Fordham Law Review

Volume 84 | Issue 4 Article 8

2016

Reality Check: A Modest Modification to Rationalize Rule 803 Hearsay Exceptions

Liesa L. Richter
University of Oklahoma College of Law

REALITY CHECK: A MODEST MODIFICATION TO RATIONALIZE RULE 803 HEARSAY EXCEPTIONS

*Liesa L. Richter**

> [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.[1]

INTRODUCTION

The Federal Rules of Evidence (or "the Rules") identify hearsay that is admissible, notwithstanding the classic hearsay prohibition, by delineating categories of hearsay statements that may be admitted into evidence.[2] For example, "dying declarations" of now-unavailable declarants may be admitted in homicide prosecutions or civil cases.[3] "Excited utterances" relating to a startling event also may be admitted for their truth.[4] The purported justification for admitting certain categories of hearsay rests upon the inherent reliability of human statements uttered in certain contexts, as well as litigants' need for crucial evidence to build cases.[5]

Criticism of this categorical approach to hearsay is longstanding.[6] As illustrated by Professor Charles McCormick's critique above, detractors

* William J. Alley Professor of Law, University of Oklahoma College of Law. I would like to thank the Advisory Committee on the Federal Rules of Evidence for hosting this dialogue about the future of hearsay and for including me in the conversation.

1. 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").

2. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:66 (4th ed. 2013) (noting that the drafters of the Federal Rules of Evidence chose "prescriptive and limiting" categories of hearsay exceptions).

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

4. *Id.* 803(2).

5. *Id.* 803 advisory committee's note ("[U]nder appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial.").

6. *See, e.g.*, Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723, 774–78 (1992); David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 1 (opining that lawyers sometimes develop a "fondness" for the "oddities of hearsay law," but that it is the sort of "affection a volunteer docent might develop for the creaky, labyrinthine corridors of an ancient mansion, haphazardly expanded over the centuries").

prior to the enactment of the Rules complained that preordained hearsay categories could never accurately capture reliable human communications.[7] Of course, the Federal Rules of Evidence answered the concern that categorical exceptions would miss or omit reliable hearsay that is vitally needed for the resolution of a case by including the residual exception to the hearsay prohibition.[8] Pursuant to the 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.[9] But concerns about "worthless evidence" fitting within the categories of admissible hearsay have never been addressed within the Rules, and the hearsay exceptions continue to draw fire on this account.[10] Most recently, Judge Richard Posner of the Seventh Circuit Court of Appeals sharply criticized the present sense impression and excited utterance hearsay exceptions in his concurring opinion in *United States v. Boyce*,[11] opining that those categorical exceptions are capable of admitting wholly unreliable hearsay statements.[12]

Critics have proposed various responses to the perceived failings of the categorical model. For example, Professor Edmund Morgan proposed admitting all hearsay statements made by testifying or unavailable declarants to avoid altogether categorical hearsay exceptions and questions about the reliability of hearsay statements.[13] Judge Jack Weinstein proposed a discretionary approach to hearsay, allowing the trial judge to weigh the probative force of particular hearsay statements on a case-by-case basis.[14] In his recent concurrence in *Boyce*, Judge Posner echoed Judge Weinstein's approach and suggested that the categorical hearsay exceptions

7. *See also* 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)).

8. FED. R. EVID. 807.

9. *Id.*

10. *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) (opining that "few lawyers are satisfied with the cracker-barrel psychology that underlies exceptions like the one for excited utterances"); Weinstein, *supra* note 7, 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.").

11. 742 F.3d 792 (7th Cir. 2014); *id.* at 801 ("[A]s with much of the folk psychology of evidence, it is difficult to take this rationale . . . entirely seriously." (quoting Lust v. Sealy, Inc., 383 F.3d 580, 588 (7th Cir. 2004))).

12. *Id.* at 800–01 (opining that there are flaws in the justifications for present sense impressions and excited utterances).

13. *See* MODEL CODE OF EVIDENCE r. 503.

14. *See* Weinstein, *supra* note 7, at 337–38 (advocating for greater discretionary power for trial judges to admit hearsay evidence and criticizing class-based hearsay exceptions).

should be dismantled and that the residual or catchall hearsay exception should drive every decision about the admissibility of hearsay evidence.[15] This proposed change would require trial judges to consider the reliability of hearsay on a statement-by-statement basis to determine admissibility, thus permitting a more individualized assessment of hearsay evidence.

This modification would create broader discretion to admit hearsay evidence, but it also would allow the trial judge new flexibility to exclude or reject hearsay evidence that has long been admissible through categorical exceptions. In this way, Judge Posner's proposal addresses longstanding concerns about "worthless" hearsay being admitted and resolves his own dissatisfaction with being constrained to admit hearsay through the allegedly suspect present sense impression and excited utterance exceptions.[16]

In a recent article, I explored the significant costs and scant benefits of the purely discretionary approach to hearsay evidence proposed by Judge Posner.[17] That article highlighted the uncertainty, unfairness, and inconsistency inherent in such an approach. Accordingly, the article concluded that dismantling the categorical hearsay exceptions in favor of a single discretionary residual exception would diminish efficiency and fairness in the litigation market at a time when exploding costs threaten the utility of the jury trial as a mechanism for dispute resolution.[18]

Rejecting Judge Posner's discretionary approach, however, does nothing to answer his criticism that the current categorical hearsay exceptions allow unreliable statements to be admitted into evidence. Of course, one possible response to this criticism is: Who cares? There are credible arguments to be made that the primary function of the categorical exceptions is to provide a degree of certainty about admissible hearsay, that no system that provides such certainty can realistically hope to achieve perfect reliability, and that the categorical exceptions are serving their purpose notwithstanding the possibility that they will allow some unreliable hearsay into evidence.[19]

That said, the ceaseless criticism of the categorical exceptions for admitting the unreliable is difficult to ignore, particularly when it comes from authorities like Judge Posner and a panel of the Seventh Circuit Court of Appeals.[20] Should the Advisory Committee on the Federal Rules of

15. *Boyce*, 742 F.3d at 802 (Posner, J., concurring).

16. *Id.* at 801 ("It is time the law awakened from its dogmatic slumber.").

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

18. *Id.* at 1866, 1907–08.

19. *Id.* at 1894–907 (discussing strong arguments in favor of maintaining existing categorical hearsay exceptions); *see also Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323, 1364–68 (2016) (describing crucial certainty provided by the scheme of categorical hearsay exceptions).

20. Many scholars have offered similar criticisms of the present sense impression and excited utterance exceptions. *See, e.g.*, Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 337–38 (2012) (advocating a corroboration limitation on the present sense impression exception to control flow of unreliable electronic hearsay); Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907 (2001) (proposing an amendment to eliminate

Evidence (or "the Advisory Committee") seek to address this longstanding criticism, there are alternatives to the Posner proposal that could respond to concerns about the categorical exceptions without generating the same costs and inefficiencies. This Article theorizes about one potential amendment to Rule 803 of the Federal Rules of Evidence that could address old and new criticisms that the hearsay exceptions in that Rule are capable of admitting unreliable and "worthless" hearsay.

If courts and commentators continue to be concerned about the fallible assumptions of reliability underlying the Rule 803 exceptions, the Advisory Committee could propose to expand the "trustworthiness" exception—which is an existing feature of the business and public records exceptions—to additional Rule 803 exceptions, like the much-maligned present sense impression and excited utterance exceptions. This modification would allow the opponent of hearsay evidence falling within those exceptions the opportunity to show that the hearsay statements nonetheless lack trustworthiness due to the circumstances of their making or the sources of their information.

With this amendment, Professor McCormick's pre-Rules criticism of categorical exceptions would finally be answered. The residual exception would continue to permit the admission of reliable hearsay not captured by the categorical exceptions, and this new modification would permit the exclusion of demonstrably unreliable statements that happen to fit within those preordained categories.

I. AN OLD FRIEND: THE TRUSTWORTHINESS EXCEPTION

Rules 803(6), (7), and (8) of the Federal Rules of Evidence all include a trustworthiness exception to the admissibility of the hearsay statements that they describe.[21] As an example, Rule 803(6), the business records exception, provides that 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 method or circumstances of preparation indicate a lack of trustworthiness."[22] The absence of business records and public records exceptions contain similar provisos.[23]

The origins of these trustworthiness exceptions can be traced to the pre-Rules U.S. Supreme Court opinion in *Palmer v. Hoffman*.[24] The Palmer suit was brought against the trustees of a railroad company due to a grade crossing accident that killed the plaintiff's spouse.[25] By the time of trial,

"immediately after" language in the present sense impression exception); Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 757–59 (2015) (reacting to Judge Posner's *Boyce* concurrence with a proposal to abolish Rule 803(2) in favor of an excited utterance-like exception requiring both unavailability and corroboration).

21. FED. R. EVID. 803(6)(E), (7)(C), (8)(B).
22. *Id.* 803(6)(E).
23. *Id.* 803(7)(C), (8)(B).
24. 318 U.S. 109 (1943).
25. *Id.* at 110–11.

the train engineer involved in the accident had died.[26] Accordingly, the railroad company sought to introduce the engineer's recorded statement of his version of the accident, arguing that the statement was routinely made in the regular course of the railroad company's business.[27] Applying the federal statute that was a precursor to Rule 803(6), the trial court excluded the statement, and the jury returned a verdict against the railroad.[28] The Second Circuit Court of Appeals affirmed the trial court's exclusion of the engineer's statement, finding it "dripping with motivations to misrepresent."[29]

In affirming exclusion of the engineer's statement, the Supreme Court found that the accident report was not made in the course of the railroad's regular business operations.[30] According to the Court, 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."[31] The Court in *Palmer*, therefore, found that the engineer's statement was not made in the regular course of railroading and that the threshold requirements of the business records statute were not satisfied.[32]

In crafting Rule 803(6), the Advisory Committee noted that the exclusion of the record in *Palmer* was driven primarily by concerns about the railroad engineer's incentives to falsify his account of the accident.[33] Acknowledging the impossibility of identifying specific business records that will be free of such concerns in all cases, the Advisory Committee elected to craft 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.'"[34]

Thus, the trustworthiness exception to the business records exception recognizes the reality behind the Rule. While the vast majority of records routinely made in the regular course of business are reliable due to the strong business incentives to document accurately, some records with all of the requisite attributes may nonetheless lack reliability due to motivational problems or other suspicious factual circumstances.[35] In drafting the

26. *Id.* at 111.
27. *Id.*
28. *Id.*
29. Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942).
30. Palmer v. Hoffman, 318 U.S. 109, 113 (1943) (finding that the engineer's statement was "not a record made for the systematic conduct of the business as a business").
31. *Id.* at 113.
32. *Id.* at 114.
33. FED. R. EVID. 803(6) advisory committee's note ("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.").
34. *Id.* (quoting *id.* 803) (noting that "[t]he formulation of specific terms which would assure satisfactory results in all cases is not possible").
35. Rule 803(6) also requires that the records include information from an inside source with first-hand knowledge and that the information is recorded near the time of the acts, events, conditions, opinions, or diagnoses documented. *Id.* 803(6).

Federal Rules of Evidence, 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. With this historical pedigree, the trustworthiness exception has been in place since the Federal Rules were enacted. 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."[36]

II. A MODEST MODIFICATION: EXPANDING THE TRUSTWORTHINESS EXCEPTION

By a bit of an accident of history, the trustworthiness exception was included in Rules 803(6), (7), and (8) due to Supreme Court precedent in the business records context. But the reality recognized in *Palmer* is the same reality critics highlight in questioning the present sense impression and excited utterance exceptions. Indeed, the concerns expressed by Judge Posner and others about these Rule 803 exceptions are very reminiscent of the concerns underlying the decision in *Palmer*.

Even if most present sense impressions and excited utterances are reliable because of the context in which they are made, there may be circumstances in which even a contemporaneous or excited description of an event may appear suspect.[37] One example could be a hearsay statement like the one admitted in *Starr v. Morsette*,[38] in which a driver said moments after an accident that her passenger "grabbed the wheel, causing the pickup to go into the ditch and overturn."[39] This is one of those hearsay statements that could potentially qualify for admission under both the present sense impression exception (if the driver made the comment sufficiently contemporaneously to the accident) and the excited utterance exception (if the driver uttered the statement while under the stress or excitement caused by the rollover accident).[40] These exceptions notwithstanding, a driver who had just rolled a truck and caused serious injury might recognize instantly

36. *Id.* 803(6) advisory committee's note to 2014 amendment. Although many courts previously placed the burden on the opponent with respect to the trustworthiness exception, some had not. *Id.*

37. Judge Posner expresses broader distrust of both exceptions, stating that "there is profound doubt whether either should be an exception to the rule against the admission of hearsay evidence." United States v. Boyce, 742 F.3d 792, 800 (7th Cir. 2014).

38. 236 N.W.2d 183 (N.D. 1975).

39. *Id.* at 186. The statement was admitted in *Morsette* against the speaker and her codefendant under the North Dakota exceptions for statements of party opponents. *Id.* An expanded trustworthiness exception would not apply to statements of party opponents, the admissibility of which does not depend upon their inherent reliability. FED. R. EVID. 801(d)(2) advisory committee's note. Importantly, the *Morsette* court noted that the driver's statement would also be admissible as a present sense impression or excited utterance without regard to the self-serving nature of the statement. *Morsette*, 236 N.W.2d at 187. Expanding the trustworthiness exception to these exceptions could change this result.

40. *See* FED. R. EVID. 803(1), (2).

her own potential liability for the incident. The self-serving nature of the statement that deflects blame and places it on her passenger might appear suspicious in light of this reality. Thus, while most contemporaneous or spontaneous excited utterances may be trustworthy, the source and circumstances of others may render them suspect. Judge Posner illustrated this point in his *Boyce* concurrence by noting that humans are capable of instantaneous lies under some circumstances.[41]

The trustworthiness exception from Rules 803(6)–(8) could be expanded to apply to additional Rule 803 exceptions to allow for the realistic and individualized assessment of hearsay statements like the one in *Morsette*.[42] If Rules 803(1) and (2) were amended to add a trustworthiness exception, it would operate just like the one in the business records exception. The proponent of a hearsay statement like the one in *Morsette* would bear the burden of demonstrating that the requirements of Rules 803(1) and (2) were satisfied in the first instance. Once the proponent met that burden, the statements would become presumptively admissible. Still, the opponent of the evidence could demonstrate the likely motivations of the declarant and the suspect self-serving nature of the statement, thus showing that the statement does not deserve the presumption of reliability that the categorical exceptions afford it.[43] Upon a finding that the opponent has met its burden of showing a lack of trustworthiness, the trial judge could exclude the hearsay statement notwithstanding satisfaction of the Rule 803(1) and (2) categorical requirements. This would answer the longstanding criticism that categorical exceptions are capable of admitting "worthless" hearsay statements by creating a mechanism for excluding suspect statements that happen to fall within the preordained categories.

III. A MORE CONSTRUCTIVE PATH FORWARD

As illustrated above, expanding the trustworthiness exception that is an existing feature of the business and public records exceptions could address criticisms about the imperfect foundations of certain Rule 803 hearsay exceptions. Importantly, this modest modification to Rule 803 could address those criticisms without imposing the same significant costs on the

41. *Boyce*, 742 F.3d at 800 ("It's not true that people can't make up a lie in a short period of time.").

42. Expanding the trustworthiness exception only within Rule 803 makes sense because these hearsay exceptions rest most heavily upon the inherent reliability of certain statements. *See* FED. R. EVID. 803 advisory committee's note. Further examination is needed to determine which Rule 803 exceptions to amend. While an expanded trustworthiness exception is definitely worthy of consideration for the oft-criticized present sense impression and excited utterance exceptions, there could be benefits for additional Rule 803 exceptions.

43. The opponent could satisfy its burden simply by pointing out these motivational defects in the hearsay statement. *See* FED. R. EVID. 803(6) advisory committee's note to 2014 amendment ("The opponent . . . is not necessarily required to introduce affirmative evidence of untrustworthiness. . . . [T]he opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point.").

trial process—in terms of efficiency, fairness, and consistency—that Judge Posner's purely discretionary proposal would.[44]

Allowing exclusion of untrustworthy hearsay falling within the Rule 803 exceptions could increase the substantive rationality of the categorical hearsay exceptions that Judge Posner and others denounce. The categorical exceptions purport to rest heavily on the reliability of particular hearsay statements made for specific reasons or in certain contexts.[45] The pre-Rules concern that categories of hearsay may be underinclusive and may miss reliable hearsay was addressed directly through the addition of the residual exception.[46] Yet, the longstanding concern about the inherent imperfection of preordained categories as predictors of reliability and the possibility that those categories are *overinclusive* has never been addressed.[47] Borrowing the trustworthiness exception from the business and public records exceptions to allow the exclusion of unreliable hearsay falling within additional preordained categories like the present sense impression and the excited utterance could at long last respond to this perceived flaw in the categorical system.

Expanding the trustworthiness exception also would strike a balance between the need for judicial discretion in evidentiary rulings and litigants' need for ex ante clarity and consistency regarding the admissibility of hearsay evidence. It would not maximize discretion in the way that Judge Posner's proposal would, because the judge's discretion to exclude would be limited to circumstances in which the opponent of the hearsay satisfied its burden of demonstrating some reason to doubt the source of or circumstances surrounding the statement. Still, a trustworthiness exception would provide a mechanism for trial judges to perform an individualized reliability assessment of specific hearsay statements that fall within the Rule 803 exceptions. This alteration would eliminate the ostensibly rigid operation of the categorical model that currently directs trial judges to admit hearsay that fits an exception, whether they find it reliable or not.[48] This is

---

44. *See* Richter, *supra* note 17, at 1882–86 (detailing the costs of the Posnerian approach to hearsay).

45. *See supra* note 5 and accompanying text.

46. FED. R. EVID. 807 advisory committee's note (describing the need for a residual exception for "new and unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions").

47. *See* McCormick, *supra* note 1, at 580–81.

48. *See* MUELLER & KIRKPATRICK, *supra* note 2, § 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."); *see also* 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)." (Friendly, J.)). Although other courts have allowed the self-serving nature of state of mind statements to be considered, the point is contested. *See* United States v. Cianci, 378 F.3d 71, 106 (1st Cir. 2004) (self-serving nature of hearsay statements justified exclusion). Adding a trustworthiness exception to the Rule 803

precisely the feature of the present sense impression and excited utterance exceptions that the Seventh Circuit lamented in reluctantly admitting hearsay statements made to a 911 operator in *United States v. Boyce* because they satisfied the stated requirements of the excited utterance exception.[49]

Importantly, this modest modification would not deprive the categorical exceptions of their procedural integrity and rationality in the same way that a purely discretionary model would.[50] Even with the expansion of the trustworthiness exception, the Rule 803 categorical exceptions would continue to allow litigants to predict the admissibility of hearsay evidence with the degree of clarity necessary to strategize about viable dispute resolution.[51] All hearsay within the Rule 803 exceptions would remain presumptively admissible and the opponent of the hearsay would bear the burden of justifying its exclusion.[52] Although federal courts are empowered to exclude business and public records using the existing trustworthiness exception, this authority has not rendered the business and public records exceptions unpredictable and standardless. Federal courts have held the opponents of these records to their burden of showing a lack of trustworthiness and have refused to exclude business and public records over an opponent's objection to trustworthiness.[53] Where federal courts have excluded business and public records due to a lack of trustworthiness, they have required the opponent to demonstrate a specific basis for doubting the reliability of the record.[54] Therefore, the flexibility created by the trustworthiness exceptions in the business and public records hearsay exceptions has not undermined the utility of those exceptions or rendered them unpredictable.

Accordingly, the familiar and recently clarified framework for considering the admissibility of hearsay pursuant to a trustworthiness exception would help maintain consistent rulings regarding additional Rule 803 hearsay exceptions. All trial judges administering the exception would follow the same roadmap. First, trial judges would require the proponent of a hearsay statement to demonstrate that the requirements of a Rule 803

---

exceptions would clarify this point and allow consideration of reliability within controlled parameters that all courts would employ.

49. United States v. Boyce, 742 F.3d 792, 796 (7th Cir. 2014) ("[D]espite these issues, the exceptions are well-established.").

50. *See generally* Richter, *supra* note 17.

51. *Id.* at 1883, 1893–94 (discussing the importance of ex ante information).

52. FED. R. EVID. 803(6) advisory committee's note to 2014 amendment.

53. *See, e.g.*, Dortch v. Fowler, 588 F.3d 396, 402–03 (6th Cir. 2009) (upholding the district court's application of trustworthiness factors to reject the opponent's challenge to the police accident report); Ellis v. Int'l Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984) (rejecting the opponent's trustworthiness challenge to toxic shock studies by the CDC; finding that the opponent had failed to satisfy its burden).

54. *See, e.g.*, Nachtsheim v. Beech Airlines, 847 F.2d 1261, 1273–75 (7th Cir. 1988) (excluding a Bureau of Flight Standards Release where the opponent demonstrated that the FAA had cancelled the Release); City of New York v. Pullman, 662 F.2d 910, 915 (2d Cir. 1981) (rejecting Urban Mass Transit Administration Report where the opponent demonstrated that the proponent supplied the data that served as the basis for the report).

exception are satisfied, thus rendering the hearsay presumptively admissible. Only then would trial judges shift the burden to the opponent of the hearsay to point to specific reasons to doubt the reliability of the otherwise admissible statement. This familiar framework would help ensure consistent applications of the trustworthiness exception across cases and courtrooms akin to those that have been made under the business and public records exceptions. Further, this well-understood framework would continue to be driven by the categorical exceptions and would allow for quick application during a fast-paced trial process, thus eliminating the need for costly in limine motions to resolve all hearsay objections.

Finally, and crucially, this modest modification of the Rule 803 exceptions that utilizes an existing feature of Rule 803 would avoid a painful period of adjustment and uncertainty concerning the admissibility of hearsay. While meaningfully addressing longstanding concerns about the rationality of certain hearsay exceptions, this amendment would not scuttle well-accepted hearsay exceptions that have proved invaluable to the trial process.[55]

CONCLUSION

Criticism of the categorical hearsay exceptions for allowing the unreliable to find its way into our trial process has continued unabated since the enactment of the Federal Rules of Evidence and has recently resurfaced prominently in the Seventh Circuit opinion in *Boyce*.[56] The purely discretionary approach to hearsay proposed by Judge Posner runs counter to the original purpose of the highly successful Federal Rules of Evidence, would prove costly and detrimental to the trial process, and should not be pursued.[57]

The Advisory Committee could credibly choose to ignore the continuing criticism of the Rule 803 hearsay exceptions by concluding that the categorical exceptions are serving their crucial certainty purpose and need not achieve accurate reliability assessments in every case, notwithstanding their purported grounding in trustworthiness. Turning a deaf ear to complaints about the Rule 803 hearsay exceptions will not quiet the increasingly vocal critics of the categorical model, however. Expanding the trustworthiness exception that is an existing feature of the business and public records exceptions to the oft-excoriated present sense impression and excited utterance exceptions could increase confidence in the integrity of the categorical hearsay model, without imposing the deleterious costs of a purely discretionary approach. Adding a "trustworthiness" reality check to

55. *See* Liesa L. Richter, *Don't Just Do Something!: E-hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657, 1699 (2012). (discussing the importance of the present sense impression in the fight against domestic violence).

56. *See supra* notes 11–12 and accompanying text.

57. *See* Richter, *supra* note 17, at 1894–907.

additional Rule 803 hearsay exceptions is, therefore, worthy of further exploration.[58]

58. This brief Article is inadequate to explore fully the ramifications of expanding the trustworthiness exception. Questions about which Rule 803 exceptions to alter, as well as the drafting of an expanded trustworthiness exception, remain to be examined. This Article is designed to introduce the concept as a more viable antidote to concerns about the Rule 803 hearsay exceptions than the Posner proposal discussed at this symposium.