

RELIABILITY OF DYING DECLARATION HEARSAY EVIDENCE

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INTRODUCTION

Rule 802 of the Federal Rules of Evidence, which prohibits the admission of hearsay statements into evidence,¹ reflects the Anglo-American tradition of favoring cross-examination for discerning truth in litigation.² But because hearsay can be valuable and sometimes necessary evidence, Rules 803 and 804 exempt twenty-eight types of hearsay statements from the ambit of the general prohibition against admissibility.

The exceptions are generally justified on the ground that there is something in the background circumstances where the excepted statements are made that make these statements reliable. Within these excepted statements, some are considered less reliable than others and thus require different treatment. The Advisory Committee on the Federal Rules of Evidence (the “Advisory Committee”) provides the following explanation in its notes to Rules 804:

Rule 803 . . . is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. [Rule 804] proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in [Rule 804].³

Judge Richard Posner has recently criticized the structure of the hearsay rule. Pointing to the general prohibition against admitting hearsay evidence, the many

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1. FED. R. EVID. 802. “Hearsay” is defined as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” *Id.* R. 801.

2. 2 MCCORMICK ON EVIDENCE § 244 (7th ed. 2013).

3. FED. R. EVID. 804(b) advisory committee’s note.

exceptions, and the Advisory Committee's notes on the rule, Posner argues that the rule is "too complex" and "archaic."⁴ Regarding the rule's exceptions, Posner has also reasoned that they "seem to [him] on the whole sound, but with three exceptions."⁵ In 2014, in *United States v. Boyce*, he wrote a concurring opinion in which he charged that Rules 803(1) and (2) "don't even have support in folk psychology" and "rest[] on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas."⁶ In 2016, he followed up on his concurring opinion in *Boyce* with an article which not only reiterates his attacks against Rules 803(1) and (2) but also criticizes Rule 804(b)(2) as being "a fossil" like the other two hearsay exceptions.⁷

Rule 803(1) (the "PSI hearsay exception") is concerned with the present sense impression ("PSI"), "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."⁸ Rule 803(2) (the "EU hearsay exception") is concerned with the excited utterance ("EU"), "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."⁹ Two earlier studies (the "PSI study"¹⁰ and the "EU study"¹¹) reviewing the literature on deception and perception have shown that, contrary to Judge Posner's assertion, there is reason to think that PSI and EU hearsay evidence may be reliable and that both Rules 803(1) and (2) may be worth retaining.¹²

This paper completes the trilogy with an examination of the scientific support for and against Rule 804(b)(2). Rule 804(b)(2) (the "DD hearsay exception") is concerned with the "statement under the belief of imminent death," more traditionally referred to as the dying declaration ("DD").¹³ DD is defined as follows:

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

5. Richard A. Posner, *On Hearsay*, 84 *FORDHAM L. REV.* 1465, 1469 (2016).

6. *Boyce*, 742 F.3d at 801–02 (Posner, J., concurring).

7. Posner, *supra* note 5, at 1471.

8. *FED. R. EVID.* 803(1)

9. *Id.* R. 803(2).

10. Timothy T. Lau, *Reliability of Present Sense Impression Hearsay Evidence*, 52 *GONZ. L. REV.* 175 (2017) [hereinafter Lau, *PSI Study*].

11. Timothy T. Lau, *Reliability of Excited Utterance Hearsay Evidence*, 87 *MISS. L.J.* (forthcoming 2018) (on file with author) [hereinafter Lau, *EU Study*].

12. The two studies found that the Advisory Committee's justifications for the exceptions, that the "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation" and that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication," are generally, though not conclusively, supported by the empirical research literature. *FED. R. EVID.* 803 advisory committee's note; Lau, *PSI Study*, *supra* note 10; Lau, *EU Study*, *supra* note 11.

13. *FED. R. EVID.* 804(b)(2).

In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.¹⁴

The motivating principle of the DD hearsay explanation is the ancient and universally held notion that dying people do not lie. The *Analects* of Confucius, dating from almost 2,000 years ago, contains the following lines:

鳥之將死，其鳴也哀；
人之將死，其言也善。
The calls of a dying bird are mournful;
*The words of a dying man are good.*¹⁵

Shakespeare's writings, which obviously drew from a very different cultural tradition, also reflect the idea. In *King John*, the dying Count Melun explains why his dying words ought to be believed:

Have I not hideous death within my view,
Retaining but a quantity of life,
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true
That I must die here and live hence by truth?¹⁶

The idea is similarly expressed in *Richard II*:

O, but they say the tongues of dying men
Enforce attention like deep harmony.
Where words are scarce they are seldom spent in vain,
For they breathe truth that breathe their words in pain.¹⁷

Within the context of Anglo-American evidence law, the DD hearsay exception derives from the medieval maxim, *nemo moriturus praesumitur mentiri*.¹⁸ In *Rex*

14. *Id.*

15. CONFUCIUS, THE ANALECTS, bk. 8, ch. 4. Zhu Xi (朱熹), the influential Confucian scholar, provides the explanation for these lines:

鳥畏死，故鳴哀。人窮反本，故言善。
Birds fear death, hence their dying calls are mournful. Humans return to their fundamental nature of goodness at their limits, hence their dying words are good.

ZHU XI, ANNOTATIONS OF THE ANALECTS, bk. 4. All translations are provided by the author.

16. WILLIAM SHAKESPEARE, KING JOHN, act 5, sc. 4, at 191–93 (Barbara A. Mowat & Paul Werstein eds., Folger Shakespeare Library n.d.) (1623).

17. WILLIAM SHAKESPEARE, RICHARD II, act 2, sc. 1, at 57 (Barbara A. Mowat & Paul Werstein eds., Folger Shakespeare Library n.d.) (1597).

18. No one about to die is presumed to lie.

v. *Woodcock*, an English case from 1789, the court provided the following articulation of the exception:

Now the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.¹⁹

The key to the reliability of DD hearsay evidence, according to this formulation, is that:

the deceased . . . apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions.²⁰

The Advisory Committee rejected this explanation for the DD hearsay exception, with all of its Abrahamic undertones. Instead, it stated that:

While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present.²¹

Few evidence scholars are convinced even by this modernized, cautious justification provided by the Advisory Committee.²² As Professor Aviva Orenstein puts it, the DD hearsay exception is “the laughing stock of hearsay exceptions.”²³

But is DD hearsay evidence really that bad? Do people, at the point of death, make unreliable statements? Not even modern defenders of the exception such as Orenstein try to justify the rule using scientific literature.²⁴ Rather, almost all assume that there is no positive, empirical case to be made about the reliability of DD hearsay evidence.

This Article seeks to explore the reliability of DD hearsay evidence using the interdisciplinary approach taken in the PSI and EU studies for their respective exceptions. It begins with a definition of reliability and reviews a number of cases where the DD hearsay exception is applied to set forth the background of the

19. *Rex v. Woodcock* (1789) 168 Eng. Rep. 352, 353; 1 Leach 500, 502.

20. *Id.*

21. FED. R. EVID. 804(b)(2) advisory committee’s note.

22. See, e.g., MICHAEL J. SAKS & BARBARA A. SPELLMAN, *THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW* 199 (2016); Bryan A. Liang, *Shortcuts to “Truth”*: *The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 259 (1998).

23. Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1413.

24. *Id.* at 1460 (arguing for the exception based on the need for evidence from women victims who are killed in acts of domestic violence).

discussion. Then, based on the reviewed cases, it proposes a classification scheme for DD hearsay statements. It looks into the available research along the definition of reliability, providing a modern justification for the exception. It ends with a conclusion about the DD hearsay exception and some general reflections about the PSI, EU, and DD hearsay exceptions.

I. ASCERTAINING THE RELIABILITY OF HEARSAY STATEMENTS

It is difficult to define what hearsay reliability means; as the Supreme Court noted, “[r]eliability is an amorphous, if not entirely subjective, concept.”²⁵ Nonetheless, as explained in the PSI study,²⁶ courts have discussed hearsay reliability in the context of “the possibility of fabrication, coaching, or confabulation”²⁷ and in terms of the “accuracy of observation.”²⁸ Hearsay reliability can, therefore, be assessed along these two metrics.

This Article reviews research on the susceptibility of DD hearsay evidence to fabrication, coaching, or confabulation, as well as the probable accuracy of underlying observations. A search of the literature yields no research that directly and empirically tests the assumptions underlying the DD hearsay exception, which can easily be explained by the fact that it is simply not ethical to bring experimental subjects near death to observe what they may say.²⁹ This review is, therefore, based on research directed at questions outside of the hearsay realm which nonetheless speak to the exception.

A. Real-Life Examples of DD Hearsay Evidence

In order to discuss the DD hearsay exception, it is helpful to consider some real-life examples of DD hearsay evidence presented in the federal courts. Uses of Rule 804(b)(2) appear to be very rare. It appears that from 2014 to 2015, just six district court judges mentioned the admission of hearsay evidence under Rule 804(b)(2) or state counterparts to the DD hearsay exception.

Pittman v. County of Madison, in the Southern District of Illinois, involves “a letter, characterized as a ‘suicide note,’ written by [declarant] to family members and retrieved after [declarant’s] suicide attempt,” while the declarant was in prison.³⁰ The letter, quoted by the court in its entirety, states:

Don’t think im weak for what im about to do. I will never snitch i wuld rather die tail [A] i love her in let her no im sorry tail her that the world was to much for me make her understand for me pleas I love u and i wish I culd have seen u

25. *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

26. Lau, *PSI Study*, *supra* note 10, at 178–79.

27. *Idaho v. Wright*, 497 U.S. 805, 820 (1990).

28. FED. R. EVID. 803(2) advisory committee’s note.

29. See, e.g., Liang, *supra* note 22, at 239 (“[D]ouble-blind, scientific experiments cannot be readily performed to assess just which particular dying declarations are in fact reliable . . .”).

30. *Pittman v. Cty. of Madison*, No. 08-cv-890-SMY-DGW, 2015 WL 557248, at *2 (S.D. Ill. Feb. 10, 2015).

one more last time everybody thinks im playen or joking but this is real. I just cant take it no more I wuld rather die I tried to talk to the crisis lady but thay ant let me I told them no one listen to me.³¹

The court further noted additions in the margins of the letter stating, “the guards keep fucking with me” and “I Love u G-ma [B] sorry.”³² It ultimately concluded that the letter was admissible as DD hearsay evidence:

Here . . . [the declarant] penned the suicide note while under the belief that death was imminent as evidenced by his subsequent, near-successful suicide attempt. Also, the note explained the reasons [the declarant] wanted to kill himself. Specifically, the note says he would rather die than “snitch.” Also, he indicates “the guards keep fucking with me” and would not let him “talk to the crisis lady.” The Court also finds it relevant to its analysis that [the declarant’s] note was written only a couple of hours before his suicide attempt. As such, [the declarant’s] suicide note qualifies as a dying declaration. It is clearly relevant in this case and its probative value is not outweighed by any prejudice. As such, it is admissible under the dying declaration exception.³³

The second is *United States v. Jordan*, where the District of Colorado was asked in 2014 to reconsider its 2005 decision finding a piece of DD hearsay evidence inadmissible.³⁴ The relevant hearsay statement is as follows:

[I]nmate [the declarant] was stabbed with a sharpened piece of metal. . . . At the emergency room, [the declarant] begged the trauma doctors to save his life. He repeatedly asked if [he] was going to die. However, approximately seven hours after [the declarant] was stabbed, he died from his wounds. Between the time of the stabbing and the time of his death, [the declarant] was questioned about the stabbing by a Bureau of Prisons agent.

[The declarant] was questioned the first time as he was taken to the trauma room. . . . While [the declarant] was in the room, [an agent] interviewed him. During the interview, when asked who stabbed him, [the declarant] replied, “[the defendant] stuck me.” [The declarant] was questioned the second time on his way to an awaiting ambulance. [The agent] asked why he was stabbed. [The declarant] replied, “It was over drug debts. [The defendant] owes about two-thousand dollars for drugs.” [The declarant] was questioned a third time by a person . . . who appears to have been a paramedic, who asked [the declarant] who stabbed him. [The declarant] replied, “[i]t was [the defendant] who stuck me.”³⁵

31. *Id.*

32. *Id.*

33. *Id.* at *3.

34. *United States v. Jordan*, No. 04-cr-00229-LTB, 2014 WL 1796698, at *1 (D. Colo. May 6, 2014).

35. *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at *1 (D. Colo. Mar. 3, 2005).

In 2005, the court concluded that the Confrontation Clause barred the admission of the evidence.³⁶ With additional guidance from the Supreme Court about the Clause, the court admitted the evidence as excepted DD hearsay evidence in 2014.³⁷

Bray v. Ingersoll-Rand Co. was a product liability case resolved by the District of Connecticut on summary judgment.³⁸ One of the pieces of evidence involved was “a brief affidavit by the [declarant], executed two days before his death” from mesothelioma and asbestosis.³⁹ In the words of the court:

In his affidavit, [the declarant] attests that he “worked with and around asbestos-containing products during [his] employment at [the company].” [The declarant] goes on to note that he can “specifically recall today using and/or being exposed to asbestos products and/or products containing, involving, or requiring the use of asbestos.”⁴⁰

The court noted that the affidavit “is likely admissible as a statement made under belief of imminent death.”⁴¹

In *Largo v. Janecka*, the petitioner for habeas corpus challenged the admission of a piece of DD hearsay evidence under the New Mexico counterpart of the DD hearsay exception.⁴² The New Mexico Supreme Court provides the following description of the admitted evidence and the disposition of the trial court:

{2} [The petitioner] and [the declarant] had been in an on-again, off-again relationship for twenty years, during which they had two children. On the morning of [day], [the petitioner], still drunk from the day before, showed up at [the declarant’s] trailer. [The declarant] let him inside and [the petitioner] told [the declarant] that he wanted to reconcile their relationship. [The declarant] told [the petitioner] she was not open to reconciliation. The two then went outside the trailer where an altercation ensued, and [the petitioner] shot [the declarant], who later died of her gunshot wounds.

{3} [The declarant’s] neighbor . . . witnessed the altercation and the shooting from his home. After [the petitioner] drove away, [the neighbor] went outside to help [the declarant], who was lying on the ground bleeding, while his mother . . . called 911. [The neighbor’s mother] then gave the phone to [the neighbor] and the 911 operator asked who shot [the declarant]. With [the neighbor] acting as a relay, [the declarant] told the 911 operator that it was [the petitioner].

36. *Jordan*, 2005 WL 513501, at *2–4.

37. *Jordan*, 2014 WL 1796698, at *2.

38. *Bray v. Ingersoll-Rand Co.*, No. 3:13-cv-1561 (SRU), 2015 WL 728515 (D. Conn. Feb. 19, 2015).

39. *Id.* at *2–3.

40. *Id.* at *5 (citation omitted).

41. *Id.* at *5 n.7.

42. *Largo v. Janecka*, No. CV 13-590 LH/LAM (D. N.M. Jan. 6, 2014), https://scholar.google.com/scholar_case?case=10908260296820040630&hl=en&as_sdt=6&as_vis=1&oi=scholarrr.

{4} [The declarant] was still lying on the ground bleeding when [the sheriff's deputy] arrived. [The declarant] also told [the deputy] that [the petitioner] shot her. Significantly, she also told the deputy that [the petitioner] "was headed to the school to shoot the kids." [The high school] was subsequently locked down.

{5} [The declarant] was transported to a hospital . . . , where she died around six hours after being shot. . . .

{6} At trial, the district court admitted [the declarant's] out-of-court statements in two forms. First, the district court admitted into evidence portions of the 911 tape where [the declarant] communicated to the 911 operator, through [the neighbor], that [the petitioner] had shot her. Second, the district court allowed [the deputy] to testify regarding [the declarant's] out-of-court statement in which she identified [the petitioner] as her shooter. [The deputy] testified: "I asked [the declarant], 'What happened?' and she said, '[The petitioner] shot me.'" The district court ruled that any evidence regarding [the declarant's] fear that [the petitioner] was headed to [the high school], however, was too prejudicial, and therefore was not presented at trial.⁴³

The District of New Mexico concluded that the petitioner failed to show that the admission of the evidence violated the Confrontation Clause or the DD hearsay exception.⁴⁴

In *United States v. Joseph*, the petitioner raised an ineffective assistance of counsel claim, alleging that counsel failed to object to the admission of a particular piece of DD hearsay evidence during the criminal trial.⁴⁵ The District of Hawaii pointed to the fact that the Ninth Circuit had already ruled that the evidence was admissible and concluded that the claim of ineffective assistance of counsel could not be established based on the DD hearsay evidence.⁴⁶ Here is a description of the DD involved, pieced together from excerpts of court documents:

[The petitioner] and [a co-defendant] were members of groups competing to provide security for illegal gambling rooms [T]hey successfully took over the security for rooms owned and operated by [name] from a group run by [the declarant], but [the declarant] re-asserted control [T]he two groups met at a golf course [The petitioner] [and two other co-defendants] shot [the declarant] and two other men from [the declarant's] group. [The declarant] and one of the other men died.⁴⁷

[T]wo . . . officers came to the golf course in response to reports of the shooting [a]nd they were told by some golfers to go to where [the

43. *State v. Largo*, 278 P.3d 532, 534–35 (N.M. 2012).

44. *Largo v. Janecka*, No. CV 13-590 LH/LAM (D. N.M. Jan. 6, 2014), https://scholar.google.com/scholar_case?case=10908260296820040630&hl=en&as_sdt=6&as_vis=1&oi=scholar.

45. *United States v. Joseph*, No. 06-CR-00080 (02) SOM, 2014 WL 794656, at *9 (D. Haw. Feb. 27, 2014).

46. *Id.* (citing *United States v. Joseph*, 465 F. App'x 690, 695 (9th Cir. 2012)).

47. *Joseph*, 465 F. App'x at 693.

declarant] was lying on his back with blood on the lower right side of his abdomen.

[One of the officers] asked [the declarant] what happened, and [the declarant] said he had been shot five times in the back. Asked who had shot him, [the declarant] said, [the petitioner] and [a co-defendant]. Asked what kind of weapon, [the declarant] said it was a .22. Eventually, he was taken to [a hospital], where he died shortly after arriving

[The court] had [a second officer] come in and testify live, and he said that he got to the golf course . . . and he said that, when [the declarant] was answering [the first officer's] questions, [the declarant] was having a hard time breathing, that his breathing was short and shallow, that he was groaning or moaning, and seemed to be in need of oxygen. [The court] recall[s] that [the second officer] described [the declarant] as "hurting."

[The second officer] did recount what happened between [the first officer] and [declarant], as . . . already described. [The second officer] asked for [the declarant] to give his name, and [the declarant] said, "[name]," then "[name]," and then was unable to answer further questions.⁴⁸

D'Amico v. Secretary was yet another habeas case, which took place in the Middle District of Florida.⁴⁹ The DD hearsay evidence, admitted according to state law, arose from the following incident:

In the early morning hours . . . the [declarant] . . . was awakened by footsteps in the hallway of his home. The [declarant] opened his bedroom door and found Petitioner, an acquaintance of both the [declarant] and the [declarant's] roommate, standing in the hallway. Petitioner stated the [declarant's] roommate had invited him into the house for a beer. The [declarant] told Petitioner to leave but Petitioner refused. Petitioner asked the [declarant] if he had any drugs and inquired about money the [declarant] owed to another drug dealer. The [declarant] told Petitioner that he had the money he owed the other drug dealer. Realizing he had revealed to Petitioner that he had cash in the house, the [declarant] insisted Petitioner leave but Petitioner again refused and asked for a beer. The [declarant] gave Petitioner a can of beer which Petitioner eventually left on a table. Petitioner headed down a hallway toward the restroom and the [declarant] began walking toward the kitchen. Petitioner came back down the hallway with a gun and shot the [declarant] in the face.

The [declarant] staggered to the front door and went across the street to a neighbor's house for help. When the neighbor did not immediately answer the door, the [declarant], bleeding profusely, kneeled down on the sidewalk and wrote the name "[name of Petitioner]" on the sidewalk in his own blood. As he lay on the ground, the [declarant] saw Petitioner leave his house. The

48. Transcript of Proceedings at 13–15, *United States v. Joseph* (D. Haw. Dec. 27, 2007) (No. 06-cr-00080-SOM-BHK).

49. *D'Amico v. Sec'y of Dep't of Corr.*, No. 8:11-cv-20-T-27EAJM, 2014 WL 1248071, at *1 (M.D. Fla. Mar. 26, 2014).

[declarant] heard a car accelerate and saw a dark blue Cadillac drive away. The [declarant] knew that Petitioner owned a Cadillac.

A neighbor . . . discovered the victim on the sidewalk and called 911. The [declarant], believing he was dying, asked [the neighbor] to contact his loved ones and told him that “[the name of Petitioner]” was the person who shot him. The [declarant] was taken to the hospital. Still believing he may die, the [declarant] told [a detective] at the hospital that “[the name of Petitioner]” had shot him.⁵⁰

The declarant survived.⁵¹ At trial, the neighbor, the detective, and the declarant all testified about the statements the declarant made to the neighbor and the detective.⁵² The district court refused to entertain the petitioner’s challenge to the admission of the evidence.⁵³

The six cases cited above are merely used in this Article as examples of DD hearsay evidence; they do not represent a comprehensive or thorough survey. Nonetheless, these cases capture the diverse instances in which DD hearsay evidence is generated: three instances of shooting; one stabbing; one asbestos-related disease; and one attempted suicide. The circumstances spanned inmate on inmate violence, guard on inmate violence, gang violence, domestic violence, burglary, and even workplace injury.

The range of circumstances in these six cases seems to be far broader than that in the cases considered in the PSI and EU studies. All four cases sampled in the PSI study involved contraband, and the subject hearsay evidence all arose from interactions with or amongst law enforcement agents.⁵⁴ Four of the five cases examined in the EU study are domestic violence cases.⁵⁵ It may seem more difficult to generalize across these six cases involving DD hearsay evidence and, one must suppose, across the entire breadth of DD hearsay evidence.

Nonetheless, some commonalities can be observed, which will be useful to consider in drawing conclusions about the DD hearsay exception from the scientific literature. First, the DD hearsay evidence discussed in each of these six cases includes a statement accusing some person or thing for causing the death. This makes sense in that DD hearsay statements made by declarants blaming themselves or not assigning blame are unlikely to become evidence, either because there is no case to litigate or because the statements may have little value in proving cases. For example, there is no criminal prosecution to be launched against a person who hits a tree with his car and who dies shortly after admitting to drinking.

50. *Id.*

51. *Id.*

52. *Id.* at *6–7.

53. *Id.* at *7.

54. See Lau, *PSI Study*, *supra* note 10, at 183.

55. See Lau, *EU Study*, *supra* note 11 (manuscript at 11).

Second, in each of these six DD cases, the persons or things accused of causing the death are not strange or alien to the declarants. The declarants were all able to specifically and unambiguously name who or what caused their terminal conditions.

Third, in each of these cases, the DD hearsay evidence is narrative. It is not unheard of for DD to be made by declarants who were in no condition to give any more than little gestures or short verbal answers. For example, *Gilmore v. Lafler*, which did not fall within the parameters of this survey,⁵⁶ involved the following DD hearsay evidence:

Defendant's convictions arise from the shooting death of [the declarant] and the armed robbery and nonfatal shooting of [A] . . . [A] testified that . . . he and the [declarant] were sitting in the [declarant]'s living room listening to music when defendant arrived. Defendant stayed for a while, then left the house and returned a few minutes later with a gun. Defendant shot the [declarant], and then pointed the gun at [A], demanding money. [A] gave defendant \$2,000 cash, and defendant shot the [declarant] again before shooting [A].

[A] went downstairs to the basement where [B] and [C] were performing some remodeling for the [declarant], and [B] called the police. When the police arrived, the [declarant] was still alive. Either [B] or the police asked the [declarant] who shot him, but he was unable to make a sound and only moved his lips. When asked if he had mouthed "Bald Head," the [declarant] nodded his head "yes." [B] asked the [declarant] if he had mouthed "Raw Head," and the [declarant] again nodded his head "yes." "Raw Head" is defendant's nickname.⁵⁷

Nonetheless, most instances of DD hearsay evidence used in court appear to have significantly more content.

This Section concludes with a caution that, although the comparative merits of the approaches taken by different jurisdictions in applying the exception are beyond the scope of this Article, there certainly is doubt whether all courts would have applied the exception to admit the subject hearsay statements of these six cases. For example, the approach in *Pittman*⁵⁸ taken to admit a suicide note appears to be one used by a minority of courts. Many courts appear hesitant to admit suicide notes as hearsay evidence at all,⁵⁹ while others have concluded that suicide notes may not qualify as excepted hearsay evidence under the DD hearsay exception but may nonetheless be admissible under the residual exception to the

56. *Gilmore v. Lafler*, No. 2:07-CV-14010, 2010 WL 2560034 (E.D. Mich. June 16, 2010). The case did not fall into the parameters of the survey because it was from 2010.

57. *People v. Gilmore*, No. 258334, 2006 WL 744268, at *3 (Mich. Ct. App. Mar. 23, 2006).

58. *Pittman v. Cty. of Madison*, No. 08-cv-890-SMY-DGW, 2015 WL 557248 (S.D. Ill. Feb. 10, 2015).

59. *See, e.g., United States v. Angleton*, 269 F. Supp. 2d 878, 884–889 (S.D. Tex. 2003); *Kincaid v. Kincaid*, 127 Cal. Rptr. 3d 863, 874 (Ct. App. 2011).

hearsay rule.⁶⁰ *Bray v. Ingersoll-Rand Co.*⁶¹ belongs to a genre of cases involving affidavits and depositions made by victims of mesothelioma in asbestos cases.⁶² While some courts, like *Bray*, have admitted such statements under the DD hearsay exception,⁶³ others have not.⁶⁴

Because this Article is directed at the empirical support underlying the DD hearsay exception, it necessarily includes analysis of hearsay statements which may test the outer limits of the exception but nonetheless have been admitted as evidence. To the extent that courts have generally applied the exception more restrictively than it has been used in these six cases, the overall reliability of DD hearsay evidence may be higher than that of the subject hearsay statements of these six cases. This focus of this Article on the hearsay exception as it is applied, therefore, tends towards underestimating the overall reliability of DD hearsay evidence.

II. CLASSIFICATION SCHEME FOR DD HEARSAY STATEMENTS

The six cases cited above suggest two dimensions for classification of DD hearsay statements, forming a two-by-two matrix:

		Extent of Injury	
		No Opportunity for Planning	Planning Possible
Origin of DD	Prompted by Circumstances	Type A Examples: <i>Jordan</i> , <i>Largo</i> , and <i>Joseph</i>	
	Initiated by Declarant	Example: <i>D'Amico</i>	Type B Examples: <i>Bray</i> and <i>Pittman</i>

60. See, e.g., *Miller v. Stovall*, 742 F.3d 642, 650 (6th Cir. 2014) (“Although [the suicide note] [does] not qualify as [a] ‘dying declaration[.]’, it was reasonable for the [Michigan] court of appeals to find that [the suicide note] [was] reliable on similar grounds.”).

61. *Bray v. Ingersoll-Rand Co.*, No. 3:13-cv-1561 (SRU), 2015 WL 728515 (D. Conn. Feb. 19, 2015).

62. Mesothelioma is a type of cancer heavily linked to asbestos exposure. In these cases, the victims often learn of their diagnosis and immediately file suit. However, the nature of mesothelioma is such that these victims often have no hope that they can survive to testify at trial. See Jacek M. Mazurek et al., *Malignant Mesothelioma Mortality—United States, 1999–2015*, 66 MORBIDITY & MORTALITY WKLY. REP. 214, 214 (2017) (“Patients have a median survival of approximately 1 year from the time of diagnosis.”). They, therefore, attempt to have their narratives captured in depositions or affidavits before they die and to have the documents admitted as DD hearsay evidence after they die. For another example of this fact pattern, see *Berry v. Am. Standard, Inc.*, 888 N.E.2d 740 (Ill. App. Ct. 2008).

63. See, e.g., *In re Asbestos Litig.*, C.A. No. PC-13-5868 (R.I. Super. Ct. Nov. 2, 2016), https://scholar.google.com/scholar_case?case=13769237177797206290.

64. See, e.g., *Farrell v. Air & Liquid Sys., Corp.*, MDL No. 875, 2013 WL 5548378, at *1 n.1 (E.D. Pa. Aug. 12, 2013).

The horizontal axis concerns the origin of the DD. There is at least a conceptual distinction between DD statements made on the declarant's own initiative, such as the suicide note of *Bray* or the volunteered statements of *D'Amico*, and those who generate a DD because the declarants were prompted, such as the law enforcement questioning of *Jordan*.

The vertical axis of DD classification is based on the physical condition of the declarant. Some DD hearsay evidence is provided by declarants who have suffered grievous injuries which will very soon kill them and which may severely limit their ability to deliberate. In contrast, some DD hearsay statements are made by declarants who still have significant time and ability to deliberate, whether or not they have already suffered the injury that will kill them. *Jordan*, *Largo*, *Joseph*, and *D'Amico* were closer to the first extreme. They involved declarants who were already dying of either knife wounds or gunshots when they made their DD. *Pittman* and *Bray*, in contrast, involved DD hearsay evidence generated by declarants who still had time to think. In *Pittman*, where the DD hearsay evidence was in the form of a suicide note, the declarant certainly thought he would die very soon. However, he had not yet inflicted the life-threatening injury upon himself when he wrote the note. In *Bray*, the declarant was suffering from the asbestos related injury that would come to kill him. Still, he had two more days to live and was in a condition to execute an affidavit, the subject of DD hearsay evidence.

As seen in the six cases cited, most examples will fall along the shaded diagonal of the matrix. Persons who are already suffering from mortal injuries such as gunshot or knife wounds are not usually in a position to initiate a DD statement. There are of course examples of dying persons, on their own initiative, writing messages with their blood, as was the case in *D'Amico*,⁶⁵ but in most cases, the DD statements are prompted by questions about the cause of the injury. *Jordan*, *Largo*, and *Joseph* all involved statements prompted by law enforcement officials asking the declarants about what happened.

On the other hand, it is also unlikely for there to be many prompted DD hearsay statements made by declarants who could plan the statements before their death. One could conceive of a hypothetical where a person explains her reasons for suicide in response to a question by a negotiator, which are subsequently brought by the negotiator into court after the declarant commits suicide. But people do not usually ask a person, "Why are you dying?" As a result, the DD hearsay statement made by declarants who still have time to plan their statements before they die will generally be made on their own initiative.

This Article will refer to those statements that are prompted and made without an opportunity for planning as "Type A" DD hearsay statements. And it will refer to those statements made on a declarant's own initiative with an opportunity for

65. The message in blood appeared not to have been used as DD hearsay evidence in *D'Amico*. *D'Amico v. Sec'y of Dep't of Corr.*, No. 8:11-cv-20-T-27EAJM, 2014 WL 1248071, at *6 (M.D. Fla. Mar. 26, 2014).

planning as “Type B” DD hearsay statements. It must be noted that this classification scheme is made out of conceptual convenience; in real-life, almost all statements would fall somewhere between the two extremes. Even in *Jordan*, *Largo*, and *Joseph*, which were closest to the Type A extreme, the declarants still had the opportunity and time to talk to more than one witness. It would not be entirely right to say that they had absolutely no opportunity to plan their DD hearsay statements. There is no way to draw realistic, bright-line distinctions between the various types of DD hearsay evidence.

III. SUSCEPTIBILITY OF DD HEARSAY EVIDENCE TO FABRICATION, COACHING, AND CONFABULATION

Fabrication, coaching, and confabulation are all potential sources of falsity but they are not the same thing. Fabrication and coaching involve intentional deception. A declarant making a fabricated or coached statement intends the statement to be false. In contrast, confabulations are false memories; confabulators sincerely believe in the veracity of their memories despite their falsity.⁶⁶ The susceptibility of DD hearsay evidence to such intentional and unintentional deception is separately discussed.

A. Fabrication and Coaching

As in the case of PSI and EU hearsay evidence, a number of conditions must be met for lies to enter into DD hearsay evidence.⁶⁷ First, there must be an opportunity to lie. Second, the declarant must make the decision to lie. Third, lies inserted into the hearsay statement must be of sufficient quality for the hearsay to be moved into evidence.

These three conditions have been discussed extensively with regard to PSI and EU hearsay evidence; therefore, this Article only briefly summarizes the findings of those studies and highlights the differences where applicable. This Article will then review the existing research about suicide notes and last statements of death penalty convicts to observe what people say in real-life, near-death circumstances. It will then attempt to draw out the combined teachings of the literature and address the criticism that persons who are about to die may make use of their death to incriminate others.

1. Opportunity to Falsify a DD

The PSI and EU studies have inferred a number of situational barriers against the injection of lies into PSI and EU hearsay evidence.⁶⁸ First, a lying declarant needs to be sure that there is, in fact, a witness to the hearsay statement and that the

66. See Lau, *PSI Study*, *supra* note 10, at 200–01.

67. See *id.* at 184; Lau, *EU Study*, *supra* note 11 (manuscript at 14–15).

68. Lau, *PSI Study*, *supra* note 10, at 185; Lau, *EU Study*, *supra* note 11 (manuscript at 15).

witness is not in a position to refute the description about the subject event or condition. Second, the physical evidence about the subject event or condition must allow for a plausible lie to be incorporated into the hearsay evidence. Third, the range of plausible lies permitted by the event or condition must be capacious enough to accommodate a lie that could benefit the declarant.⁶⁹

Analogues of these situational factors also exist in terms of the presence of lies in DD hearsay evidence, which is concerned with the cause or circumstances of the declarant's death.

First, a dying declarant seeking to make use of his death to create hearsay evidence needs to be sure that there is someone else who will be witness to his statement and that the witness will actually believe and do something with his statement.⁷⁰ The first part of this condition is easily met in cases involving Type B DD hearsay evidence, such as *Pittman* and *Bray*, where the declarants wrote the notes containing the DD and thereby engineered the presence of witnesses. However, Type A DD declarants do not have this luxury. For there to be DD hearsay evidence in these cases, the declarants need to find witnesses before they die. And both Type A and Type B DD declarants need the witnesses to take action with their statements and bring the statements to court rather than summarily dismiss them.

Second, the available physical evidence about the death of a DD declarant must still allow the construction of a plausible lie. It is well-known that John Adams uttered Thomas Jefferson's name in his last words.⁷¹ But, however much enmity Adams might have felt against Jefferson at that moment, it would not have been plausible for Adams to use his last words to accuse Jefferson of strangling him. After all, Jefferson was far away and actually died a few hours before him. There was no plausible lie for Adams to make about Jefferson that would lead to a prosecution.

Third, even if the circumstances of the death permit the generation and construction of plausible lies, there may be no lie that could be useful to the DD declarant. A dying person likely can inject lies into a DD to create suspicions about or even to destroy another person known to be near him when he was dying. But such person must still be someone he would want to harm. A person dying of natural causes while surrounded by family members at her deathbed may not have anyone who she can plausibly accuse that she would find it pleasing to accuse.

It is not possible to estimate how often these situational barriers exist to protect statements made by dying persons from being contaminated with lies; however,

69. Lau, *PSI Study*, *supra* note 10, at 185.

70. This condition applies to all DD hearsay statements, whether true or false. A dying person who has no one but the murderer to serve as witness to his DD can have no expectation that his DD, however true, will ever be brought to court as evidence.

71. 7 MEMOIRS OF JOHN QUINCY ADAMS 133 (Charles Francis Adams ed., Philadelphia, J. B. Lippincott & Co. 1875).

they do exist at least some of the time. Certainly, it would seem that Type B DD hearsay evidence would be more vulnerable to lying. For example, a person who commits suicide has more flexibility to manipulate the physical evidence to make his blame of others more plausible than a person who is already mortally wounded by a gunshot.

2. *Deciding to Falsify a DD*

Even if the conditions allow the declarant to inject lies into a DD, the declarant must still make the decision to lie. The literature about lying has been extensively reviewed in the PSI study,⁷² and will only be briefly repeated here.

Deciding to lie requires cognitive effort and hinges on the presence of a motivation to lie.⁷³ Generally, when there is a motivation to lie, the default response is to lie, and when there is no motivation to lie, the default response is to tell the truth.⁷⁴

The suppression of the default response—to lie when there is no motivation to lie or to be honest when there is a motivation to lie—requires cognitive effort.⁷⁵ During this deliberative process, the mind may weigh such factors as moral judgment and the justification for lying.⁷⁶ The process requires time and demands attentional focus.⁷⁷ It is more impaired under situations of high cognitive load, such as conditions that promote attentional lapses or depletion of self-control,⁷⁸ or under fatigue, such as conditions of sleep deprivation or later times of the day.⁷⁹

72. See Lau, *PSI Study*, *supra* note 10, at 187–89.

73. See Bruno Verschuere & Shaul Shalvi, *The Truth Comes Naturally! Does It?*, 33 J. LANGUAGE & SOC. PSYCHOL. 417, 420–21 (2014).

74. See *id.* at 421; Sean A. Spence et al., *Behavioural and Functional Anatomical Correlates of Deception in Humans*, 12 NEUROREPORT 2849, 2852 (2001); Bruno Verschuere et al., *The Ease of Lying*, 20 CONSCIOUSNESS & COGNITION 908, 909 (2011).

75. Shawn E. Christ et al., *The Contributions of Prefrontal Cortex and Executive Control to Deception: Evidence from Activation Likelihood Estimate Meta-Analyses*, 19 CEREBRAL CORTEX 1557, 1558 (2009); Evelyne Debey et al., *Lying and Executive Control: An Experimental Investigation Using Ego Depletion and Goal Neglect*, 140 ACTA PSYCHOLOGICA 133, 138–40 (2012) [hereinafter Debey et al., *Lying and Executive Control*]; Evelyne Debey et al., *Lying Relies on the Truth*, 132 COGNITION 324, 331 (2014) [hereinafter Debey et al., *Lying Relies on the Truth*]; Ahmed A. Karim et al., *The Truth About Lying: Inhibition of the Anterior Prefrontal Cortex Improves Deceptive Behavior*, 20 CEREBRAL CORTEX 205, 209–10 (2010); Shaul Shalvi et al., *Honesty Requires Time (and Lack of Justifications)*, 23 PSYCHOL. SCI. 1264, 1268 (2012).

76. Nobuhito Abe et al., *The Neural Basis of Dishonest Decisions that Serve to Harm or Help the Target*, 90 BRAIN & COGNITION 41, 41 (2014); Debey et al., *Lying and Executive Control*, *supra* note 75, at 138–40; Shalvi et al., *supra* note 75, at 1268; Jeffrey J. Walczyk et al., *Cognitive Mechanisms Underlying Lying to Questions: Response Time as a Cue to Deception*, 17 APPLIED COGNITIVE PSYCHOL. 755, 771 (2003) [hereinafter Walczyk et al., *Cognitive Mechanisms*].

77. 79 Debey et al., *Lying and Executive Control*, *supra* note 75, at 138, 140; Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 191, 199 (2011).

79. Christopher M. Barnes et al., *Lack of Sleep and Unethical Conduct*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 169, 177–78 (2011); Maryam Kouchaki & Isaac H. Smith, *The Morning Morality Effect: The Influence of Time of Day on Unethical Behavior*, 25 PSYCHOL. SCI. 95, 100 (2013).

This research would again suggest that Type B DD hearsay statements are more susceptible to lying than Type A DD hearsay statements.⁸⁰ Type B DD declarants may have significantly more time and, importantly, are in far better shape to identify the motivation to lie.

3. *Injecting Lies into a DD*

As the PSI study makes clear, actually constructing a lie requires a mental step distinct from the mere decision to lie.⁸¹ Constructing a lie requires additional time and cognitive resources⁸² for the individual to perceive the truth of the situation, mentally suppress the urge to tell the truth, and then consciously state something different.⁸³ And, just as in the case of PSI and EU statements, for a DD to be submitted into evidence, any lie would have to be of some quality because the duty of candor to the tribunal forbids attorneys from offering evidence they know to be false.⁸⁴

The difficulty of lying increases when there is a greater need to think through the lie. In other words, a more complex lie or a more complex situation requires greater cognitive effort.⁸⁵ For example, research finds that lying is more cognitively taxing and takes longer when multiple lies are plausible or when the lies are made in response to open-ended questions rather than yes/no questions.⁸⁶ When a lie must fit within a narrative to advance an agenda, the liar needs to expend

80. Whether Type A DD declarants may decide to lie is conceptually related to the question of whether EU declarants may decide to lie. See Lau, *EU Study*, *supra* note 11. As in the case of EU, the declarant of a Type A DD is also under stress, except the stress is considerably higher, given that the DD declarant is suffering from a life-threatening injury.

81. Lau, *PSI Study*, *supra* note 10, at 191; see also Jeffrey J. Walczyk et al., *Advancing Lie Detection by Inducing Cognitive Load on Liars: A Review of Relevant Theories and Techniques Guided by Lessons from Polygraph-Based Approaches*, *FRONTIERS PSYCHOL.*, Feb. 2013, at 1, 4 (proposing the Activation-Decision-Construction model of lying where the construction of lies is a separate step).

82. Jeffrey J. Walczyk et al., *Lying Person-to-Person About Life Events: A Cognitive Framework for Lie Detection*, 58 *PERSONNEL PSYCHOL.* 141, 145 (2005) [hereinafter Walczyk et al., *Lying Person-to-Person*]; Emma J. Williams et al., *Telling Lies: The Irrepressible Truth?*, *PLOS ONE*, Apr. 2013, at 1, 12.

83. Christ et al., *supra* note 75, at 1558; Evelyne Debey et al., *From Junior to Senior Pinocchio: A Cross-Sectional Lifespan Investigation of Deception*, 160 *ACTA PSYCHOLOGICA* 58, 65–66 (2015); Debey et al., *Lying Relies on the Truth*, *supra* note 75, at 331; Walczyk et al., *Cognitive Mechanisms*, *supra* note 76, at 766–77.

84. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 1983). At the least, attorneys will avoid submitting such evidence when they believe the factfinder may catch the lies within. It should be noted that another scholar has proposed that a lie in hearsay evidence ought to be capable of "withstand[ing] effective subsequent rebuttal by the other facts in the case." Edward J. Imwinkelried, *The Case for the Present Sense Impression Hearsay Exception: The Relevance of the Original Version of Federal Rule of Evidence 803 to Judge Posner's Criticism of the Exception*, 54 *U. LOUISVILLE L. REV.* 455, 477 (2016). This is more stringent than the requirement for quality proposed in this Article and would be more difficult for a lying declarant to meet.

85. Jeffrey J. Walczyk et al., *A Social-Cognitive Framework for Understanding Serious Lies: Activation-Decision-Construction-Action Theory*, 34 *NEW IDEAS PSYCHOL.* 22, 33 (2014).

86. Williams et al., *supra* note 82, at 12; Walczyk et al., *Lying Person-to-Person*, *supra* note 82, at 160.

cognitive effort to keep the story straight.⁸⁷ Maintaining a plausible and consistent narrative should be more difficult under situations that increase cognitive load.⁸⁸ To that end, lying by omitting information should be cognitively easier because, unlike more active forms of lying, it does not require assessing the truth, inhibiting an urge to tell the truth, and then creating a lie that counters the truth.⁸⁹ Research suggests that lying by omission may be the most prevalent form of deception.⁹⁰

Lying in response to an expected opportunity may also be easier because retrieval of rehearsed lies from memory takes less cognitive effort than the generation of spontaneous lies.⁹¹ But even when a lie has been prepared in advance, lying may still be more difficult than telling the truth because truthful knowledge may be encoded in a larger portion of the brain.⁹²

Furthermore, a successful liar must appear honest and credible, which motivates them to regulate their own behavior as well as to monitor the behavior of surrounding people.⁹³ This behavioral monitoring may constitute an additional cognitive burden.⁹⁴

Again, these findings lead to the conclusion that DD hearsay evidence in the Type B extreme are more susceptible to lies than those in the Type A extreme.⁹⁵ Type B DD declarants will usually have the cognitive capacity to construct better lies.

4. *Research on Actual Statements Made Near Death*

The pages above have discussed the necessary ingredients for hearsay evidence to be contaminated with deliberate lies: (1) the opportunity for falsification; (2) the

87. G. Ganis et al., *Neural Correlates of Different Types of Deception: An fMRI Investigation*, 13 CEREBRAL CORTEX 830, 835 (2003).

88. See Aldert Vrij et al., *Increasing Cognitive Load to Facilitate Lie Detection: The Benefit of Recalling an Event in Reverse Order*, 32 LAW HUM. BEHAV. 253, 254–55, 259–60, 262–63 (2008) [hereinafter Vrij et al., *Increasing Cognitive Load*] (finding that increasing cognitive load by requesting a narrative in reverse order increased cues and thus detection of deception by police officers).

89. Timothy R. Levine et al., *Self-Construal, Self and Other Benefit, and the Generation of Deceptive Messages*, 31 J. INTERCULTURAL COMM. RES. 29, 34 (2002).

90. *Id.* at 43.

91. Ganis et al., *supra* note 87, at 831; Aldert Vrij et al., *Saccadic Eye Movement Rate as a Cue to Deceit*, 4 J. APPLIED RES. MEMORY & COGNITION 15, 18 (2015) [hereinafter Vrij et al., *Saccadic Eye Movement Rate*]; Lara Warmelink et al., *The Effect of Question Expectedness and Experience on Lying about Intentions*, 141 ACTA PSYCHOLOGICA 178, 178 (2012).

92. Ganis et al., *supra* note 87, at 834–35. *But see* Vrij et al., *Saccadic Eye Movement Rate*, *supra* note 91, at 18 (finding saccadic eye movements, correlated with the search of long term memory, to be higher in the telling of planned lies than in truth-telling, although the difference was not considered significant).

93. See Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74, 103 (2003); Kamila E. Sip et al., *When Pinocchio's Nose Does Not Grow: Belief Regarding Lie-Detectability Modulates Production of Deception*, FRONTIERS HUM. NEUROSCIENCE, Feb. 2013, at 1, 9; Vrij et al., *Increasing Cognitive Load*, *supra* note 88, at 254, 259.

94. DePaulo et al., *supra* note 93, at 103; Sip et al., *supra* note 93, at 9; Vrij et al., *Increasing Cognitive Load*, *supra* note 88, at 254, 259.

95. Again, whether Type A DD declarants may be able to create good lies is conceptually related to the question of whether EU declarants may do the same. See *supra* note 80.

decision to falsify; and (3) the construction of good falsification. The research suggests that Type B DD hearsay evidence may be more vulnerable to deliberate lies, in that Type B DD declarants have more time and cognitive capacity to inject lies into their hearsay statements. However, none of the research about these three factors concerns statements made by dying persons. Without some other indicia of the reliability of either Type A or Type B DD hearsay statements, these findings alone are insufficient for drawing conclusions about the overall reliability of DD hearsay evidence.

There are two variants of statements made by persons shortly before their death which have been the subject of academic research: suicide notes and last statements given by death penalty convicts. This Article, therefore, reviews both bodies of literature and attempts to draw conclusions about the reliability of DD hearsay evidence.

It is important to note, however, the limitations to this approach. Suicide notes and last statements form an extremely small subset of all statements that people make when they die. In some sense, they can only directly speak to DD hearsay evidence of the Type B extreme.⁹⁶ There is a considerable gap in interpolating from persons writing suicide notes or delivering last statements to the Type A DD declarants who are dying of mortal wounds, as was the case in *Jordan*, *Largo*, and *Joseph*.

But, as stated earlier, it is practically and ethically impossible to subject persons to death to see if they will lie. There is no way to test the reliability of the DD hearsay exception by direct experimentation. Reviewing the research about suicide notes and last statements is, therefore, very valuable because the combined findings can provide some baseline reference, however imperfectly, into what people think or say at the verge of death. It represents a great leap beyond existing legal studies, none of which appear to draw upon research of real statements made by dying persons.⁹⁷

a. Suicide Notes

It must be acknowledged that suicide notes, at least within the United States, are a comparatively rare phenomenon.⁹⁸ In a recent study of suicide notes written by suicide victims in Kentucky, only 18% of the suicides with known circumstances

96. A suicide note was admitted in *Pittman*. See *Pittman v. Cty. of Madison*, No. 08-cv-890-SMY-DGW, 2015 WL 557248, at *3 (S.D. Ill. Feb. 10, 2015). The question of whether last statements are admissible as DD hearsay evidence appears not to have been considered in the federal courts. One state case touched on the issue. See *Thompson v. State*, 796 N.E.2d 834, 840 (Ind. Ct. App. 2003) (“While we do not foreclose the possibility that a statement made by a death row inmate may properly be admitted as a dying declaration in a criminal proceeding, the facts of this case do not qualify [the inmate’s] statement as such.”).

97. See, e.g., Stephen J. Cribari, *Is Death Different? Dying Declarations and the Confrontation Clause After Crawford*, 35 WM. MITCHELL L. REV. 1542 (2009); Liang, *supra* note 22; Orenstein, *supra* note 23.

98. Julie Cerel et al., *Who Leaves Suicide Notes? A Six-Year Population-Based Study*, 45 SUICIDE & LIFE-THREATENING BEHAV. 326, 326 (2015).

included a note.⁹⁹ Scholars do not appear, at this time, to have agreed on how demographic factors such as gender and education relate to the frequency of note-leaving.¹⁰⁰ It is possible that cultural factors and even media influence play a role.¹⁰¹ There may also be a correlation between the method of suicide and the frequency of notes; for example, persons who poison themselves are more likely to leave notes than are persons who kill themselves by firearm, hanging, or jumping from heights.¹⁰² But notably, the circumstances faced by those who commit suicide, such as depression and financial problems, and the reasons for suicide, do not appear to affect the frequency of note-leaving.¹⁰³

Compared to the frequency of note leaving, the content of the notes appears to be better understood. Although methodology differs from study to study, and although demographic factors such as gender and age are known to play a role in content,¹⁰⁴ scholars are overwhelmingly in agreement that suicide notes are generally positive in expressing relationship themes.¹⁰⁵ The most frequently observed themes and categories in suicide notes concern instructions to others after death and expressions of love.¹⁰⁶ Of particular interest to the question of DD hearsay reliability, expressions of guilt, shame, or blame of self are far more prevalent than those of blame of others, anger, or hurt.¹⁰⁷ Although religious

99. *Id.* at 328.

100. *See id.* at 327; Paul W.C. Wong et al., *Suicide Notes in Hong Kong in 2000*, 33 *DEATH STUD.* 372, 373 (2009).

101. *See* Wong et al., *supra* note 100, at 379.

102. *See, e.g.*, Valerie J. Callanan & Mark S. Davis, *A Comparison of Suicide Note Writers with Suicides Who Did Not Leave Notes*, 39 *SUICIDE & LIFE-THREATENING BEHAV.* 558, 564 tbl.3 (2009); Cerel et al., *supra* note 98, at 330 tbl.1; *see also* Wong et al., *supra* note 100, at 379–80 (results from Hong Kong); N. Heim & D. Lester, *Do Suicides Who Write Notes Differ from Those Who Do Not? A Study of Suicides in West Berlin*, 82 *ACTA PSYCHIATRICA SCANDINAVICA* 372 (1990) (results from West Germany).

103. Callanan & Davis, *supra* note 102, at 564 tbl.3; Cerel et al., *supra* note 98, at 331–33; *see also* Ana-María Chávez-Hernández, *Suicide Notes in Mexico: What Do They Tell Us?*, 36 *SUICIDE & LIFE-THREATENING BEHAV.* 709, 713 tbl.2 (2006) (results from Mexico); Toshiki Shioiri et al., *Incidence of Note-Leaving Remains Constant Despite Increasing Suicide Rates*, 59 *PSYCHIATRY & CLINICAL NEUROSCIENCES* 226, 228 (2005) (results from Japan).

104. *See* John P. Pestian et al., *What's in a Note: Construction of a Suicide Note Corpus*, *BIOMEDICAL INFORMATICS INSIGHTS*, Nov. 2012, at 1, 2.

105. *See* Sandra Sanger & Patricia McCarthy Veach, *The Interpersonal Nature of Suicide: A Qualitative Investigation of Suicide Notes*, 12 *ARCHIVES SUICIDE RES.* 352, 361–62 (2008).

106. *Id.* at 358 tbl.1; Bart Desmet & Véronique Hoste, *Emotion Detection in Suicide Notes*, 40 *EXPERT SYS. WITH APPLICATIONS* 6351, 6355 fig.3 (2013); Maria Ioannou & Agata Debowska, *Genuine and Simulated Suicide Notes: An Analysis of Content*, 245 *FORENSIC SCI. INT'L* 151, 155, 157 (2014); Pestian et al., *supra* note 104, at 5 tbl.3.

107. Drew Coster & David Lester, *Last Words: Analysis of Suicide Notes from an RECBT Perspective: An Exploratory Study*, 31 *J. RATIONAL-EMOTIVE & COGNITIVE-BEHAV. THERAPY* 136, 143–45 (2013); Pestian et al., *supra* note 104, at 5 tbl.3; Sanger & Veach, *supra* note 105, at 358 tbl.1, 360–61; *see also* Lisa McClelland et al., *A Last Defence: The Negotiation of Blame Within Suicide Notes*, 10 *J. COMMUNITY & APPLIED SOC. PSYCHOL.* 225, 233 (2000) (finding that out of 172 suicide notes analyzed in Exeter, United Kingdom, sixty-eight involved an absolution of others, while thirty-four allocated blame directly or indirectly to others).

content is a known theme of suicide notes,¹⁰⁸ there are insufficient up-to-date studies concerning whether spirituality or religious thoughts are on the mind of persons who commit suicide.¹⁰⁹

Interestingly enough, some of these factors have been helpful in distinguishing between genuine and simulated suicide notes. Genuine notes are more likely to be positive in tone and to contain instructions and less likely to explain the reasons for suicide.¹¹⁰

b. Last Statements

At the outset, any attempt to draw broader implications about DD hearsay statements based on research into the contents of last statements of death penalty convicts must necessarily accept the very narrow demographics of these convicts as a caveat. From the beginning of 2000 to the end of 2011, the United States executed 679 people; of these, 34% were black and 1% were women.¹¹¹ Most executions took place in the South.¹¹² Cultural and racial differences are known to be reflected in the contents of last statements;¹¹³ so, the studies from last statements appear extremely unlikely to be representative of DD declarants in general.

The vast majority of death penalty convicts choose to give a statement.¹¹⁴ A large portion of the last statements are positive in tone, with well-wishes serving as the dominant theme.¹¹⁵ Notably, religious references, such as mentions of afterlife and prayers, constitute a major theme in many last statements as well.¹¹⁶ Expressions of contrition, apologies, and admissions of guilt occur at a far higher

108. See Jerry Jacobs, *A Phenomenological Study of Suicide Notes*, 15 SOC. PROBS. 60, 70–72 (1967).

109. There are two relatively recent studies which looked into the spiritual content of suicide notes. See Lenora M. Olson et al., *Suicide Notes Among Native Americans, Hispanics, and Anglos*, 21 QUALITATIVE HEATH RES. 1484, 1489–90 (2011); James R. Rogers et al., *Content Analysis of Suicide Notes as a Test of the Motivational Component of the Existential-Constructivist Model of Suicide*, 85 J. COUNSELING & DEV. 182, 185–86 (2007). These studies cannot speak generally to the religious themes of suicide notes because they concern whether, at least according to suicide notes, spirituality was a motivation for suicide. Suicide notes which cite spirituality as a motivation are necessarily a subset but not the entirety of suicide notes which contain religious or spiritual themes. For what it is worth, one of these studies identified spiritual motivations in about 20% of the suicide notes in the study. See *id.* at 185.

110. Natalie J. Jones & Craig Bennell, *The Development and Validation of Statistical Prediction Rules for Discriminating Between Genuine and Simulated Suicide Notes*, 11 ARCHIVES SUICIDE RES. 219, 224–25 (2007); David Lester, *Differences Between Genuine and Simulated Suicide Notes*, 103 PSYCHOL. REP. 527, 527–28 (2008).

111. Judy Eaton, *Honor on Death Row: Apology, Remorse, and the Culture of Honor in the U.S. South*, SAGE OPEN, Apr.–June 2014, at 1, 3–4.

112. *Id.* at 3.

113. See *id.* at 6–7.

114. See Robert Johnson et al., *Death Row Confinement and the Meaning of Last Words*, 3 LAWS 141, 146 (2014) (finding about twenty-five percent of inmates choose not to give a statement).

115. Scott Vollum & Dennis R. Longmire, *Giving Voice to the Dead: Last Statements of the Condemned*, 12 CONTEMP. JUST. REV. 5, 10–12 (2009).

116. *Id.* at 13–15.

frequency than denials of responsibility.¹¹⁷ Even among those death penalty convicts who deny guilt, the vast majority do so by assertions of innocence; very few go on to blame someone or something else in particular.¹¹⁸ In a study of 251 last statements in Texas, only thirteen externalized any blame.¹¹⁹ This number is worth noting in light of the fact that eight statements contained an explicit acceptance of responsibility for crimes beyond the murder for which the convicts were executed.¹²⁰

Finally, the longer a convict has been on death row, the less likely he will express remorse.¹²¹ On the other hand, the presence of the victim's family at the execution increases the likelihood of an expression of remorse.¹²²

5. Combined Conclusions

The similarity in the contents of suicide notes and last statements is remarkable given the obvious differences in the circumstances from which the two types of statement originate.¹²³ Both are generally positive and contrite in tone and demonstrate care and concern for others.¹²⁴ The reasons given for the contents of

117. *Id.* at 11 tbl.1; *see also* Judy Eaton & Ann Theuer, *Apology and Remorse in the Last Statements of Death Row Prisoners*, 26 JUST. Q. 327, 337–38 (2009) (“Of the 305 inmates who provided a last statement, approximately one-quarter of them . . . offered an apology to the victim’s family. Approximately one-fifth of them . . . asked for forgiveness, and but [sic] only 8.5 percent made expressions of remorse. Only 10.8 percent of prisoners took responsibility for their crime, although 22.6 percent admitted that they were guilty. Some (16.4 percent) also claimed innocence.”).

118. *See* Vollum & Longmire, *supra* note 115, at 19–20.

119. *Id.* at 11 tbl.1.

120. *Id.* at 12 tbl.1.

121. Eaton, *supra* note 111, at 6.

122. *Id.*

123. Anecdotal observations of soldiers dying of battlefield wounds suggest that the conclusions of these two lines of research may actually be universal to statements made at the point of death. *See, e.g.*, Brooks O’Kane, *Dying Soldiers’ Last Words Both Called Out for ‘Mom’*, SEACOASTONLINE (May 12, 2012), <http://www.seacoastonline.com/article/20120512/Opinion/205120326> (“[A] very young [U.S.] soldier[’s] . . . only words were, ‘Mom, mom,’ then he died. A few months later some of us were taking out snipers on top of a ridge, in the woods, in Germany. A German soldier rose in front of me . . . [H]e was wounded badly in the stomach . . . He uttered these words over and over . . . ‘Mutter, mutter.’”); Olha Omelyanchuk, *Surgeon from the ATO Zone: Before Death, All Soldiers Call for Their Mothers* EUROMAIDAN PRESS (Aug. 4, 2014), <http://euromaidanpress.com/2014/08/04/surgeon-from-the-ato-zone-before-death-all-soldiers-call-for-their-mothers> (“When soldiers are dying, they all say the same thing: they call for their mother or their fellow soldiers.”); Robert E. Serafin, *Where Soldiers Cried for Morphine, Their Mothers*, MORNING CALL (MAY 27, 2002), http://articles.mcall.com/2002-05-27/news/all-robertserafin_1_morphine-german-plane-boom (“There was one guy in a complete body cast from the neck down. He must have had a back injury and was in awful pain, and he was crying for his mother. . . . I found out in Vietnam, too, that as soon as a guy would be in bad shape, he’d always ask for his mother.”).

124. Among the most famous recorded last words were those of Socrates. According to Plato, Socrates stated, after the hemlock he drank began to take effect, “Crito, we ought to offer a cock to Asclepius. See to it, and don’t forget.” Colin Wells, *The Mystery of Socrates’ Last Words*, 16 ARION 137, 138 (2008). Philosophers have long sought to find deep meaning within the words. *See id.* However, the scientific research cited within this article gives a far more mundane explanation: like many others confronting death, Socrates was simply giving instructions to his friends.

each type of statement are also similar. One article offers this explanation for the presence of positive, interpersonal themes in suicide notes:

Positive relationship themes, such as saying “I love you” and praising others, were more frequent than negative themes such as loneliness, isolation, and overt hostility. These results are consistent with prior findings that over one-half of a suicide note sample contained positive affective statements, while about one-fourth showed negative or hostile affect. In contrast with prior postulations, the present sample rarely expressed hostility or blamed others for the suicide. These results are somewhat surprising, as presentations of suicidal individuals are often permeated with negative cognitions and affect states that may preclude their awareness of positive relationships. It may be that even though suicidal individuals can access social support, they feel hopeless that anyone can help. Perhaps, paradoxically, consideration of the finality of impending suicide and the associated relief at finding a solution to life’s problems allow distressed individuals to acknowledge positive connections, even if they believe they cannot be helped. It is likely more important to simply recognize that many individuals considering suicide have positive relationships in their lives. Further evidence for positive connections may be seen in the theme of *concern for others*.¹²⁵

The article then goes on to explain:

The pervasiveness of interpersonal themes in the suicide notes is further evidenced by their occurrence even within what might be considered the most *banal* content, that is, instructions to others. Although many of the categories comprising this theme could be considered utilitarian (e.g., settling final affairs), they also might indicate decedents’ efforts to ease transitions following their deaths for loved ones. Furthermore, the relational instructions category more explicitly demonstrates individuals’ efforts to orchestrate interpersonal plans even after their deaths. Numerous statements comprising this category also revealed the note writers’ care and concern for others.¹²⁶

Here is another author’s explanation of the themes contained in last statements:

The most common theme expressed in the last words of the condemned involved expressions of well-wishes and love. In 58.6% of [292] cases the condemned made some form of positive statement toward others usually reflecting love or encouragement. The majority (117 of 171) of these were in the form of statements directed at the condemned’s family or friends. In 40.1% of all cases, last statements included an expression of love or well-wishes to family and friends These expressions of love were often accompanied by words of encouragement to family members and friends. In a somewhat ironic twist, the last statements often reveal the condemned attempting to console

125. Sanger & Veach, *supra* note 105, at 361 (citations omitted).

126. *Id.* at 162 (citation omitted).

loved ones while facing his or her death [A] substantial proportion (14.7%) of the condemned expressed a wish for peace or closure for the co-victims

It is interesting that the single most predominant theme among the last statements of the condemned is one in which s/he expresses love, concern, and even sacrifice for others. Perhaps this stems from a need to make death—a premature and involuntary death—righteous. The condemned may, through such expressions, be transforming what is a situation of powerlessness and helplessness into one in which s/he can feel some level of control. By expressing well-wishes, love, encouragement, and wishes for closure and peace, the condemned effectively transform their execution into something that transcends their otherwise defiled death. By transforming their death into an event that may bring some good to others or by granting their love and encouragement, they exult themselves to a position of beneficence and righteousness—a sort of martyrdom. Whatever the reason, the fact that the majority of the condemned use their last statements, at least in part, to express positive feelings of compassion for and connection to other individuals is an astounding reality when considering the circumstances of their life and death.¹²⁷

From the evidentiary point of view, it is not the positive content, apologies, and contrition in hearsay statements that matter. Rather, it is the frequency with which these statements assign blame that is of greater interest. It is a bedrock principle of Anglo-American jurisprudence that wrongful convictions are more unjust than wrongful exonerations.¹²⁸ Accordingly, statements of self-incrimination, which may deflect blame from true culprits, do not present as much of a problem to the justice system as statements of blame, which may result in wrongful convictions. Furthermore, as mentioned above, lying by omission is the easiest and probably the most common form of deception.¹²⁹ A dying person who seeks to shield her killer from prosecution could resort to saying nothing, and, in those cases, there would be no DD hearsay evidence to speak of.

It is, therefore, noteworthy that in both suicide notes and last statements, explicit hostility and assignment of blame towards other persons may be rare.¹³⁰ To the extent that suicide notes and last statements are representative of Type B DD hearsay statements, this particular finding suggests that Type B DD declarants are in most cases not seeking to blame others for their deaths when they are about to die. Rather, the declarants may be more likely to seek reconciliation and to

127. Vollum & Longmire, *supra* note 115, at 10, 12–13 (citation omitted).

128. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *352 (“[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”).

129. See Levine et al., *supra* note 89, at 34.

130. Sanger & Veach, *supra* note 105, at 358 tbl.1, 360–61; Vollum & Longmire, *supra* note 115, at 20–21 (citation omitted).

communicate to their loved ones. These features can be observed in *Pittman*, for example, where the suicide note is, on the whole, a show of love and concern for loved ones.¹³¹ The accusation concerning the guards is almost incidental.¹³²

The research is not conclusive about how the old, religious justification for the DD hearsay exception may apply to Type B DD hearsay evidence although there may be a kernel of truth in it given the frequency of religious themes in last statements. But the Advisory Committee's rationale that "it can scarcely be doubted that powerful psychological pressures are present,"¹³³ is certainly correct with respect to Type B DD hearsay evidence, in that there appears to be a natural force towards seeking positive connections to other humans at death. Those rare Type B DD hearsay statements that do assign blame and which become Type B DD hearsay evidence may be reliable.

With regard to Type A DD hearsay evidence, the research about the process of lying already suggests that it would be more difficult to falsify Type A than Type B DD hearsay evidence. There is already some reason to think that Type A DD hearsay evidence may be reliable.

In addition, notwithstanding the earlier caveats, the literature about suicide notes and death statements does seem to have some bearing on declarants of Type A DD hearsay evidence. Judicial opinions often do not capture all the words DD declarants may have uttered before their demise, so there is insufficient context for a full analysis of real-life Type A DD hearsay evidence. Still, from the fragments of their statements documented in judicial opinions, Type A DD declarants do appear to show care and concern for others in their last moments just like suicide note writers and death penalty convicts. For example, in *Largo*, in the portion of the DD excluded for being excessively prejudicial,¹³⁴ the declarant showed her concern for her children when she informed the police about the safety threat at the high school.¹³⁵ Examples of such behavior can be observed in other declarants of Type A DD hearsay evidence.¹³⁶ Just like their Type B counterparts, Type A DD

131. See *Pittman v. Cty. of Madison*, No. 08-cv-890-SMY-DGW, 2015 WL 557248, at *2 (S.D. Ill. Feb. 10, 2015).

132. See *id.*

133. FED. R. EVID. 804(b)(2) advisory committee's note.

134. According to Rule 403, "the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403. To the extent that Rule 403 is used to exclude portions of DD hearsay statements that show concern for other humans, it may undermine the credibility of the resulting DD hearsay evidence by stripping away critical context about the thinking of the declarants. A full exploration about the interaction between Rule 403 and the hearsay exceptions is beyond the scope of this article.

135. See *State v. Largo*, 278 P.3d 532, 534–35 (N.M. 2012). It may also be noted that, in *D'Amico*, the declarant made an explicit effort to tell the neighbor to contact his loved ones. See *D'Amico v. Sec'y of Dep't of Corr.*, No. 8:11-cv-20-T-27EAJM, 2014 WL 1248071, at *1 (M.D. Fla. Mar. 26, 2014).

136. See, e.g., *Conley v. Warden, Ross Corr. Inst.*, No. 2:11-cv-1142, 2013 WL 1787384, at *3 (S.D. Ohio Apr. 25, 2013) ("[The DD declarant's] first request to the [persons who found him dying of gunshot wounds] was to

declarants may also be naturally drawn to reconcile and show concern rather than to blame as they are dying.

In sum, research suggests that DD hearsay statements are unlikely to assign blame. It is impossible to evaluate whether thoughts about the afterlife can account for this, but the research does tend to support the Advisory Committee's statement that "powerful psychological pressures are present" at the point of death, which drive dying persons towards reconciliation and away from accusation. Accordingly, there does seem to be reason to believe, in terms of susceptibility to fabrication and coaching, that DD hearsay evidence is reliable enough to at least warrant a hearsay exception under Rule 804, with all of the additional restrictions articulated in Rule 804(a) cabinining the use of such evidence.

6. Critiques of the DD Hearsay Exception

It is worthwhile to further explore the fear, posed by critics of the DD hearsay exception that, just as Captain Ahab sought to smite Moby Dick with his dying throw, DD declarants may try to ruin their enemies with a dying lie. Judge Posner quoted the following passage from an 1877 opinion of the Wisconsin Supreme Court in his criticism of the DD hearsay exception:

Physical or mental weakness consequent upon the approach of death, *a desire of self-vindication*, or *a disposition to impute the responsibility for a wrong to another*, as well as the fact that the declarations are made in the absence of the accused, and often in response to leading questions and direct suggestions, and with no opportunity for cross-examination: all these considerations conspire to render such declarations a dangerous kind of evidence.¹³⁷

The language, "desire of self-vindication" and "disposition to impute the responsibility for a wrong to another," speak to this concern.

To that end, research about suicide notes and last statements are particularly informative for two reasons. First, both types of statements, as opposed to statements made by persons who are already mortally wounded, allow makers of the statements sufficient time and opportunity to reflect on whether they want to lie and what lie they may deliver. Second, especially in the case of last statements, death penalty convicts have a high incentive to deflect blame or to accuse others. These types of statements are, therefore, good test cases for whether persons may make use of their impending deaths to harm others with false incriminations.

The research cited here does not suggest that these motivations are always absent for note-leavers or death penalty convicts; certainly, there are suicide notes and last statements that express a wish of harm to others.¹³⁸ However, such

allow him to call his loved ones, and he specifically told his girlfriend he 'might not make it.')

Conley, No. 10AP-227, 2010 WL 4793356, at *5 (Ohio Ct. App. Nov. 23, 2010)).

137. Posner, *supra* note 5, at 1471 (emphasis added) (quoting *State v. Dickinson*, 41 Wis. 299, 303 (1877)).

138. See Sanger & Veach, *supra* note 105, at 360–61; Vollum & Longmire, *supra* note 115, at 21.

statements, as stated above, are rare. A study of suicide notes written by 138 individuals from 1955 to 1968 found that less than 15% expressed hostility or blamed others for the suicide, respectively.¹³⁹ In the study of 251 last statements in Texas from 1982 to 2004, only 12% expressed anger and resentment and around 5% externalized blame.¹⁴⁰ If there were a more general “desire” or “disposition” amongst dying persons to use their deaths to destroy their enemies, there should be many more suicide notes and last statements that show accusatory sentiments. The desire to make peace with fellow humans one last time seems to be a far more important driving force for what real-life dying persons say than the wish to capitalize on their deaths to destroy enemies.

In short, the fear that dying persons have a general wish to falsely incriminate is simply not substantiated by research.

B. Confabulation

A detailed scientific review about confabulation has been presented in the PSI study, which will not be repeated here.¹⁴¹ In short, though, confabulations are false memories which often result from brain damage or mental disease, such as Korsakoff’s syndrome or amnesia.¹⁴² While healthy persons also may confabulate, they generally do so during memory tests or under lengthy and pressured questioning.¹⁴³

Overall, confabulations do not appear to present much of a threat to the reliability of DD hearsay evidence. First, it is not likely that attorneys will frequently introduce statements made by declarants known to suffer from brain damage as DD hearsay evidence. It also seems unlikely, absent strong corroborating evidence, that jurors would credit such evidence.

Second, it is unlikely for DD hearsay evidence to be tainted by the type of confabulations created under questioning. For such corruption to occur, it would be necessary for law enforcement to develop and force a narrative about the declarant’s death onto the declarant and for the declarant to accept the narrative and generate false memories to support the narrative. While DD hearsay evidence, particularly those statements of the Type A variety, are with some frequency statements made by declarants to law enforcement (as in *Jordan, Largo, and Joseph*), the officials in these cases generally arrive to find the declarants who are well on their way to death. The officials in these situations have little time to learn

139. Sanger & Veach, *supra* note 105, at 358 tbl.1; *see also* McClelland et al., *supra* note 107, at 233 (finding 20% of 172 suicide notes from Exeter, United Kingdom between 1979 to 1991 involved direct or indirect allocation of blame upon others).

140. Vollum & Longmire, *supra* note 115, at 11–12 tbl.1.

141. *See* Lau, *PSI Study*, *supra* note 10, at 200–03.

142. *See* Michael D. Kopelman, *Varieties of Confabulation and Delusion*, 15 *COGNITIVE NEUROPSYCHIATRY* 14, 15, 18, 21–24 (2010).

143. *Id.* at 21–24; Chris McVittie et al., *The Dog that Didn’t Growl: The Interactional Negotiation of Momentary Confabulations*, 22 *MEMORY* 824, 825–26 (2014).

about what happened from the declarants before they die. It seems quite inconceivable then that the officials could find the necessary facts, formulate theories about the facts, and then make the dying declarants regurgitate these theories as their DD hearsay statements.

Accordingly, there is little reason to think that the reliability of DD hearsay evidence would frequently be harmed by confabulations.

IV. ACCURACY OF OBSERVATION UNDERLYING DD HEARSAY EVIDENCE

Honesty is a necessary but not sufficient condition for reliable DD hearsay evidence. In order for there to be reliable DD hearsay evidence, the declarant must accurately observe and relay the reasons for his demise.

The criticism of the DD hearsay exception along the axis of accuracy of observation is centered on the idea that a person, at death, may not be in the best physical shape to provide accurate observation. Again, here is the criticism that Judge Posner quoted from the Wisconsin Supreme Court:

*Physical or mental weakness consequent upon the approach of death, a desire of self-vindication, or a disposition to impute the responsibility for a wrong to another, as well as the fact that the declarations are made in the absence of the accused, and often in response to leading questions and direct suggestions, and with no opportunity for cross-examination: all these considerations conspire to render such declarations a dangerous kind of evidence.*¹⁴⁴

The phrase, “physical or mental weakness consequent upon the approach of death,” reflects this concern.

Numerous opponents of the DD hearsay exception agree. Of these, the literature review provided by Professor Bryan Liang is the most comprehensive.¹⁴⁵ The full details of his review can be found in his article. Only his summary of the literature is excerpted:

In sum, to determine the inherent reliability of dying declarations, an assessment of the most frequent circumstances that result in these utterances must be made. Epidemiologically, penetrating trauma is the causative factor in most of the homicides in the United States. Hemorrhage functionally leads to anoxic or hypoxic states, causing death. Under controlled conditions, hypoxia alone results in significant effects upon cognition. Further, hypoxic events, trauma, and physical and psychosocial stressors appear to have a causative relationship with delirium, a heightened state of impaired cognition. Because this state would appear to be plausibly relevant to circumstances when dying declara-

144. Posner, *supra* note 5, at 1471 (emphasis added) (quoting *State v. Dickinson*, 41 Wis. 299, 303 (1877)).

145. See Liang, *supra* note 22, at 239–43; see also SAKS & SPELLMAN, *supra* note 22, at 199 (“And, of course, in addition to being under stress, someone who is in fear of imminent death is also likely to be in less-than-perfect physical shape in ways that would affect perception, memory, and reasoning (e.g., injured, drugged, losing blood).”).

tions are uttered, the scientific and medical evidence seriously challenges the contention that dying declarations are inherently reliable.¹⁴⁶

There is certainly no ground to quibble with the idea that traumatic injury negatively affects cognition. There are, however, a number of reasons why the argument provided by Liang does not persuasively show that DD hearsay evidence is, on the whole, unreliable.

First, Liang's argument applies only to Type A DD hearsay evidence. Type B DD declarants, such as those in *Bray* and *Pittman*, are not suffering from hemorrhage. They may be suffering from emotional distress, as in *Bray*, or from incurable diseases, as in *Pittman*, but those are not good reasons for thinking that these declarants are so cognitively impaired that they are unreliable observers about why or how they are about to die.

Second, even for Type A DD hearsay evidence, it is important to note that the observations underlying DD hearsay evidence are mostly made before the traumatic injury occurs. In *Jordan*, for example, the declarant named the defendant who stabbed him and stated that the defendant owed him money for drugs.¹⁴⁷ The declarant certainly knew of these facts before he was fatally stabbed. The problems attendant with perception while suffering from hemorrhage may not be entirely applicable to DD hearsay evidence.

Third, DD hearsay evidence frequently concerns persons familiar to the declarants, as evidenced by the six cases previously discussed. Moreover, Type A DD hearsay evidence appears to often be generated subsequent to a direct interaction between the declarants and the defendants. While the context in which the fatal blows occurred is not clear from the court opinions of *Jordan* and *Joseph*, at least in *Largo* and *D'Amico* it was evident that the declarants and those they accused actually had conversations before the injuries were inflicted.¹⁴⁸ There may be a reason to distrust DD hearsay evidence if the evidence often concerns the identification of strangers. But the demand on the abilities of identification required in real-life DD scenarios does not seem particularly high when the hearsay evidence is so frequently about individuals familiar to declarants and made soon after the declarants had interactions or conversations with these individuals.¹⁴⁹

Fourth, it is important to note that DD hearsay evidence is often part of a larger statement, with content beyond any explicit statement of blame. In *Jordan*, the

146. Liang, *supra* note 22, at 243.

147. *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at *1 (D. Colo. Mar. 3, 2005).

148. *See State v. Largo*, 278 P.3d 532, 534 (N.M. 2012); *D'Amico v. Sec'y of Dep't of Corr.*, No. 8:11-cv-20-T-27EAJM, 2014 WL 1248071, at *1 (M.D. Fla. Mar. 26, 2014).

149. This argument holds particular force in domestic violence cases, such as *Largo*, 278 P.3d 532. *See Orenstein, supra* note 23, at 1457 ("Problems with accuracy are less likely in dying declarations made by intimate partners.").

declarant spoke of the existence of a drug debt.¹⁵⁰ In *Largo*, the declarant warned law enforcement about the petitioner's intent to conduct a school shooting.¹⁵¹ In *Joseph*, the declarant spoke about the caliber of the gun with which he was shot and about the number of times he was shot.¹⁵² In *D'Amico*, the declarant told the person who found him to call his loved ones.¹⁵³

These cases show that real-life DD hearsay evidence is often generated by declarants who, although in bad physical condition, may not be in such poor shape that they can no longer recall what happened or show concern for others. Also, the details DD declarants provide about the circumstances of their deaths permit additional points for corroboration; if these details do not comport with reality, the credibility of their statements may be severely undermined.

At any rate, that DD declarants may be cognitively impaired by their injuries may actually be a reason to think that DD hearsay evidence is reliable. As stated earlier, making the decision to lie and constructing lies are cognitive acts, requiring a certain level of ability and effort.¹⁵⁴ At the least, to inject lies into statements that would mature into DD hearsay evidence, declarants need to understand the available facts and observe the reactions of the witnesses sufficiently well to ensure that the lies they make are plausible and good enough to be brought to court. If it were true that DD declarants have such diminished cognitive ability that they cannot be trusted to accurately perceive or to recall, then there is no reason to think that they would be able to decide to lie or construct good lies. In that case, the Advisory Committee's justification for the EU hearsay exception, that "circumstances may . . . still[] the capacity of reflection and produce[] utterances free of conscious fabrication,"¹⁵⁵ could actually be used as a justification for the DD hearsay exception as well.

In short, it is true that DD declarants are not likely in the best physical shape for accurate observation and recall. However, actual examples of DD hearsay evidence do show that the level of cognitive ability required for accurate observation is not necessarily beyond the physical ability of real-life DD declarants.

CONCLUSION

This Article analyzed the reliability of DD hearsay evidence along two dimensions established by the federal courts: (1) the susceptibility to fabrication, coaching, or confabulation; and (2) the accuracy of underlying observation.

150. *Jordan*, 2005 WL 513501, at *1.

151. *Largo*, 278 P.3d at 534.

152. See Transcript of Proceedings at 14, *United States v. Joseph* (D. Haw. Dec. 27, 2007) (No. 06-cr-00080-SOM-BHK).

153. *D'Amico*, 2014 WL 1248071, at *1.

154. Interestingly enough, Shakespeare noted this in his words: "For they breathe truth that breathe their words in pain." WILLIAM SHAKESPEARE, *RICHARD II*, act 2, sc. 1, at 57 (Barbara A. Mowat & Paul Werstein eds., Folger Shakespeare Library n.d.) (1597)

155. FED. R. EVID. 803(2) advisory committee's note.

With regard to intentional lying, the DD hearsay exception is largely supported by the research showing that lying requires deliberation, which may be more difficult when DD declarants are suffering from grievous injuries. The literature about suicide notes and last statements of death penalty convicts also appear to support the Advisory Committee's explanation of the EU hearsay exception, that "powerful psychological pressures are present" at the point of death, which may drive declarants towards reconciliation and away from false accusations.¹⁵⁶

Confabulations are false memories which often result from brain damage or mental disease; while healthy persons also may confabulate, they generally do so during memory tests or lengthy and pressured questioning. Confabulations do not appear to present much threat to the DD hearsay exception.

The critics of the DD hearsay exception are generally correct that persons suffering from mortal injuries may not be in the best position to observe and to recall. However, actual examples of DD hearsay evidence suggest that the demand for accurate observation may not be so high as to be beyond the capability of real-life DD declarants.

On balance then, there is a reason to think that DD hearsay evidence may be sufficiently reliable to justify the existing hearsay exception. The necessity for DD hearsay evidence was not analyzed in this Article, but to the extent that DD hearsay evidence is necessary, as scholars such as Orenstein have argued,¹⁵⁷ there is more reason for the DD hearsay exception to be retained.

The study concludes a series of studies on the three hearsay exceptions challenged by Judge Posner concerning PSI, EU, and DD.¹⁵⁸ Enough support was identified for the reliability of all three types of hearsay statements to explain why the three hearsay exceptions should be retained.¹⁵⁹ To the extent that these three are considered the worst-justified and least-supported of all hearsay exceptions, these three studies should provide some confidence for the hearsay exceptions as a whole.

It is worthwhile, in conclusion, to reflect on the findings of the three hearsay exceptions. Should it be surprising that the reliability of all three types of excepted hearsay find support in the scientific literature? What do the three studies say about criticisms of evidence law in general?

From a narrow perspective, the lesson from these three studies is that discussions about the hearsay exceptions should be mindful of the distinction between a particular type of hearsay statement and hearsay statements of the particular type that do become hearsay evidence. Not all statements of a particular type will be used as hearsay evidence.

156. *Id.* R. 804(b)(2) advisory committee's note.

157. See Orenstein, *supra* note 23, at 1447–59.

158. See Posner, *supra* note 5, at 1469–71.

159. See Lau, *PSI Study*, *supra* note 10; Lau, *EU Study*, *supra* note 11.

The literal words of the hearsay exceptions themselves are not the only limits on the hearsay statements which are admitted into evidence. The entire machinery of litigation itself acts as a filter. For example, it is simply good practice for attorneys to maintain their credibility by being careful with what they present in court. As a result, one would expect that many unreliable hearsay statements, particularly those which could be easily exposed as lies, would not be used as hearsay evidence. Likewise, hearsay evidence is used to prove facts. If a dying person were only able to mutter something indecipherable or incomprehensible before he died, then his words would not become DD hearsay evidence. Also, the hearsay exceptions are ultimately concerned about trials, and real-life disputes that are brought to trial generally have some heft and seriousness. The EU hearsay exception has been challenged, for instance, with the hypothetical that children can easily fabricate some EU to implicate their siblings when they break household objects.¹⁶⁰ But it is difficult to see how children generating unbelievable lies in this trivial context may be important to any discussion about the EU hearsay exception when the judiciary is rarely, if ever, involved in this type of routine family dispute.

Accordingly, the central concern about hearsay exceptions is not the reliability of all statements that meet the definition of a particular hearsay statement but that of hearsay statements that actually are presented in court as hearsay evidence. Because of the difficulty in predicting which particular hearsay statements may survive the entire filtering process, it is of crucial importance to make some attempt to survey actual cases to examine how the hearsay exceptions are invoked in court. In that way, discussions of the exceptions can be meaningfully focused on those hearsay statements that actually get into evidence.

More broadly, the studies of these three hearsay exceptions counsel caution against the temptation to think that, given the vast advances in the sciences over this past century, all old ideas need to be tossed out. With regard to the three hearsay exceptions, while the idea behind the PSI hearsay exception is more modern, dating to the late nineteenth century,¹⁶¹ the EU and DD hearsay exceptions are truly old. The EU hearsay exception was first known to be invoked, in a more primitive form, in 1694.¹⁶² Although the first reported case employing the DD hearsay exception dates to 1722,¹⁶³ the underlying principle derives from a medieval maxim. All three exceptions, at any rate, seem antiquated to modern eyes; even their names, “present sense impressions,” “excited utterances,” and “dying declarations” reflect outdated diction. It is somewhat understandable that

160. See Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 738 (2015).

161. The PSI hearsay exception was discussed in the 1880s, although the rule itself came into being with the enactment of the Federal Rules of Evidence in 1975. See Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 907–13 (2001) (summarizing the history of the PSI hearsay exception).

162. See *Thompson v. Trevanion* (1693) 90 Eng. Rep. 179; *Skin*. 402.

163. See *Rex v. Reason* (1722) 93 Eng. Rep. 659, 659–60; 1 *Strange* 499, 499–500.

language such as “folk psychology,”¹⁶⁴ “fossil,” and “judicial incuriosity,” and “ancient dogmas” would be used by scholars like Judge Posner to criticize these three exceptions.¹⁶⁵

But reliance on “old” understandings of human nature is not necessarily a bad thing. Here is a list of other ideas that originated around the time of the DD, PSI, and EU hearsay exceptions:

Year	Event
1532	Niccolò Machiavelli published <i>Il Principe</i> ¹⁶⁶
1623	Shakespeare’s <i>King John</i> ¹⁶⁷ published in the First Folio
1684	Gottfried Leibniz published the first paper employing calculus ¹⁶⁸
1687	Isaac Newton published <i>Philosophiæ Naturalis Principia Mathematica</i> , setting forth the foundation for classical mechanics ¹⁶⁹
1694	First known opinion citing the EU Hearsay Exception ¹⁷⁰
1722	First reported case citing the DD Hearsay Exception ¹⁷¹
1776	Adam Smith published <i>An Inquiry into the Nature and Causes of the Wealth of Nations</i> ¹⁷²
1870	Ludwig Boltzmann initiated the field of statistical thermodynamics ¹⁷³
1879	Wilhelm Wundt established the first formal laboratory for experimental psychology
1881	James Thayer published the papers credited for the first articulation of the PSI Hearsay Exception ¹⁷⁴
1892	Rudolf Diesel patented the diesel engine ¹⁷⁵

As can be seen in the list, many of the ideas from the time period of the three hearsay exceptions have largely been proven to be valid. That is not to say that the old ideas were perfect and incapable of further refinement. For example, quantum mechanics has extended the classical framework established by Newton. *The*

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

165. Posner, *supra* note 5, at 1470, 1471.

166. NICCOLO MACHIAVELLI, *THE PRINCE* (David Wooten ed. & trans., Hackett Publishing Co. 1995) (1532).

167. WILLIAM SHAKESPEARE, *KING JOHN* (1623).

168. Gottfried Leibniz, *Nova Methodus pro Maximis et Minimis*, 1684 ACTA ERUDITORUM 467.

169. ISSAC NEWTON, *PHILOSOPHIÆ NATURALIS PRINCIPIA MATHEMATICA* (1687).

170. Thompson v. Trevanion (1693) 90 Eng. Rep. 179; Skin. 402.

171. Rex v. Reason (1722) 93 Eng. Rep. 659; 1 Strange 499.

172. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Regency Publishing, Inc. 1998) (1776).

173. See Jos Uffink, *Boltzmann’s Work in Statistical Physics*, STAN. ENCYCLOPEDIA PHIL. (Nov. 17, 2014), <https://plato.stanford.edu/entries/statphys-Boltzmann/>.

174. James B. Thayer, *Bedingfield’s Case—Declarations as a Part of the Res Gesta* (pts. 1–3), 14 AM. L. REV. 817 (1880), 15 AM. L. REV. 1, 71 (1881).

175. U.S. Patent No. 542,846 (filed Aug. 26, 1892).

*General Theory of Employment, Interest and Money*¹⁷⁶ added much to the economic theories set forth in *The Wealth of Nations*. But the old ideas are not all consigned to the dustbin of history. Classical mechanics may not be used to explain the orbitals of electrons around atomic nuclei, but it still informs the design of cars and buildings. Adam Smith is cited, with apparent approval, by Judge Posner himself.¹⁷⁷

The same can be said about legal developments. With regard to the DD, EU, and PSI hearsay exceptions, all three are founded on observations about human behavior. That is, they were based on the idea that humans generally do not accuse others when they die or lie when they are under stress or under time pressure. Are those observations really that superstitious, sentimental, or counterintuitive? As seen in the PSI, EU, and this study, contemporary science does not overthrow but instead generally validates these old observations about human nature.

And this result should come as no shock. Judges in the past were well capable of watching and observing the phenomenon of lying, even though they may not have the benefit of the findings of experimental psychology. And human nature simply has not changed so much that their observations made two to five centuries ago are no longer valid today. Machiavelli wrote *The Prince* with a Renaissance understanding of lying, but no one now suggests that the work is of no value in understanding the modern world. Indeed, Sun Tzu's teachings about deception in the *Art of War*, written 2,500 years ago, still find regular application in business and politics.¹⁷⁸

However, the theories seeking to account for the observations of human behavior certainly should be updated in view of better scientific understanding. The original explanation for why persons do not lie at death, set forth in *Woodcock* in 1789, was that "the deceased . . . apprehended that she was in such a state of mortality as would inevitably oblige her to answer before her Maker for the truth or falsehood of her assertions."¹⁷⁹ The Advisory Committee's update reflects a better understanding of modern psychology, stating that "[w]hile the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present."¹⁸⁰ This Article, in some way, is an attempt to expand upon the Advisory Committee's explanation. And this Article along with the other two studies are not and cannot be the final word on their respective matter; better understanding of science will necessitate an update to the articles. This author

176. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1936).

177. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 135–36 (1979) ("The morality I have deduced from wealth maximization resembles what Adam Smith called the system of 'natural liberty' and what a student of Smith has referred to as the 'capitalist conception of justice.'" (citation omitted)).

178. See, e.g., Eric Jackson, *Sun Tzu's 31 Best Pieces of Leadership Advice*, FORBES (May 23, 2014), <http://www.forbes.com/sites/ericjackson/2014/05/23/sun-tzus-33-best-pieces-of-leadership-advice>.

179. Rex v. Woodcock (1789) 168 Eng. Rep. 352, 353–54; 1 Leach 500, 503.

180. FED. R. EVID. 804(b)(2) advisory committee's note.

would consider it more pleasing to read a scholarly review by a plucky, young legal scholar which entirely refutes the three articles when he is old and gray than to see the articles remain unchallenged in his lifetime.

In sum, there is no reason to think that judges and legal scholars of earlier times were somehow different from their counterparts in other disciplines and professions in being ignorant and uncurious. It should not be presumed that the doctrines they created were tainted by blindness to empirical realities. Naturally, legal doctrines should be refined in the course of time, but old doctrines are not all bad and do not all need to be stripped from the books. If anything, it is the bald assertions denying the validity of old experience about human behavior that merits the stronger skepticism.