972 proposed rules.

265. See 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:75 ("[S]tatements by parents to doctor[s] ... must be treated as suspect because perpetrators are often parents or relatives with motive for casting blame." (citing *United States v. Yazzie*, 59 F.3d 807, 812-13 (9th Cir. 1995))).

266. See FED. R. EVID. 803(4).

267. This assumption was subsequently displaced by a 2000 amendment to Rule 703 providing that otherwise inadmissible evidence upon which an expert relies should not be revealed to the fact-finder unless its "probative value in helping the jury evaluate the [expert's] opinion substantially outweighs [any] prejudicial effect." FED. R. EVID. 703; *id.* 703 advisory committee's note to 2000 amendments. Of course, patient hearsay statements made for purposes of diagnosis that fall within Rule 803(4) are admissible and not subject to the Rule 703 limitation.

268. See FED. R. EVID. 803(4) (covering statements made for "medical diagnosis").



A trustworthiness exception to Rule 803(4) would preserve the admissibility of most statements made for purposes of medical treatment or diagnosis when patients possess a strong interest in speaking accurately, while allowing opponents in rare circumstances such as the ones above to challenge the reliability of suspect statements and to exclude those that appear untrustworthy. Finally, statements assigning fault for a condition or injury to a particular individual are typically excluded as outside Rule 803(4) because fault is not pertinent to appropriate treatment, and declarants may lack the incentive to accurately report that they possess with respect to general causation or their symptoms.<sup>269</sup> Courts have expanded Rule 803(4) beyond its traditional reliability guarantees to statements of fault in the context of child abuse cases, however.<sup>270</sup> While courts evaluate some motivational factors to determine the admissibility of statements identifying abusers made to treating professionals through Rule 803(4) in these cases, a trustworthiness escape could be an additional tool for identifying circumstances that justify this expansive approach to hearsay statements of fault made to medical professionals.<sup>271</sup>

The Advisory Committee on Evidence Rules recently focused its attention on the “ancient documents” hearsay exception in Rule 803(16).<sup>272</sup> Since its adoption in 1975, this exception has allowed authentic documents that are at least twenty years old to be admitted for their truth.<sup>273</sup> Emphasizing that age alone provides no guarantee of reliability and alarmed by the vast amount of electronically stored data approaching twenty years of age, the Advisory Committee on Evidence Rules proposed abrogation of the ancient documents exception in 2015.<sup>274</sup> The public comment on the proposal

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269. See *id.* 803(4) advisory committee’s note to 1972 proposed rules.

270. See, e.g., *Blake v. State*, 933 P.2d 474, 477 n.2 (Wyo. 1997) (noting that “an overwhelming majority of jurisdictions, including at least 32 states and 4 federal circuits” admit victim statements identifying the perpetrator in child abuse cases).

271. See Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 281 (1989) (arguing that the rationale for the hearsay exception does not extend to victims’ identifications of perpetrators).

272. See Capra Memorandum on Proposal to Eliminate the Ancient Documents Exception, *supra* note 56, at 6-9.

273. FED. R. EVID. 803(16). The exception has a companion authenticity provision in Fed. R. Evid. 901(b)(8).

274. See Capra Memorandum on Proposal to Eliminate the Ancient Documents Exception,

vehemently opposed abrogation of the exception.<sup>275</sup> Although the commenters failed to identify any inherent reliability in twenty-year-old hearsay, they passionately defended their dependence on the exception in cases involving latent diseases, toxic torts, and church child abuse.<sup>276</sup> The Advisory Committee modified the proposal as a result, retaining the ancient documents exception for documents created before January 1, 1998, but abolishing the exception for all documents, including the pending onslaught of electronically stored information created on, or after, that date.<sup>277</sup> Therefore, notwithstanding the Advisory Committee's expressed concern that the age of a document alone provides *no* assurance of reliability, the exception is retained for documents created before January 1, 1998.

A trustworthiness exception applicable to Rule 803(16) could provide some remedy for the original reliability concern that led to the proposed abrogation, while continuing the general availability of the exception in the cases described by the public commentary. Opponents of ancient documents created before 1998 could point to motivational or other circumstances suggesting that specific ancient documents lack trustworthiness to exclude those that appear affirmatively unreliable. For example, public commentary opposing the abrogation of the ancient documents exception specifically pointed to cases of decades-old child abuse by church officials as an example of the need for an ancient documents exception.<sup>278</sup> Importantly, the ancient documents exception could work *against* plaintiffs in cases like these. Suppose that an accused church official kept a diary at the time of the alleged abuse. If more than twenty years old, created before 1998, and authentic, *all* statements in that diary—including

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*supra* note 56, at 6-9 (describing the proposed abrogation); *see also* Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*, 17 YALE J.L. & TECH. 1, 34-41 (2015) (discussing ways to amend Rule 803(16)). Indeed, it is not clear that there was a hearsay exception for ancient documents prior to the Rules. *See* 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:100.

275. *See* Capra Memorandum on Proposal to Eliminate the Ancient Documents Exception, *supra* note 56, at 9-10, 12 (describing the public comment).

276. *Id.* at 9-10.

277. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 57, at 3.

278. *See* Capra Memorandum on Proposal to Eliminate the Ancient Documents Exception, *supra* note 56, at 12 (describing the public comment).

self-serving and exculpatory explanations of encounters with involved children—would be admissible for their truth.

Here again, a trustworthiness exception could assist plaintiffs in excluding this evidence. If plaintiffs could demonstrate the motivational defects in this diary, they could potentially exclude this specific, unreliable ancient document. While a trustworthiness “exception” was not an appropriate response to the Advisory Committee’s original concern that ancient documents warrant no presumption of inherent trustworthiness in the first place,<sup>279</sup> the trustworthiness escape clause could provide some modest protection to opponents of demonstrably unreliable pre-1998 documents that remain admissible under the modified exception. While it may be difficult to demonstrate the untrustworthy nature of ancient documents, and challenges to the admissibility of these documents may rarely succeed, it would afford opponents at least some mechanism to challenge the wholesale admission of the old under the modified exception.

Even lesser-used Rule 803 exceptions might benefit from a trustworthiness escape clause. Rule 803(9) admits public records of vital statistics, including births, deaths, or marriages.<sup>280</sup> Record-keepers in this context must rely on representations from third parties involved in births, marriages, or deaths.<sup>281</sup> Although certainly deserving of a presumption of reliability given the solemnity and ceremony attending such occasions, some unusual circumstances could arise which would detract from the trustworthiness of even these hearsay statements.<sup>282</sup> For example, with respect to a birth certificate, there could be motivations in cases involving a paternity dispute to misrepresent identity of parents.<sup>283</sup> A trustworthiness clause could be useful in challenging certificates resulting from reports of declarants with clear motives to lie.

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279. *See id.* at 1 (noting that the Committee had found that the exception “confuses authenticity ... with reliability”).

280. FED. R. EVID. 803(9).

281. *See* 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:93.

282. *See id.*

283. *See id.* (“In many settings, attending physicians or midwives ... who deliver a child should be able to rely on statements by the mother identifying the father, but arguably not in the setting of paternity suits where motivation may be problematic at the time of birth.”).

Rule 803(13) admits “statements of fact about personal or family history contained in family record[s], such as Bible[s], genealog[ies], chart[s], engraving[s] ... [and] inscription[s].”<sup>284</sup> While certainly deserving of a presumption of reliability, it is not difficult to imagine circumstances calling the trustworthiness of certain inscriptions in Bibles or engravings on rings into question. Here too, a trustworthiness exception could be utilized to challenge such family records in appropriate cases. Similarly, Rule 803(19) allows evidence of reputation on personal or family history among family members, associates, or in the community.<sup>285</sup> Even here where information is needed and likely reliable, “[m]istakes occur and false information circulates (careless talk, rumor, even determined deception), but usually common repute gets the matter right.”<sup>286</sup> Although Rule 803(19) is rarely invoked,<sup>287</sup> a trustworthiness exception could aid potential reliability issues in this area.

Therefore, expanding the trustworthiness escape that currently exists in the business and the public records context into additional Rule 803 hearsay exceptions is a reform that is “just right” to address many of the contemporary concerns about hearsay doctrine. With a single stroke of the pen, it could resolve a number of thorny issues that have plagued multiple exceptions within Rule 803. Rather than upending the entire system of categorical exceptions or implementing unique restrictions applicable to only single exceptions,<sup>288</sup> a trustworthiness expansion promises to remedy defects in Rule 803 exceptions with both precision and efficiency. More silver bullet than sledgehammer, an expanded trustworthiness escape clause could cure many of the imperfections in the Rule 803 exceptions decried by its many critics.

### 3. *Reliability Matters*

Other critics suggest abrogation of the Rule 803 hearsay exceptions altogether, contending that “reliability” of hearsay statements

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284. FED. R. EVID. 803(13) (including engravings on rings, urns or burial markers, and inscriptions on portraits).

285. FED. R. EVID. 803(19).

286. 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:103.

287. *Id.*

288. *See supra* Part I.A.

is unimportant or that the hearsay statements permitted by some of the most frequently used Rule 803 exceptions lack any empirically supported reliability.<sup>289</sup> But questions of reliability are inextricably intertwined with hearsay doctrine, and a hearsay reform by way of the trustworthiness exception targets the value most critical to the admissibility of hearsay admitted through Rule 803.<sup>290</sup>

Scholars have long questioned the propriety of utilizing “reliability” as a basis for admitting or rejecting hearsay.<sup>291</sup> Recently, Professor Sevier suggested that “procedural fairness” represents the true value underlying the hearsay prohibition and should be the *only* value utilized in defining hearsay doctrine.<sup>292</sup> Professor Sevier opines that only the procedural fairness created by face-to-face confrontation justifies the rule against hearsay.<sup>293</sup> According to Professor Sevier’s conclusions, it is fundamentally unfair to hold a party accountable based upon hearsay statements that cannot be cross-examined in court, regardless of the reliability of those out-of-court statements.<sup>294</sup> Of course, the Sixth Amendment provides criminal defendants with constitutional protection beyond the hearsay rules that confers such a procedural right to confront witnesses regardless of reliability.<sup>295</sup> While it is true that a similar purely procedural approach to the hearsay rules could enhance the predictability and consistency of hearsay rulings, there are several reasons why reliability should continue to count in the hearsay calculus.<sup>296</sup>

First and foremost, Professor Sevier’s conclusions about hearsay doctrine are based upon a false dichotomy, suggesting that hearsay

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289. *See supra* Part I.A.

290. *See* FED. R. EVID. 803 advisory committee’s note to 1972 proposed rules (noting that Rule 803 exceptions are premised “upon the [notion] that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial”).

291. *See, e.g.*, Morgan, *supra* note 105, at 27.

292. Sevier, *supra* note 2, at 688-89.

293. *Id.* at 689.

294. *See id.* at 678, 687-88. Professor Sevier’s philosophy would align admissibility of all hearsay with the Sixth Amendment approach to testimonial hearsay in *Crawford*. *See id.* at 648, 663-64 (suggesting the exclusion of uncross-examined testimonial hearsay in civil cases).

295. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004).

296. *See Richter, supra* note 30, at 1905 (positing that a move toward a procedural model could eliminate slippery considerations of reliability).

rules must be driven by *either* procedural justice *or* reliability.<sup>297</sup> In reality, the fundamental justification for hearsay doctrine is binary, firmly grounded in *both* procedural justice and reliability.<sup>298</sup> Face-to-face cross-examination creates legitimacy because it affords an opponent the opportunity to expose defects in testimony and to test the reliability of a witness's account.<sup>299</sup> The hearsay prohibition rests on the concern that statements made without the benefit of that testing are of questionable reliability.<sup>300</sup> Hearsay doctrine should, therefore, aim to maximize both procedural fairness and reliability. Accordingly, considerations of reliability that serve as the basis for the majority of the Rule 803 hearsay exceptions are highly relevant to sound hearsay doctrine. A trustworthiness exception geared toward assessing the particularized reliability of hearsay statements admitted through Rule 803 would advance this fundamental hearsay value.

A trustworthiness exception within Rule 803 would also enhance procedural fairness beyond that offered by the existing regime. While a trustworthiness exception would not provide face-to-face cross-examination of hearsay admitted through Rule 803, it would provide some mechanism for opponents of hearsay evidence to challenge the reliability assumptions embedded in the categorical hearsay exceptions for particular hearsay statements. Under the existing rules, opponents of much-maligned present sense impressions and excited utterances possess no right to challenge the admissibility of hearsay satisfying those exceptions on reliability grounds.<sup>301</sup> Thus, a trustworthiness exception advances procedural fairness, as well as the inherent reliability of admitted hearsay.

Other critics of the Rule 803 exceptions argue that, even if reliability counts, the specific reliability assumptions underlying many of the categorical exceptions in Rule 803 are empirically

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297. See Sevier, *supra* note 2, at 647.

298. See 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:3 (explaining that the hearsay prohibition stems from the idea that cross-examination can reveal risks of deception, forgetfulness, misperception, and ambiguity and noting that hearsay exceptions allow trustworthy statements thought to present reduced risks). Additional justifications support the existing hearsay exceptions as well. See Saltzburg, *supra* note 235, at 1488.

299. See *Crawford*, 541 U.S. at 57.

300. See *id.* at 61.

301. See McCormick, *supra* note 103, at 512.

bankrupt and supported only by “folk psychology.”<sup>302</sup> An argument that *some* statements, which qualify as present sense impressions or excited utterances, could be unreliable undoubtedly has merit. But any argument that the reliability of such statements is wholly unsupported is hyperbolic. Recent reviews of social science research provide some support for the reliability assumptions inherent in the present sense impression exception, the excited utterance exception, and other Rule 803 exceptions.<sup>303</sup>

Not surprisingly, when it comes to lying practice makes perfect. Rehearsed lies are easier and more likely to be told.<sup>304</sup> Two of the most criticized Rule 803 hearsay exceptions—present sense impressions and excited utterances—include requirements specifically designed to eliminate the possibility of planned or rehearsed lies. The timing requirement of the present sense impression exception, which demands contemporaneous observation and description, prevents the possibility of rehearsal or planning.<sup>305</sup> By insisting that the declarant speak while “under the stress of excitement” caused by a startling event, the excited utterance exception also eliminates planned or rehearsed hearsay statements.<sup>306</sup>

Further, the literature supports the self-evident proposition that attention to a particular event also improves accuracy.<sup>307</sup> The contemporaneous observation and statement required by the present sense impression ensures that a declarant will focus her attention on the event at the time of the statement.<sup>308</sup> Likewise, requiring that the declarant remain under the stress of a startling event guarantees that the declarant’s attention will remain on the startling event at the time she makes a statement relating to it.<sup>309</sup> For the state of

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302. See *United States v. Boyce*, 742 F.3d 792, 796-97 (7th Cir. 2014).

303. See, e.g., Timothy T. Lau, *Reliability of Present Sense Impression Hearsay Evidence*, 52 GONZ. L. REV. 175, 205 (2017).

304. *Id.* at 194 (“Lies may be made easier with preparation and rehearsal.”).

305. See FED. R. EVID. 803(1) advisory committee’s note to 1972 proposed rules (“[S]ubstantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.”).

306. See FED. R. EVID. 803(2); *id.* 803(2) advisory committee’s note to 1972 proposed rules.

307. Lau, *supra* note 303, at 203 (“[R]esearch suggests that attention generally facilitates accurate perception.”).

308. See FED. R. EVID. 803(1) advisory committee’s note to 1972 proposed rules; Lau, *supra* note 303, at 204 (stating that present sense impressions “generally should be supported by the force of attention”).

309. See FED. R. EVID. 803(2) advisory committee’s note to 1972 proposed rules.

mind exception in Rule 803(3), the declarant must recount a “*then-existing* state of mind ... emotion[,], sens[ation], or physical condition,” again ensuring that the declarant’s attention will be focused on the sensations he is relating.<sup>310</sup> For statements made concerning medical history, causation, and symptoms for the purpose of obtaining medical treatment or diagnosis, there is also some assurance that the speaker will be focused on his health as he relates this information.<sup>311</sup>

The literature on lying also reveals that it most often involves casual social untruths.<sup>312</sup> Many of the subjects embraced by the Rule 803 hearsay exceptions, by definition, exclude hearsay statements involving casual social remarks. For example, Rule 803(4) covers statements of past and present symptoms that are reasonably pertinent to medical treatment or diagnosis and made for that purpose, eliminating the possibility of casual social remarks satisfying the exception.<sup>313</sup> Likewise, “[a] statement relating to a startling event” while the declarant remains “under the stress” of that event is the antithesis of the “casual” “social” remark likely to result in lying.<sup>314</sup> Even statements that fit Rule 803 exceptions with fewer restrictions on subject matter, like the present sense impression that allows a description of any event or condition,<sup>315</sup> are also less likely to be relevant to later litigation if they are truly casual social observations. A present sense impression complimenting an acquaintance’s clothing would rarely prove relevant for its truth in a federal lawsuit.<sup>316</sup>

Lastly, social science predictably suggests that a declarant’s motivation is the key to lying.<sup>317</sup> It turns out that a human can lie

310. FED. R. EVID. 803(3) (emphasis added).

311. See FED. R. EVID. 803(4) advisory committee’s note to 1972 proposed rules.

312. See Lau, *supra* note 303, at 187 (“[M]ost people tell few lies, and those lies which are told are generally not serious, are made in the context of everyday social interactions, and involve little planning and little regret.”).

313. See FED. R. EVID. 803(4) advisory committee’s note to the 1972 proposed rules.

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

315. See FED. R. EVID. 803(1).

316. See Richter, *supra* note 30, at 1901-02 (questioning whether a lie to a neighbor about his dog’s beauty could ever satisfy the present sense impression exception or be relevant to any litigated dispute); see also Lau, *supra* note 303, at 199-200 (similarly questioning whether Judge Posner’s hypothetical would be admissible or relevant).

317. Lau, *supra* note 303, at 187 (“[E]xistence of a motivation to lie is a key determinant.”).



quite quickly or tell the truth after much reflection.<sup>318</sup> What really counts is the speaker's recognition of self-interest and motivation to fabricate at the time of the statement.<sup>319</sup> Hearsay exceptions like 803(1), (2), and (4) were crafted to minimize the impact of a declarant's motivation and self-interest. The strict timing requirement of the present sense impression was designed to minimize a declarant's opportunity to develop and recognize any motive to falsify a description or explanation of a contemporaneously observed event or condition.<sup>320</sup> Likewise, the declarant's startled state, as required by the excited utterance exception, was designed to minimize the effects of potential motivations to shade or distort.<sup>321</sup> A declarant's strong motive to provide truthful information in seeking medical treatment underlies the hearsay exception for reasonably pertinent statements made in seeking medical help.<sup>322</sup> The contours of the Rule 803 exceptions that minimize the likelihood of declarant-recognized motivations to fabricate justify the continuing presumptive admissibility of the hearsay within those exceptions.

However, it is in connection with the declarant's recognized motivations that many of the Rule 803 exceptions have the potential to fall short in certain situations. A declarant who immediately comprehends the potential future implications of an event could make a self-interested present sense impression or excited utterance.<sup>323</sup> A declarant's motive to avoid culpability or embarrassment could cause her to lie to her doctor even while seeking treatment.<sup>324</sup> In these circumstances, a trustworthiness exception could serve to ameliorate motivationally suspect statements that otherwise fit within the Rule 803 hearsay exceptions. The business records exception in Rule 803(6) was crafted to minimize the admissibility of self-serving records by demanding that "making the record was a regular practice" and not a random practice followed only when

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318. *Id.* at 187-90.

319. *Id.*

320. See FED. R. EVID. 803(1) advisory committee's note to 1972 proposed rules.

321. See FED. R. EVID. 803(2) advisory committee's note to 1972 proposed rules.

322. See FED. R. EVID. 803(4) advisory committee's note to 1972 proposed rules.

323. See Lau, *supra* note 303, at 190 (stating that a present sense impression declarant "may be primed to lie" when "there is a benefit to lie readily perceptible").

324. See *id.*

necessary to protect an unusual business concern.<sup>325</sup> Still, the business records exception already includes a trustworthiness exception due to the potential for some businesses to implement a policy of regularly creating and maintaining self-serving records.<sup>326</sup> A broader trustworthiness exception would take the same pragmatic approach to additional Rule 803 exceptions and similarly allow opponents of hearsay falling within these traditional categories to examine and highlight the motivations of the particular hearsay declarants in the specific context that created the hearsay statements, thereby increasing rationality of hearsay doctrine.

Therefore, notwithstanding vocal critics who complain that the Rule 803 hearsay exceptions are “dubious” or “empirically bankrupt,”<sup>327</sup> the social sciences literature lends some support for many of the reliability assumptions enshrined in the Rule 803 hearsay exceptions. Where that literature does reveal weaknesses in those assumptions—with respect to hearsay statements by declarants with demonstrable motivations to distort or lie—a trustworthiness escape clause would align the Rule 803 exceptions with the human reality by providing a mechanism to exclude only those particular statements.

#### 4. Systemic Symmetry

Adding a trustworthiness exception to the Rule 803 hearsay exceptions would also create much-needed systemic symmetry in the Article Eight hearsay regime. One of the principal arguments against categorical hearsay exceptions like those in Rule 803 when the original Rules were debated, was the impossibility of identifying reliable hearsay statements in advance through rigid rules.<sup>328</sup> As described above, noted evidence authority Charles McCormick captured this criticism perfectly when he wrote, “[T]he values of hearsay declarations or writings, and the need for them, in particular situations cannot with any degree of realism be thus minutely

325. See FED. R. EVID. 803(6); *id.* 803(6) advisory committee’s note to 1972 proposed rules.

326. See FED. R. EVID. 803(6) advisory committee’s note to 1972 proposed rules (“[H]esitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity.”).

327. See *supra* Part I.A.

328. See CAPRA, *supra* note 227, at 48.

ticketed in advance.... Too much worthless evidence will fit the categories, too much that is vitally needed will be left out.”<sup>329</sup>

In essence, Professor McCormick opined that categorical hearsay exceptions would be simultaneously *underinclusive*—omitting particular valuable and reliable hearsay statements from coverage, as well as *overinclusive*—approving in advance certain hearsay statements that may be unworthy of admission when viewed in their specific factual contexts.<sup>330</sup> Although the drafters of the Rules ultimately proposed categorical hearsay exceptions, they humbly responded to this critique by proposing the catchall or residual exception to ensure a hearsay model that was not irrationally rigid.<sup>331</sup> Pursuant to the residual exception, a trial judge may admit hearsay evidence that does not fall within the parameters of the categorical exceptions so long as the hearsay shares “equivalent circumstantial guarantees of trustworthiness.”<sup>332</sup> The residual exception thus responds to the criticism that categorical exceptions will necessarily be underinclusive.

The residual hearsay exception, of course, only partially responds to Professor McCormick’s critique and ignores the possibility that the categorical hearsay exceptions may be overinclusive. While recognizing their limitations in making *ex ante* decisions about which hearsay should be admitted, the drafters of the Rules failed to recognize those same limitations with respect to decisions about which hearsay statements to *exclude*. Much of the long-standing and ongoing criticism of the Rule 803 hearsay exceptions stems from this drafting imbalance. Scholars and judges routinely note the fallibility

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329. McCormick, *supra* note 103, at 512.

330. *Id.* (advocating a discretionary approach to hearsay evidence and criticizing “sharp categories” of hearsay exceptions as “strange”); *see also* Morgan, *supra* note 105, at 38-47 (describing how much probative evidence the hearsay rule excludes and how much unreliable evidence of low probative value the categorical hearsay exceptions permit); Weinstein, *supra* note 102, at 337 (“Wigmore’s rationale ... makes admissible a *class* of hearsay rather than *particular* hearsay for which, in the circumstances of the case, there is need and assurance of reliability.” (emphasis added)).

331. FED. R. EVID. 807.

332. FED. R. EVID. 807(a)(1). The residual exception also demands hearsay that “is offered as evidence of a material fact,” that “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts,” and that “will best serve ... the interests of justice.” FED. R. EVID. 807(a)(2)-(4). The Advisory Committee has been reviewing Rule 807 in the past year to consider possible amendments. *See* Capra Memorandum on Expanding the Residual Exception, *supra* note 9.

of the reliability assumptions embedded in the Rule 803 exceptions in particular.<sup>333</sup> Many have noted the possibility that some hearsay statements satisfying all requirements for admissibility might nonetheless be untrustworthy in light of a particular factual context.<sup>334</sup> The drafters of Article Eight created an escape valve to allow the admission of reliable hearsay that cannot make it through the necessarily limited and preordained categorical exceptions. But they left no escape mechanism for courts and litigants confronted with unreliable hearsay falling squarely within the rigid and preordained categorical exceptions.

The tension and distrust caused by the admissibility of hearsay perceived to be untrustworthy through the Rule 803 exceptions creates intolerable pressure that infects the entire hearsay regime. Indeed, Pascal's law of fluid mechanics illustrates the impact of rigid categorical hearsay exceptions that allow no discretion to exclude qualifying hearsay statements on the hearsay system as a whole. According to Pascal's Law,

[W]hen the pressure at any point in a static fluid in a closed system is changed, the change in pressure will disperse equally throughout the fluid....

....  
 ... Pascal himself showed that it worked by filling a barrel with water and inserting a long pipe into the top. When he poured water into the top of the pipe, the barrel burst. The weight of the water in the pipe caused an increase in pressure inside the barrel that pushed against the sides until they gave way.<sup>335</sup>

Although the categorical exceptions represent an open system with respect to the *admission* of hearsay due to the residual exception, they represent Pascal's closed system with respect to the *exclusion* of unreliable hearsay satisfying their requirements. Rule 803 is akin to Pascal's barrel of water, filled with the inherently reliable hearsay it was designed to accept. Any time a court admits a

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333. See *supra* note 2 and accompanying text.

334. See *supra* Part I.A.

335. *What Is Pascal's Law?*, WISEGEEK, <http://www.wisegeek.org/what-is-pascals-law.htm> [<https://perma.cc/3H8Q-BDK4>]; see also PIJUSH K. KUNDU & IRA M. COHEN, *FLUID MECHANICS* 10-11 (4th ed. 2008).

patently unreliable hearsay statement through the Rule 803 exceptions, intolerable pressure builds. The resulting explosion of distrust bleeds into the entire Article Eight regime. Adding a trustworthiness exception to the Rule 803 exceptions, where reliability critiques remain unaddressed, would release the stress on the hearsay system by allowing flexibility in both the exclusion and admission of hearsay evidence. Such systemic symmetry would do much to increase the rationality of the Article Eight hearsay regime and the confidence in the integrity of the system, allowing it to function at a more optimal level.

##### *5. Certainty and Predictability Retained*

Adding needed “flexibility” to the Rule 803 hearsay exceptions raises the specter of unbridled judicial discretion in the administration of hearsay doctrine that could threaten the critical predictability and consistency of the system.<sup>336</sup> A purely discretionary approach to the Rule 803 exceptions would pose all of the problems of the Posner proposal, albeit in a more limited context.<sup>337</sup> Importantly, adding a trustworthiness escape hatch to the existing Rule 803 hearsay exceptions will not sacrifice the crucial predictability and consistency necessary to efficient litigation. An expanded trustworthiness exception in the Rule 803 hearsay categories will not transform those exceptions into mere guidelines or illustrations for trial judges to follow at their discretion. Instead, the well-settled operation of the existing trustworthiness exceptions in the business and the public records categories will limit an expanded trustworthiness provision in a manner that will prevent unbridled judicial discretion and promote predictability.

In other words, the existing requirements of the Rule 803 hearsay exceptions would continue to drive admissibility. A proponent of hearsay relying on any Rule 803 exception would first have to demonstrate that the proffered hearsay statement satisfies the threshold requirements for admissibility. Once a proponent makes that showing, the proffered hearsay becomes presumptively

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336. See Richter, *supra* note 30, at 1885-86 (exploring the costs associated with a discretionary hearsay system).

337. See *generally* United States v. Boyce, 742 F.3d 792, 799-802 (7th Cir. 2014) (Posner, J., concurring).

admissible.<sup>338</sup> Only then would a court permit an opponent of the hearsay to launch a challenge to trustworthiness. The opponent of the hearsay would bear the burden of overcoming the presumption of admissibility by pointing to specific facts or circumstances undermining the reliability of the specific statement.<sup>339</sup> The 2014 amendments to Rules 803(6), (7), and (8) make this roadmap for admissibility explicit and mandatory with respect to the existing trustworthiness exceptions found in those Rules.<sup>340</sup>

In evaluating trustworthiness challenges under the business and the public records exceptions, most federal courts adopted this analytical structure even before the 2014 amendments.<sup>341</sup> Although opponents of business and public records need not produce evidence to demonstrate a lack of trustworthiness, courts have required opponents to point to specific circumstances undermining the traditional and presumed trustworthiness of these records.<sup>342</sup> Courts have examined proffered circumstances carefully and have rejected trustworthiness challenges regularly, despite alleged problems with methodology or completeness.<sup>343</sup>

When examining the federal cases in which trustworthiness challenges have resulted in the exclusion of otherwise admissible business and public records, clear patterns emerge. Demonstrated bias in the authors of, or contributors to, business and public records will likely result in exclusion. When a report by the Urban Mass Transit Administration parroted the proposed safety modifications of a party with a clear interest in avoiding massive liability, the Second Circuit Court of Appeals upheld the exclusion of the public record

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338. *See, e.g.*, FED. R. EVID. 803(6) advisory committee's note to 2014 amendments (“[T]he basic admissibility requirements are sufficient to establish a presumption that the record is reliable.”).

339. *See id.* (noting the burden on the opponent to demonstrate a lack of trustworthiness and that the opponent need not introduce “affirmative evidence of untrustworthiness”).

340. *See* FED. R. EVID. 803(6)-(8) advisory committee's notes to 2014 amendments.

341. *See id.* (explaining that most courts imposed this burden on the opponent of the hearsay even prior to the amendment).

342. *Cf.* 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:83 (“[M]any more decisions cite trustworthiness as a reason to admit records than untrustworthiness as a reason to exclude. Few reported opinions openly speak of excluding business records where the specific requirements are met.”).

343. *See, e.g.*, *Dortch v. Fowler*, 588 F.3d 396, 403-04 (6th Cir. 2009); *United States v. Reyes*, 157 F.3d 949, 953 (2d Cir. 1998); *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 301-04 (4th Cir. 1984).

under the trustworthiness escape clause in Rule 803(8).<sup>344</sup> When an insurance adjustor's report was prepared in anticipation of litigation, the Fourth Circuit Court of Appeals found that the trial court erred in admitting it over a trustworthiness objection.<sup>345</sup> Similarly, courts have excluded public records that would otherwise be admissible when the opponent can demonstrate circumstances calling into question the finality or validity of the reports.<sup>346</sup> In the absence of these types of circumstances, trustworthiness challenges to business and public records are likely to fail.

A review of the federal cases decided under the existing trustworthiness escape clauses in Rules 803(6) and (8) reveals that these provisions have not transformed those hearsay exceptions into inconsistent or unpredictable, standardless guidelines. Given the well-established demands on an opponent raising a trustworthiness challenge, such challenges are not routine or *pro forma* whenever a party employs the business or public records exceptions. Parties routinely utilize both exceptions without any objection to trustworthiness. Furthermore, parties can predict in advance the likely outcome of any such challenge based upon the careful analysis of these challenges in the federal opinions.

Although an expanded trustworthiness escape in Rule 803 would undoubtedly broaden trial judge discretion in overseeing the Rule 803 hearsay exceptions, it poses little threat of allowing unfair and unguided notions of general reliability to supplant those longstanding exceptions. Federal courts will have an established structure upon which to rely in evaluating trustworthiness, with the burden squarely on the opponent of the hearsay evidence. Additionally, federal courts may draw on recognized factors undermining reliability—most notably demonstrated motivational defects—in deciding whether to exclude hearsay evidence.

To a large extent, timing is everything. Expanding the trustworthiness escape to additional Rule 803 exceptions following forty-plus years of careful application in the context of the business and the

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344. *City of New York v. Pullman, Inc.*, 662 F.2d 910, 915 (2d Cir. 1981).

345. *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000).

346. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1275 (7th Cir. 1988) (upholding exclusion of Bureau of Flight Standards Release when the opponent demonstrated that the Release had been "cancelled" by the Federal Aviation Administration).

public records exceptions ensures a predictable blueprint to govern and limit an expanded trustworthiness clause. Including a trustworthiness escape for all Rule 803 exceptions in the original draft of the Federal Rules of Evidence may have dramatically altered the character of the Rule 803 hearsay exceptions, leading trial judges to treat them as disfavored and discretionary rather than as prescriptive and definitive. Since their adoption in 1975, the Rule 803 exceptions have gained a solid foothold as categorical and authoritative exceptions to the prohibition on hearsay. Starting with trustworthiness escape clauses in only the business and public records contexts rendered use of those clauses unique and exceptional.<sup>347</sup> Now that the nature of that trustworthiness escape feature is also established as a rare exception to presumptive admissibility,<sup>348</sup> the trustworthiness clause is well positioned to help resolve long-standing concerns about the overinclusive operation of some of the Rule 803 hearsay exceptions. Given the evolutionary development of the Rules, therefore, trial judges and litigants are primed to continue recognizing the hearsay within the Rule 803 exceptions as presumptively admissible with a rare opportunity to exclude for opponents who can show a lack of trustworthiness even after the addition of a trustworthiness escape.

Indeed, some states have expanded application of the trustworthiness exception within their state counterparts to Rule 803 without sacrificing the predictable application of those hearsay exceptions. Florida Evidence Rule 90.803(1), the state equivalent of the present sense impression exception, contains an exception to admissibility when “circumstances ... indicate [a] lack of trustworthiness.”<sup>349</sup> According to the Florida Supreme Court, “This provision enables the judge to bar the admission of statements that lack sufficient reliability. The drafters were particularly concerned with statements by unidentified bystanders. The court should weigh any corroborating

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347. FED. R. EVID. 803(6)(E), (7)(C), (8)(B); *supra* Part II.B.

348. *See supra* Part II.B.

349. *Compare* FED. R. EVID. 803(1), *with* FLA. STAT. § 90.803(1) (2017) (“A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, *except when such statement is made under circumstances that indicate its lack of trustworthiness.*” (emphasis added)).



evidence together with all other factors in making this determination.”<sup>350</sup>

Notwithstanding the trustworthiness exception, the application of the present sense impression exception in Florida largely mirrors its application under Rule 803(1).<sup>351</sup> Only in rare cases have Florida courts utilized the trustworthiness exception to exclude a statement that otherwise appears to meet the stated requirements of a present sense impression.<sup>352</sup> Ohio Evidence Rule 803(1) also contains a trustworthiness exception.<sup>353</sup> According to the Ohio Evidence Advisory Committee, the Ohio exception vested the trial judge with discretion to exclude untrustworthy present sense impressions in an effort to “narrow[] the availability of this exception.”<sup>354</sup> Notwithstanding strong lip service to the trustworthiness exception in several Ohio appellate court opinions, the Ohio present sense impression exception reaches results similar to those that would be reached under Federal Rule of Evidence 803(1) in most cases.<sup>355</sup> Therefore, the experience of those states that have expanded a trustworthiness exception to additional Rule 803 hearsay exceptions reveals no threat to the continued consistent and predictable

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350. *Deparvine v. State*, 995 So. 2d 351, 368 (Fla. 2008) (quoting 7 CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* § 803.1 (2007)).

351. *See, e.g.*, *Alexander v. State*, 627 So. 2d 35, 36, 43-44 (Fla. Dist. Ct. App. 1993) (per curiam) (reversing a murder conviction of a teenager based on the exclusion of the defendant's self-exculpatory statements and finding nothing to suggest that the defendant's statements were lacking in apparent trustworthiness notwithstanding their exculpatory tendencies).

352. *See, e.g.*, *Overton v. State*, 429 So. 2d 722, 723 (Fla. Dist. Ct. App. 1983) (affirming a trial court's exclusion of a defendant's statement to a deputy upon arrest that he was “the wrong guy” and that the “right guy” was “get[ting] away” because the statement was “self-serving and made under circumstances ... indicat[ing] its lack of trustworthiness”).

353. OHIO EVID. R. 803(1) (“A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter *unless circumstances indicate lack of trustworthiness.*” (emphasis added)).

354. OHIO EVID. R. 803 staff notes. The drafters of Ohio Evidence Rule 803(1) may have taken a more restrictive view of the present sense impression because no Ohio case had directly recognized the exception prior to the enactment of the Ohio rules. *Id.*

355. *See, e.g.*, *State v. McNeal*, No. 1-01-158, 2002 WL 1376177, at \*5 (Ohio Ct. App. June 18, 2002) (affirming admission of 911 caller's statements pursuant to the present sense impression exception over trustworthiness challenge); *State v. Penland*, 724 N.E.2d 841, 844, 846 (Ohio Ct. App. 1998) (affirming the admission of the police officer's contemporaneous description over shoulder-mounted radio of pursuit of the defendant and of the defendant's possession of a firearm as a present sense impression); *State v. Wages*, 623 N.E.2d 193, 198 (Ohio Ct. App. 1993) (affirming admission of the victim's statement over the phone that the defendant “had just pulled into her driveway” over a trustworthiness challenge).

application of those exceptions. Instead, the trustworthiness clause empowers courts to exclude particular hearsay satisfying the traditional requirements of the Rule 803 exceptions in rare circumstances where that hearsay falls demonstrably short of the reliability ideal.

Examples outside the Rule 803 context also support this prediction about continued consistency and certainty in the operation of Rule 803 with an expanded trustworthiness exception. As previously discussed, the original Rules vested trial judges with discretion to admit reliable hearsay not covered by the categorical exceptions by including a residual exception.<sup>356</sup> Recent research suggests that courts have exercised that discretion cautiously and have avoided wielding that power in a way that would create uncertainty and inconsistency.<sup>357</sup> This hearsay-specific experience with judicial discretion suggests that a carefully cabined trustworthiness exception would be handled with similar caution.

Controlled flexibility, therefore, need not sacrifice clear and predictable rules and outcomes. There is no reason to expect that affording a structured and controlled exception to the well-settled Rule 803 hearsay exceptions will undermine the predictability and consistency critical in the administration of hearsay doctrine.

#### 6. Do Not Upset the Whole Apple Cart

Expansion of the existing trustworthiness exception already embodied in Rules 803(6)-(8) represents a modest adjustment to the hearsay regime that will not throw the operation of hearsay doctrine into disarray. Litigants and judges are already familiar with this existing feature of the hearsay rules and can be expected to incorporate it seamlessly into the existing fabric of hearsay doctrine. Evidence of the disruptive nature of a complete paradigm shift is readily available in the wake of the *Crawford* revolution in Confrontation Clause jurisprudence.<sup>358</sup> Where the *Crawford* standard is

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356. See FED. R. EVID. 807 advisory committee's note to 1997 amendments (explaining Rule 807 was formerly 803(24) and 804(b)(5)).

357. See Capra Memorandum on Expanding the Residual Exception, *supra* note 9, at 17-18 (describing the restrictive application of the residual exception by federal courts).

358. See Richter, *supra* note 30, at 1903 (noting the continuing uncertainties and ambiguities playing out in the wake of *Crawford*).

grounded on a constitutional mandate, the inefficiencies and reversals inherent in that transition become irrelevant.<sup>359</sup> Any complete overhaul of the recognized and complex hearsay regime is certain to condemn litigants, judges, and justices to a lengthy period of confusion and adaptation. Where a hearsay paradigm-shift is not constitutionally mandated, the certain and destructive effect on practice counsels against such a sweeping reform. The addition of a recognized trustworthiness exception to the existing hearsay regime poses no threat of disruption and upheaval, further recommending it as a palliative for the ailments of Rule 803.

### III. RATIONALIZING RULE 803: DRAFTING ALTERNATIVES

It is all fun and games until you have to draft a rule that will achieve its intended purpose without creating unintended collateral consequences or interpretive conundrums. With regard to modifying the well-understood, but often-criticized, character rules, the Supreme Court famously noted:

[M]uch of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.<sup>360</sup>

Drafting within the complex system of hearsay rules presents similar challenges, and care must be taken to expand the trustworthiness exception in a clear, efficient manner that does not undermine the intended operation of the many exceptions in the Rule 803 category. There are two options for expanding the trustworthiness exception. First, a blanket trustworthiness exception could be added to the opening provision of Rule 803 that could be used in conjunction with any of the twenty-three hearsay exceptions in the

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359. *See id.* at 1903-04.

360. *Michelson v. United States*, 335 U.S. 469, 486 (1948).

provision. Alternatively, specific hearsay exceptions within Rule 803 could be amended to include a new trustworthiness escape clause, specifically tailored to those exceptions only.

#### A. *The Blanket Approach*

A single overarching trustworthiness exception could be added to the opening provision of Rule 803 that would comprehensively capture all Rule 803 hearsay exceptions. Such a broad trustworthiness exception could be justified on the grounds that the entire Rule 803 category of hearsay exceptions is largely premised on notions of inherent reliability,<sup>361</sup> making a trustworthiness challenge uniquely appropriate throughout the Rule 803 arena. From the standpoint of systemic symmetry, a trustworthiness exception applicable to the entire category of hearsay exceptions that is beholden exclusively to notions of reliability makes good sense.<sup>362</sup>

There are significant benefits to expanding the trustworthiness exception in this manner. Such an amendment would be efficient and elegant, requiring added language only in the opening lines of the Rule. It would avoid the piecemeal approach of amending specific exceptions one at a time that would add complexity by littering Rule 803 with numerous new requirements. It also affords maximum substantive impact and flexibility by allowing opponents and judges to use the trustworthiness exception in unforeseen particularized applications of all Rule 803 hearsay exceptions, rather than only in contexts where reliability concerns have already surfaced. A blanket amendment would eliminate the need for additional amendments to account for future reliability issues.

Such an approach also comes with some potentially negative consequences, however. Adding a trustworthiness exception to the opening provision of Rule 803 would render the trustworthiness language currently part of Rules 803(6)-(8) superfluous and would require the elimination of that existing language.<sup>363</sup> The trustworthiness language in the business and the public records exceptions has been part of those Rules since their enactment and has recently

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361. See Richter, *supra* note 30, at 1874.

362. See *supra* Part II.C.4.

363. See FED. R. EVID. 803(6)(E), (7)(C), (8)(B).

been updated and clarified.<sup>364</sup> There could be substantial resistance to eliminating these preexisting trustworthiness limits. In addition, Rule 803(15) covering statements in documents affecting an interest in property already contains an “unless” clause suggesting that later dealings with the property that are inconsistent “*with the truth of th[os]e statement[s] or the purport of the document*” may render them inadmissible.<sup>365</sup> This clause is in essence a trustworthiness exception specifically tailored to the hearsay admissible through Rule 803(15) and would likely need to be eliminated or altered in the wake of a blanket trustworthiness exception covering all Rule 803 exceptions.

In addition, there are hearsay exceptions within Rule 803 that may not be appropriate for a trustworthiness exception in any circumstance. For example, Rule 803(5) allows the past recorded recollection of a forgetful testifying witness to be admitted for its truth.<sup>366</sup> Rule 803(5) requires that the declarant-witness affirm the accuracy of the recorded statement.<sup>367</sup> With both an in-court affirmation of accuracy and an opportunity for the opponent to cross-examine the declarant, exclusion of a record satisfying Rule 803(5) on reliability grounds seems unnecessary. As another example, Rule 803(18) covers “[s]tatements in [l]earned [t]reatises, [p]eriodicals, or [p]amphlets.”<sup>368</sup> In order to establish the admissibility of a learned treatise in the first place, a proponent is required to establish it as “a reliable authority.”<sup>369</sup> It would seem illogical and incoherent to find that such a treatise meets that threshold reliability requirement for admissibility, but that it must be excluded as “untrustworthy” under the particular circumstances. This makes the learned treatise hearsay exception a poor candidate for a trustworthiness clause. If there are Rule 803 exceptions which should never give

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364. See FED. R. EVID. 803(6), (8) advisory committee’s notes to 2014 amendments (clarifying that the burden of showing a lack of trustworthiness rests on the opponent of hearsay evidence).

365. FED. R. EVID. 803(15) (emphasis added).

366. FED. R. EVID. 803(5). The exception permits the proponent to read the recorded statement into evidence but allows it to “be received as an exhibit only if offered by [the] adverse party.” *Id.*

367. *Id.* (allowing “[a] record that ... accurately reflects the witness’s knowledge”).

368. FED. R. EVID. 803(18).

369. FED. R. EVID. 803(18)(B).

way to a trustworthiness challenge, therefore, this counsels against a blanket approach to a trustworthiness amendment.

Finally, a blanket amendment would require language that would capture accurately the divergent trustworthiness concerns that may arise in the numerous and varied contexts presented by the Rule 803 hearsay exceptions. For example, current wording of the trustworthiness exception in the business records rule that addresses untrustworthy methods “of preparation” would be ill-suited to an oral present sense impression or excited utterance admissible through Rules 803(1) and (2).<sup>370</sup> The language in Rule 803(15) referencing later inconsistent “dealings with the property”<sup>371</sup> makes no sense in connection with the many hearsay exceptions in Rule 803 that operate apart from any property context. Crafting wording to fit with the multifarious reliability justifications of all Rule 803 exceptions poses a challenge.

That said, a blanket amendment might read:

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness  
The following *statements* are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness, *unless the opponent shows specific facts or circumstances regarding the source of information in a statement or the making of a statement that render it untrustworthy.*<sup>372</sup>

By requiring “specific facts or circumstances,” this amendment would require opponents to articulate specific contextual reasons for doubting the reliability of particular hearsay statements being challenged. By referencing the need for the “opponent” to “show” such facts or circumstances, the amendment would maintain the existing burden on the opponent and the crucial presumptive admissibility of hearsay statements satisfying the Rule 803 hearsay

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370. Compare FED. R. EVID. 803(6)(E), with FED. R. EVID. 803(1), (2).

371. See FED. R. EVID. 803(15).

372. This proposal emphasizes language that would be added to the existing Rule 803 preamble. See FED. R. EVID. 803. Arguably, this language would not require the abrogation of the “unless” clause in Rule 803(15) because it would not reach conduct subsequent to the making of a statement. See FED. R. EVID. 803(15). It would, however, supplant the language in existing Rules 803(6)-(8). See FED. R. EVID. 803(6)-(8).

exceptions.<sup>373</sup> By placing this trustworthiness limit in the opening provision, Rule 803 could eliminate the awkward existing requirements in Rules 803(6)-(8) that hearsay is admissible when “the opponent does not show” a “lack of trustworthiness.”<sup>374</sup> Although this language omits the “method or circumstances of preparation” language uniquely suited to hearsay in the form of records,<sup>375</sup> it continues to permit a challenge to hearsay records based upon “facts or circumstances regarding ... the making of a statement,” which is sufficiently broad to capture methodological defects in preparation.

An advisory committee note to a blanket amendment should emphasize several points. First, it should highlight the presumptive admissibility of hearsay statements falling within the Rule 803 hearsay exceptions and explain that the long-standing trustworthiness exceptions from the business and the public records contexts are simply expanded to the remaining Rule 803 exceptions. The note should reinforce that the burden remains on the opponent of the hearsay evidence to demonstrate a lack of trustworthiness<sup>376</sup> and note that specific facts or circumstances undermining the reliability of the presumptively admissible hearsay are necessary to exclude. Importantly, a broad expansion of the trustworthiness exception to all Rule 803 exceptions should emphasize that such an exception is much more likely to apply to certain Rule 803 exceptions, such as the present sense impression, excited utterance, and state of mind exceptions, and should be sparingly applied, if at all, to others.

### *B. The Exception-Specific Alternative*

The alternative to a broadly applicable blanket amendment to Rule 803 is the addition of a trustworthiness exception in each Rule 803 hearsay exception where it is likely to help the most. There are significant benefits to this approach. The language of each trustworthiness exception could be specially tailored to fit the hearsay statements admitted through that exception. Hearsay exceptions

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373. See, e.g., FED. R. EVID. 803(6)-(8) advisory committee’s notes to 2014 amendments.

374. See, e.g., FED. R. EVID. 803(6)(E) (admitting a record if “the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness”).

375. See, e.g., *id.*

376. FED. R. EVID. 803(6)-(8) advisory committee’s notes to 2014 amendments.

admitting records could reference “methods of preparation,” while exceptions admitting oral statements could be tailored to “sources of information” or “motivations of the declarant.” With freestanding trustworthiness exceptions applicable to only specific exceptions, the time-honored existing trustworthiness language in the business and the public records exceptions could remain undisturbed. Most importantly, trustworthiness amendments within individual Rule 803 exceptions could apply the trustworthiness remedy only where it is needed the most and thus avoid illogical applications.

Of course, an exception-by-exception approach to trustworthiness has drawbacks as well. Amendments to multiple exceptions would be less efficient and would add complexity to the already complicated Rule 803 landscape by altering the methodology applicable to some Rule 803 exceptions but not others. It likewise would require tinkering with the language of a number of long-standing Rule 803 exceptions. From a more substantive perspective, an exception-specific approach to expanded trustworthiness would rigidly permit exclusion for a lack of reliability only under the amended exceptions. Should future concerns arise about the reliability of certain hearsay statements falling within unamended exceptions, additional amendments to Rule 803 would be necessary. This raises the challenge inherent in identifying the universe of Rule 803 exceptions that are most likely to be improved by a trustworthiness clause.

As explored earlier, there are several obvious candidates for a trustworthiness amendment within Rule 803.<sup>377</sup> The present sense impression and excited utterance exceptions have drawn the most fire for their potential to admit unreliable hearsay.<sup>378</sup> Any expansion of the trustworthiness exception should start in Rules 803(1) and 803(2). As discussed above, a trustworthiness escape clause could also improve the hearsay exceptions for state of mind statements and statements for medical diagnosis or treatment.<sup>379</sup> These, too, should be added to the list for exception-specific amendments. Still other exceptions, like those for ancient documents or family records, could benefit in some circumstances from an opportunity to defeat their wholesale admissibility.<sup>380</sup>

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377. *See supra* Part II.

378. *See supra* Part I.A.

379. *See supra* Part II.C.2.

380. *See supra* Part II.C.2.



Whichever specific exceptions are selected ultimately, a uniform Advisory Committee note could be drafted to accompany these amendments. Like the note accompanying a blanket amendment, this note would focus litigants and judges on the presumptive admissibility of hearsay within the affected exceptions, the burden on the opponent to defeat that presumptive admissibility, and the factors to be utilized in evaluating a trustworthiness challenge.

#### CONCLUSION

Although the Advisory Committee on Evidence Rules has been content to leave the Rule 803 hearsay exceptions largely alone up to now, the controversy surrounding those exceptions is unlikely to abate. Should pressure continue to build around the Rule 803 hearsay exceptions and the rationality of hearsay doctrine more generally, the Committee should not scuttle the entire hearsay regime or pile on specific hurdles to block the use of long-standing and needed hearsay exceptions within that regime. Instead, an expanded trustworthiness limit on the Rule 803 exceptions could prove to be the hearsay reform that is “just right” to address truly narrow critiques of a limited slice of the whole hearsay picture.