The Residual Exception's Renaissance

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ABSTRACT

Eminent jurist and legal scholar Richard Posner, formerly of the Seventh Circuit, has recently ignited a controversy regarding the Federal Rules of Evidence ("FRE") hearsay exceptions. Through his concurrence in United States v. Boyce*, Judge Posner characterized the existing hearsay exception paradigm as mere "folk psychology." Further, Judge Posner called for the abolition of the modern categorical method and, instead, favored a "residual reliability" approach pursuant to FRE 807. Under this approach, each statement's admissibility would hinge upon the statement's unique demonstrated reliability to the presiding trial judge. Prior to the FRE's enactment, the Advisory Committee contemplated the preferability of solely utilizing a residual approach. Judge Posner's concurrence is a modern renaissance of this debate. However, the legal scholarly consensus remains against the Posnerian model. Perhaps most tellingly, as recently as October 21, 2016, the Advisory Committee rejected Judge Posner's proposal while describing it as an "all-out discretion fest." Since, Judge Posner has dialed back on abolishing the hearsay rule. Crucially, however, Judge Posner still adamantly maintains that the most prominent exceptions of the traditional approach should be eliminated.*

This note examines and expands upon Judge Posner's proposal through analyzing the interplay of law, psychology, and policy. Most fundamentally, this note underscores what Judge Posner's critics fail to adequately address. This note uniquely reveals the "truth behind the hearsay curtain" which is that trial judges already frequently employ a masked residual model while hiding behind the exception labels. This note also elucidates a myriad of psychological evidence underlying the archaic nature of several prominent exceptions criticized by Posner including: present sense impressions, excited utterances, and dying declarations. Furthermore, this note expands the Posnerian approach to the then-existing mental, emotional or physical condition statements, and statements made for medical diagnosis or treatment. Additionally, this note examines the chief criticism of the residual approach which alleges that trial judges would receive unfettered discretion thereby posing severe judicial uncertainty. After analogizing the judicial discretion allowed under FRE 403 for measuring prejudicial value and under FRE 404(b) for assessing character evidence,

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coupled with the Posnerian model's covert frequent usage, this note submits that the residual approach surpasses this criticism. Thus, this note ultimately concludes that an expanded Posnerian model provides an optimal direction for the FRE with the caveat that a select few modern exceptions should remain based upon their practical value and internal safeguards of reliability: business records, public records, and declarations against interest.

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INTRODUCTION

With twenty-three exceptions,[1] the Anglo-American hearsay doctrine is naturally viewed as complex and counterintuitive.[2] Yet, it is also an invaluable tool for trial lawyers, ensuring a litigant's right to cross-examine opposing witnesses.[3] There is a movement to reform and simplify the rule, however there is disagreement among both legal scholars and the judiciary on just how to do so. Some scholars acknowledge the plausibility of merely altering the existing exceptions.[4] Others have articulated more expansive renovation proposals.[5] Judge Posner's 2014 concurrence in *United States v. Boyce* especially has reawakened the hearsay reformation debate,[6] which stems back to the Advisory Committee Notes.[7] In

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1. *See* FED. R. EVID. 803.

2. *See* FED. R. EVID. art. VIII advisory committee's notes ("Emphasis on the hearsay rule today tends to *center upon the condition of cross-examination* . . . [t]he belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental." (emphasis added)).

3. *See* Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1863 (2016).

4. *See* Richter, *supra* note 3, at 1861–62 ("[E]fforts to reform the hearsay regime would be more effectively focused *on modifying existing categorical exceptions* or in pursuing a truly new paradigm for hearsay evidence that eliminates amorphous considerations of 'reliability' altogether." (emphasis added)); 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, 466 (2016) ("Several commentators, though, have found the rationale for the present sense impression exception attractive. For example, Edmund Morgan, one of the great Evidence reformers of the last century, favored the exception.").

5. *See* Richter, *supra* note 3, at 1861–62 ("[E]fforts to reform the hearsay regime would be more effectively focused on modifying existing categorical exceptions or *in pursuing a truly new paradigm for hearsay evidence that eliminates amorphous considerations of 'reliability' altogether*." (emphasis added)); *see also* Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MICH. L. REV. 723 (1992); Paul S. Milich, *Hearsay Antinomies*: *The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723 (1992); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987).

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

7. *See* S. REP. NO. 93-1277 (1974), *as reprinted in* FED. R. EVID. 803 advisory committee's notes ("The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.").

particular, Judge Posner provocatively criticized two of the most prominent hearsay exceptions: present sense impressions[8] and excited utterances.[9] Judge Posner characterized these exceptions as no more than "folk psychology."[10] Judge Posner supported the abolition of the traditional hearsay exceptions in favor of a residual reliability approach as implemented in Rule 807 of the Federal Rules of Evidence ("FRE").[11] Under Posner's model, rather than a fixed set of categories governing admissibility, the presiding trial judge would apply a general reliability approach based upon the unique circumstances surrounding the statement when that statement was made by the declarant.[12]

While Judge Posner's concurrence has served as a catalyst in the current hearsay reform debate, his position has already been rejected by many in the legal community, including the most important body (at least for evidence rules). As recently as October 21, 2016, the Advisory Committee on Rules of Evidence declined to adopt Posner's model, characterizing it as an "all-out discretion fest."[13] The Committee elaborated: "One can hope that there is a sweet spot somewhere between outright rejection of a residual exception—which could result either in the loss of a good deal of reliable evidence or an unwelcome expansion and misshaping of the standard exceptions—and an all-out discretion fest as championed by Judge Posner."[14] The committee emphasized that its goal "is to find that sweet spot."[15] Furthermore, in its fall 2016 meeting, the Advisory Committee highlighted the minutes of the spring meeting, which indicated that "[a]t the Hearsay Symposium, the Committee heard *repeatedly* from lawyers that they wanted *predictable hearsay exceptions*——judicial discretion would lead to inconsistent results and lack of predictability would raise the costs of litigation and would make it difficult to settle cases."[16] Relatedly, the Federal Judicial Center has authored a twenty-four-page memorandum defending the reliability of the present sense impression and excited utterance exceptions post-*Boyce* and has rejected the need for further experimentation into the reliability of these

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8. *See Boyce*, 742 F.3d at 796 ("We have said before regarding the reasoning behind the present sense impression that '[a]s with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances.'" (quoting Lust v. Sealy, Inc., 383 F.3d 580, 588 (7th Cir. 2004)) (citing Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 916 (2001) (noting studies showing that less than one second is needed to fabricate a lie)).

9. *Id.* ("As for the excited utterance exception, '[t]he entire basis for the exception may be questioned . . . .'" (quoting 2 McCormick on Evidence § 272 (Kenneth S. Broun ed., 7th ed. 2013))).

10. *Id.* at 801.

11. *Id.* at 802 ("What I would like to see is Rule 807 ('Residual Exception') swallow *much of* Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee.") (emphasis added).

12. *Id.*

13. *See* Advisory Comm. on Rules of Evidence, Fall 2016 Meeting Agenda Book, at 118 (Oct. 21, 2016), https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf [https://perma.cc/LR5N-DNKM].

14. *Id.* at 118.

15. *Id.*

16. *Id.* at 110–11 (emphasis added).

exceptions.[17] Finally, Judge Posner's concurrence prompted an article from Professor Edward J. Imwinkelried, the most cited legal scholar in the country for evidence law,[18] defending the present sense impression exception.[19]

To be clear, after receiving the above criticism, Judge Posner wrote an article and appeared to be more restrained, stating that he is "not yet ready to endorse the abolition of the hearsay rule."[20] Crucially, however, Judge Posner's clarification that the *entire* hearsay rule should not be eliminated still leaves his concurrence in *Boyce* on the table. This is because he still contended in the same recent article that the most prominent exceptions *should* be abolished which are present sense impressions and excited utterances.[21] Furthermore, Judge Posner also advocated for the death of the dying declaration exception as well.[22]

Building from the Posnerian model, this note argues for an expanded form of the residual approach. Contrary to the impression of Judge Posner's critics, federal judges already frequently employ the Posnerian residual approach, just under the labels of the traditional exceptions. As a corollary, this note contends that virtually the entire categorical model should be repealed as a matter of sound law, psychological evidence, and public policy. Part I outlines the background of the modern categorical approach by analyzing the justifications for several key exceptions. Part II explicates the Seventh Circuit's holding in *Boyce*. Most importantly, however, Part II also provides a novel and empirical catalogue of numerous cases in which judges already employed the masked residual approach. Relatedly, Part II underscores numerous psychological deficiencies with those prominent existing exceptions criticized in Judge Posner's concurrence along with other key exceptions, such as then-existing mental, emotional or physical condition statements, and statements made for medical diagnosis or treatment. Part III argues for adoption of an elevated Posnerian approach and notes a minority of "diamonds in the rough" that should not be repealed. These include the business records, public records, and declarations against interest exceptions. Relatedly, by analogy to the discretionary standard for weighing prejudice under FRE 403 and assessing character evidence under FRE 404(b), Part III concludes that an expanded Posnerian model would not facilitate unfettered judicial discretion merely by allowing the judiciary to decide an evidentiary issue on a case-by-case basis.

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17. *See* TIMOTHY LAU, FED. JUDICIAL CTR., REVIEW OF SCIENTIFIC LITERATURE ON THE RELIABILITY OF PRESENT SENSE IMPRESSIONS AND EXCITED UTTERANCES, 22–24 (2016).

18. *See Most Cited Law Professors by Specialty, 2000–2007*, BRIAN LEITER'S L. SCH. RANKINGS (Dec. 18, 2007), http://www.leiterrankings.com/faculty/2007faculty_impact_areas.shtml#Evidence [https://perma.cc/44Q9-Q9SV].

19. *See* Imwinkelried, *supra* note 4.

20. Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1467 (2016).

21. *Id.* at 1470.

22. *Id.* at 1471.

I. THE CODIFIED EXCEPTIONS: HOW THEY CAME TO BE

A. *The Text of the Rules*

FRE 801(c) defines hearsay as a statement that "the declarant does not make while testifying at the current hearing" and that "a party offers in evidence to prove the truth of the matter asserted in the statement."[23] FRE 803 allows for the admissibility of twenty-three different types of hearsay statements, regardless of the declarant's availability to testify, based upon preconceived notions of reliability surrounding the contexts of those statements.[24] Encompassed within FRE 803 are the present sense impression and excited utterance exceptions criticized in *Boyce*.[25] Other exceptions under FRE 803 include: statements of a declarant's then-existing mental, emotional, or physical condition,[26] statements made for the purpose of medical diagnosis or treatment,[27] business records,[28] and public records.[29]

Under FRE 804, five additional exceptions allow the admissibility for certain hearsay statements contingent upon the declarant's unavailability to testify at trial.[30] Notably, the dying declaration exception is found under FRE 804,[31] as is the declaration against interest exception.[32] Finally, and paramount to Judge Posner's concurrence in *Boyce*, the residual exception, under FRE 807, allows for the admissibility of any hearsay statement that does not fit into one of the traditional categories but possesses "equivalent circumstantial guarantees of trustworthiness."[33]

B. *Legal, Policy, and Psychological Justifications of the Categorical Approach*

The FRE Advisory Committee originally provided four psychological criteria that help determine hearsay exceptions: perception, memory, narration, and sincerity.[34] The Advisory Committee considered these criteria when contemplating

23. FED. R. EVID. 801(c).
24. FED. R. EVID. 803.
25. *See* FED. R. EVID. 803(1)–(2); United States v. Boyce, 742 F.3d 792, 800–01 (7th Cir. 2014) (Posner, J., concurring).
26. FED. R. EVID. 803(3).
27. FED. R. EVID. 803(4).
28. FED. R. EVID. 803(6).
29. FED. R. EVID. 803(8).
30. FED. R. EVID. 804(b).
31. FED. R. EVID. 804(b)(2).
32. FED. R. EVID. 804(b)(3).
33. FED. R. EVID. 807. The following additional requirements must be met for a statement to be admitted under the residual exception: (1) it is offered as evidence of a material fact; (2) it is more probative on the point for which it is offered than any other evidence than the proponent can obtain through reasonable efforts; and (3) admitting it will best serve the purposes of these rules and the interests of justice. *Id.*
34. FED. R. EVID. art. VIII, Introductory Note: The Hearsay Problem (citing Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948)). However, sincerity "seems merely to be an aspect of the first three." *Id.* Nonetheless, for the sake of completeness, this note will include sincerity in analyzing the various exceptions.

a categorical approach over a purely residual model.[35] Several of the most prominent hearsay exceptions illustrate this psychological foundation.

1. Excited Utterances

Under FRE 803(2), an excited utterance is "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."[36] The Advisory Committee enacted this exception under the theory that the circumstances giving rise to the utterance may conjure such excitement as to temporarily still the capacity of reflection.[37] In theory, excitement "produces utterances free of conscious fabrication."[38] The psychological backdrop of perception, memory narration and sincerity applies to excited utterances as follows: perception disfavors admitting the statements since "excitation decreases accuracy."[39] Memory was not discussed as a major concern by the Advisory Committee.[40] However, sincerity was viewed as the main justification of this exception since the declarant is too excited to lie.[41] Consequently, "spontaneity" is the cornerstone of the excited utterance's perceived reliability.[42]

2. Present Sense Impressions

A present sense impression is "a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."[43] As outlined by the Advisory Committee, the traditional justification for this exception is "that substantial contemporaneity of event and statement negative the likelihood of deliberate [or] conscious misrepresentation."[44] If the testifying witness is the declarant then the declarant will be able to be cross-examined anyway.[45] Conversely, if the witness is not the declarant, then, at a bare minimum, the witness "may be examined as to the circumstances as an aid in evaluating the statement."[46] Thus, the purported psychological justification for present sense

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35. S. REP. NO. 93-1277 (1974), *as reprinted in* FED. R. EVID. 803 advisory committee's notes ("The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.").

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

37. *See* FED. R. EVID. 803(2) advisory committee's notes to 1972 proposed rules ("[C]ircumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.").

38. *Id.*

39. *See* MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 193 (2016) (describing potential guarantees of veracity for excited utterances).

40. *See* FED. R. EVID. 803(2) advisory committee's notes (focusing on reflection and perception concerns).

41. *Id.*

42. *Id.*

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

44. *See* FED. R. EVID. 803(1) advisory committee's notes.

45. *Id.*

46. *Id.*

impressions addresses perception, memory, sincerity and narration in the following ways: (1) for perception and memory the event happened "right then" as the statement was uttered which allegedly bolsters the statement's accuracy;[47] (2) for sincerity, the event prompting the statement occurred "too quick" for the declarant to lie;[48] (3) narration is not implicated here because this psychological factor is usually only pertinent for expert testimony and "shaping the parameters of the learned treatise hearsay exception."[49] Finally, others can independently verify the factual circumstances surrounding such statements.[50]

3. Then-Existing Mental, Emotional, or Physical Conditions

Under FRE 803(3), a hearsay statement is admissible when it provides "the declarant's then-existing state of mind . . . or emotional, sensory or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."[51] Axiomatically, the hearsay rule would be destroyed if statements were routinely admitted anytime they concerned the declarant's state of mind.[52] However, the Advisory Committee decided to carve out an exception to this general prohibition out of "necessity and expediency" concerns "rather than logic."[53] Although not explicitly stated by the Committee, the implication is that such "necessity and expediency" is derived from the inherent difficulty of proving an individual's state of mind.[54] Also implied is that the declarant is the most capable individual to remember the state of mind he or she possessed when making the statement.[55] This exception was codified as a "specialized application" of the present sense impression exception despite multiple psychological concerns. Most significantly, with respect to sincerity, there does not appear to be a safeguard for veracity with this exception listed in the Advisory Notes.[56] So, the

47. *See* SAKS & SPELLMAN, *supra* note 39, at 193 (describing the accuracy mechanism for present sense impressions).

48. *Id.*

49. *See* Imwinkelried, *supra* note 4, at 459 (providing that narration is meant to ensure that a jury is not misled by complicated information deriving from an expert's work). Therefore, the narration criterion safeguards the jury's understanding of complex expert testimony by conditioning the admission of the treatise information upon having an expert present on the witness stand capable of explaining the technical language to the jury. Since none of the exceptions I will be addressing involve expert testimony, narration will not be discussed any further.

50. *See* SAKS & SPELLMAN, *supra* note 39, at 193.

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

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

53. FED. R. EVID. 803(3) advisory committee's notes to 1972 proposed rules (quoting MCCORMICK ON EVIDENCE §271, 577–78 (Kenneth S. Broun ed., 7th ed. 2013) ("The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic.").

54. *See id.*

55. *See id.*

56. *Id.*

timing of such statements does not necessarily result in circumstances where it is too quick or too startling for the declarant to lie.[57]

4. Dying Declarations

Dying declarations are defined as statements by the declarant "while believing the declarant's death to be imminent, made about its causes/circumstances."[58] The main justification is an individual's "fear to die telling a lie" while facing death.[59] Yet, accurate perception and memory is hindered by the "excitation" or "loss of declaring mental capacity" under the belief of imminent death.[60] Moreover, it is arguably "irrelevant" whether the dying declaration's validity could be independently verified since that would probably not deter the declarant from fabrication if they believe death was imminent anyway.[61] Yet, due to the Advisory Committee's belief that sincerity was established, the dying declaration common-law exception was still codified.[62]

5. Statements Made for Medical Diagnosis or Treatment

Under FRE 803(4), statements are admissible when "made for—and is reasonably pertinent to—medical diagnosis or treatment" and "describe[] medical history . . . ."[63] The Advisory Committee's rationale is that 803(4) statements are: "made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful."[64] Sincerity, then, is at the heart of this exception in determining reliability. The Committee also believes perception and memory are not problematic since the declarant is the one experiencing the condition.[65] However, the Committee did highlight the sincerity concerns for when a plaintiff makes medical statements "to a physician consulted only for the purpose of enabling him to testify."[66]

6. Residual Exception

The Committee contemplated that situations would arise where a statement's "circumstantial reliability" would be established without fully satisfying one of

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57. *Id.* (contrasting then-existing conditions with present sense impressions and excited utterances.).
58. FED. R. EVID. 804(b)(2).
59. *See* FED. R. EVID. 804(b)(2) advisory committee's notes to 1972 proposed rule; SAKS & SPELLMAN, *supra* note 39, at 193.
60. SAKS & SPELLMAN, *supra* note 39, at 193.
61. *Id.*
62. *Id.*; FED. R. EVID. 804(b)(2) advisory committee's notes ("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*." (emphasis added)).
63. FED. R. EVID. 803(4).
64. *See* FED. R. EVID. 803(4) advisory committee's notes to 1972 proposed rules.
65. *Id.*
66. *Id.*

the categorical exceptions.[67] Its codification coincides with FRE 102, which provides that part of the FRE's purpose is to "promote the development of evidence law."[68] Yet, the relevant Senate report, reprinted in the Advisory Committee Notes, rejected a hearsay rule consisting solely of a residual exception, characterizing such a scheme as "emasculating the hearsay rule."[69] Interestingly, however, the Advisory Committee is currently contemplating an amendment to the residual exception under FRE 807.[70] The most recent proposed amendment would permit admission of a hearsay statement so long as the following requirements are satisfied:

> (1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804;
>
> (2) the court determines that it is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;
>
> (4) admitting it will best serve the purposes of these rules and the interests of *justice*.[71]

But under this reformed rule, the categorical exceptions would still remain.

II. *UNITED STATES V. BOYCE*: THE MODERN RENAISSANCE OF THE RESIDUAL EXCEPTION

The *Boyce* decision captures the context of various hearsay statements and its impact on reliability. For example, *Boyle* examines whether the declarant made a statement in response to a question by police and whether the declarant had the *opportunity* to reflect prior to the statement. Such analysis is the primary subject matter of Judge Posner's concurrence as well.

A. The Seventh Circuit's Decision

On March 27, 2010, officers received a call from defendant Darnell Boyce's girlfriend, Sarah Portis, claiming he had just hit her and was "going crazy for no

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67. *See* FED. R. EVID. (803) advisory committee's notes to 1974 enactment ("We feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed).").

68. FED. R. EVID. 102.

69. FED. R. EVID. 803 advisory committee's notes on 1974 enactment.

70. Advisory Comm. on Rules of Evidence, Agenda Book, at 5, 106 (Apr. 26–27, 2018), https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf [https://perma.cc/DG3X-B4DR].

71. *Id*. The word "justice" is currently deleted but may be added back in. The last sentence is incomplete right now in draft form, but the word "justice" is in the current rule. FED. R. EVID. 807.

reason."[72] The 911 operator asked whether Boyce had any weapons.[73] Portis responded that Boyce had a gun.[74] The operator then informed Portis that if she was not telling the truth she could be taken to jail.[75] Portis responded that she was "positive" Boyce had a gun.[76] When officers arrived, Boyce attempted to run away with the officers giving chase.[77]

At trial, the officers testified about chasing Boyce, witnessing Boyce throw the gun into a neighboring yard, and finding ammunition in Boyce's pocket.[78] The District Court admitted Portis' 911 statements about Boyce possessing a gun as both present sense impressions under FRE 803(1) and excited utterances under 803(2).[79] Boyce was convicted of both being a felon in possession of a firearm and a felon in possession of ammunition.[80] On appeal, Boyce argued the District Court erroneously admitted the hearsay statements.[81] However, the Seventh Circuit affirmed Boyce's conviction and concluded the District Court did not abuse its discretion in admitting the hearsay statements under the excited utterance exception.[82] The court did not "definitively decide" on whether the statements would qualify under the present sense impression exception since the statements were already admissible as excited utterances.[83] When addressing the present sense impression exception, the court highlighted that Portis did not indicate Boyce possessed a firearm until *after* questioning by the 911 operator, which itself occurred after she ran to another residence prior to the 911 call.[84] However, the Seventh Circuit indicated that a declarant may still utter statements in response to questions without calculated narration.[85] Indeed, it was Portis who first mentioned the gun.[86] Yet, the court still found that Portis' statements could plausibly be the product of calculated narration based upon the circumstances mentioned.[87]

After addressing the present sense impression exception, the Seventh Circuit provided that the excited utterance exception "allows for broader scope."[88] The Seventh Circuit relied on two key events in finding the District Court did not

72. United States v. Boyce, 742 F.3d 792, 793 (7th Cir. 2014).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 794.
78. *Id.*
79. *Id.*
80. *Id.* at 793, 800.
81. *Id.* at 793. Boyce also appealed on the grounds that that his civil rights had been restored and therefore he could lawfully possess a handgun. *Id.*
82. *Id.*
83. *Id.* at 798
84. *Id.* at 797–98.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 798.

abuse its discretion in applying the excited utterance exception. First, the domestic battery constituted a startling event.[89] Second, the 911 call occurred while Portis was under the stress of the excitement caused by the domestic battery.[90] Additionally, the court provided that one of the officers testified Portis appeared "emotional" and as if "she had just been in a fight" when he arrived at the scene.[91] Finally, the court concluded: "if a domestic battery victim in Portis's circumstances knows her assailant has access to a gun nearby, the potential for more lethal force to be used against her would be a subject likely to be evoked in the description of her assault."[92] Therefore, Boyce's conviction was affirmed.[93]

B. Judge Posner's Concurrence

Judge Posner concurred with the panel and explicitly indicated from the outset that he "disagreed with nothing" in the majority opinion.[94] Judge Posner's aim in his concurrence was instead to "amplify" the concerns the majority opinion expressed regarding the reliability of present sense impressions and excited utterances.[95] Judge Posner agreed that Portis's statements qualified under the definition of both expressions but also reiterated that "there is profound doubt whether either should be an exception to the rule against the admission of hearsay evidence."[96]

For present sense impressions, Judge Posner criticized the assumption in the Advisory Committee Notes that "if the event described and the statement describing it are near to each other in time, this 'negate[s] the likelihood of deliberate or conscious misrepresentation.'"[97] Specifically, Judge Posner referred to the same recent, post-FRE codification, psychological studies that the majority did[98] indicating that "less than one second is required to fabricate a lie,"[99] and that "most

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 799.
93. *Id.* The Court also declined to set aside Boyce's conviction on the ground that his civil rights were restored. *Id.* at 795–96.
94. *Id.* at 799 (Posner, J., concurring).
95. *Id.* at 799–800.
96. *Id.* at 800.
97. *Id.* (quoting advisory committee's notes to 1972 Proposed Rules).
98. *Id.* at 796.
99. *Id.* at 800–01 (quoting Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 916 (2001)); *see also* Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 362–66 (2012); Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*," 1970 UTAH L. REV. 1, 27–29. Judge Posner further provided: "Wigmore made the point emphatically 110 years ago." 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1757, at 2268 (1904) ("[T]o admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle.").

lies in fact are spontaneous."[100] Judge Posner concluded the present sense impression exception "has neither a theoretical nor an empirical basis; and it's not even common sense—it's not even good folk psychology."[101] While the majority acknowledged the concerns of the studies showing that "less than one second is required to fabricate a lie," it still moved on and applied the traditional exceptions because of the exceptions' previous widespread acceptance.[102]

Judge Posner expressed even more vocal disagreement with the excited utterance exception, underscoring that the Advisory Committee Notes provide "even less convincing justification" for that exception.[103] In particular, Judge Posner noted that the McCormick treatise cited by the majority indicates that "[t]he entire basis for the [excited utterance] exception may . . . be questioned."[104] Relatedly, Judge Posner noted the underlying theory for excited utterances is "simply that circumstances *may* produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[105] Judge Posner expressed concern that, even conceding the absence of the capacity for reflection, there is no justified reason for believing the statement is *automatically* reliable.[106] As the concurrence's final component, Judge Posner offered his own hearsay reform model,[107] which did not seek a "net reduction" of hearsay evidence in federal court.[108] Instead, Judge Posner called for the abolition of the categorical approach, hoping the residual exception under FRE 807 would "swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee."[109] Judge Posner proposed a tripartite test: (1) the statement must be "reliable"; (2) the jury must be able to comprehend the statement's "strength and limitations"; (3) the statement will "materially enhance the likelihood of a correct outcome."[110]

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100. *Id.* at 800 (quoting Monica T. Whitty et al., *Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication*, 63 J. AM. SOC'Y INFO. SCI. TECH. 208, 208–09, 214 (2012)).

101. United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014) (Posner, J., concurring). Judge Posner also noted the fact that present sense impressions that are allegedly immediate have been interpreted to encompass periods as long as twenty-three minutes after the events prompting the statement. *Id.* at 800.

102. *Id.* at 796.

103. *Id.* at 800.

104. *Id.* at 801–02 (quoting 2 MCCORMICK ON EVIDENCE § 272 at 366 (Kenneth S. Broun ed., 7th ed. 2013)).

105. *Id.* at 801 (citing FED. R. EVID. 803(2) advisory committee's note) (emphasis added).

106. *Id.* at 801 (citing Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432, 437 (1928)).

107. *Id.*

108. *Id.* ("I don't want to leave the impression that in questioning the present sense and excited utterance exceptions to the hearsay rule I want to reduce the amount of hearsay evidence admissible in federal trials.").

109. *Id.*

110. *Id.* Importantly, while Judge Posner has subsequently made statements that suggest he has retreated from the abolition of the entire hearsay rule, he still adamantly contends that the most prominent hearsay exceptions, present sense impressions and excited utterances, as well as dying

C. The Truth Behind the Hearsay Curtain

Modern criticism of the categorical approach encapsulates some of the most prominent hearsay exceptions.[111] In fact, "[t]he research conducted on a few exceptions flatly contradicts their underlying assumptions about enhanced reliability of perception, memory, and sincerity."[112] But more significantly, proponents of the categorical approach convey the impression that the residual approach is rarely used by federal judges. For example, the lawyers consulted by the Advisory Committee when considering reforming the residual exception rejected the Posnerian model because they wanted "predicable exceptions."[113] Admittedly, the Advisory Committee is correct that the categorical approach *appears* more predictable. Similarly, evidence offered under FRE 807's residual approach *appears* to be excluded more than it is admitted in the current case law. At the time of the Advisory Committee on Rules of Evidence fall 2016 meeting, a digest of approximately two hundred cases over a ten-year period revealed that "courts are excluding more than admitting" under FRE 807.[114] Yet, this digest data fails to recognize that federal judges frequently "mask" a residual analysis under the labels of the traditional exceptions. To adequately expose such masking, this section will also explore a myriad of legal, psychological, and policy deficiencies of several prominent exceptions.

1. Excited Utterances

Today, virtually no legal scholar unconditionally embraces the excited utterance exception's alleged indicia of reliability.[115] Moreover, even the Advisory Committee has stated that FRE 803(2) has been "criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication."[116] Furthermore, the Committee has conceded that perception and

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declarations, have no basis for remaining in the FRE. *See* Posner, *supra* note 20, at 1470–71. In fact, Posner specifically reiterates his justifications from *Boyce* in this current article as the reasons for abolishing the present sense impressions and excited utterances exceptions. *Id.* 1470–71. Finally, Judge Posner still advocates the removal of the dying declarations exception as well. *Id.* at 1471. Thus, this paper builds off of the Posnerian model in also advocating for the abolition of the then-existing state of mind and statements for medical diagnosis exceptions.

111. *See* Richter, *supra* note 3, at 1882 (criticizing both the statements made for purposes of diagnosis or treatment and dying declaration exceptions.); Imwinkelried, supra note 4, at 466.

112. Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1351 (1987).

113. *See* Advisory Comm. on Rules of Evidence, *supra* note 13, at 110.

114. *See id.* at 125 ("[T]here are a number of exclusions in which the courts impose very high standards: clear trustworthiness, significantly more probative, truly exceptional, must compare favorably to a standard exception, etc. There are a number of cases where the evidence as described looks quite trustworthy and yet the court . . . excludes the evidence.").

115. *See* Imwinkelried, supra note 4, at 466 (providing in reference to the excited utterance exception, "[f]or that matter, one would be hard pressed to find a modern commentator who wholeheartedly endorses that rationale").

116. *See* FED. R. EVID. 803(2) advisory committee's note ("[t]he theory of Exception [paragraph] (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication . . . ." (citing Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432 (1928)). Notably, this is the same

memory disfavor admitting excited utterances since "excitement decreases accuracy."[117] Moreover, Professor Imwinkelried, who penned an article for the chief purpose of criticizing Judge Posner's concurrence and defending the present sense impression exception, conceded the faulty reliability of excited utterances.[118] Indeed, an article published recently by Professor Steven Baicker-McKee argues that the excited utterance exception "should be abolished."[119] This is because the "short answer" to the question "Can people lie while in an excited state after a startling event?" is "yes."[120] More accurately, and further justifying the abolition of the excited utterance exception, "individuals *vary* in their inclination and ability to lie while under stress, in the types of lies they tell while in an excited state, and in the sorts of conditions under which they are more or less motivated or able to lie."[121] Thus, because the categorical approach provides no textual means for judges to take this litany of individual factors into account, it is an ill-suited means for ensuring evidentiary reliability from psychologically "untrained" judges.[122] Hence, the pivotal question is: If the Advisory Committee Notes and legal scholarship recognize FRE 803(2)'s deficiencies, do judges truly apply this exception in a straightforward manner? Or, do judges employ other evidentiary tools to ensure reliability?

Boyce serves as an invaluable example of how judges might employ other evidentiary tools to ensure reliability. The majority opinion found no abuse of discretion in the District Court's application of the excited utterance exception, in part, due to "Officer Solomon's testimony that Portis appeared emotional, as though she had just been in an argument or fight."[123] Indeed, the District Court characterized this evidence as "further support" (i.e., circumstantial reliability) for applying the excited utterance exception to Portis's statements.[124] Furthermore, a significant portion of the majority's basis for concluding Portis made the 911 call "while under the stress of the excitement caused by the domestic battery" stemmed from the fact that Portis informed the operator she had "just" run upstairs to make the call.[125] Therefore, by using the word "just," Portis, in a sense, advocated that her statements were made under the stress of a startling condition. The word "just" suggests no time for reflection.

study Judge Posner cites in *Boyce* for the identical proposition thereby underscoring the historical continuity of this criticism. *See* United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014) (Posner, J., concurring).

117. *See* SAKS & SPELLMAN, *supra* note 39, at 193.

118. *See* Imwinkelried, *supra* note 4, at 466.

119. Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U. L. REV. 111, 178 (2017).

120. *Id.* at 153.

121. *Id.*

122. *Id.* at 178.

123. *See* United States v. Boyce, 742 F.3d 792, 798 (7th Cir. 2014).

124. *Id.*

125. *Id.*

Consider another scenario: suppose if, when the officers arrived, Portis did not appear beaten, her clothes appeared brand new, but she still used the word "just" in referring to the timeline of events in the 911 call. This factual alteration would certainly not disprove the validity of her allegations given other evidence.[126] However, this alternative scenario would certainly raise "reflective thought" concerns by removing the circumstantial indicia of reliability upon which the majority relied.[127] Thus, under this hypothetical, a glaring problem arises. The fact that the officer observed both Portis's emotional state and physical demeanor are not requirements under FRE 803(2).[128] Yet these external reliability aspects were unequivocally factored into the majority opinion.[129] Furthermore, no requirements are given under FRE 803(2) for *how* a federal judge is to determine whether a statement was made while under the stress of a startling condition.[130] In fact, upon closer examination, it appears the majority opinion in *Boyce* is conducting the Posnerian residual approach.[131]

There are three indicators that suggest the majority used a residual approach in its analysis. First, the Seventh Circuit's use of the language "further support,"[132] when referring to the officer's observation of Portis, demonstrates the Seventh Circuit's concerns regarding circumstantial (i.e. Posnerian) reliability.[133] Second, by noting the officer testified "that Portis appeared emotional,"[134] the Seventh Circuit is further signaling its use of Judge Posner's residual-type analysis that "the jury can understand the strengths and limitations" of the statement.[135] Indeed, it seems axiomatic that a reasonable jury would ascertain that an individual appearing emotionally distraught upon the officer's arrival lends credence to the assertion that the individual was "excited" when the statement was made. Finally, part three of the Posnerian model, that the statement "will materially enhance the likelihood of a correct outcome,"[136] is implied in the majority's reasoning as well. Of course, if an individual is being charged with possession of a firearm and there is a reliable statement linking the gun to the defendant, the admission of the statement is "materially enhancing" the likelihood the defendant will accurately be found guilty.[137] This third factor appears to be a comprehensive evaluation of the evidence that would take place anyway thereby not adding a

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126. *See id*. at 794.
127. *Id*. at 796 (citing 2 MCCORMICK ON EVIDENCE § 272 (Kenneth S. Broun ed., 7th ed. 2013)).
128. *See* FED. R. EVID. 803(2) (requiring only "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused").
129. *See Boyce*, 742 F.3d at 798.
130. *Id*.
131. *Id*.
132. *Id*.
133. *Id*. at 802 (Posner, J., concurring).
134. *Id*. at 798 (majority opinion).
135. *Id*. at 802 (Posner, J., concurring).
136. *Id*.
137. *Id*.

significant component to the residual analysis. Judge Posner did not expand upon this factor any further.[138]

Even a cursory look at modern hearsay jurisprudence reveals further examples of judges applying the masked residual approach under the excited utterance exception. For example, the District of New Mexico recently held in *Leon v. FedEx Ground Package System, Inc.* that the statement "we got another one" by an employee of a shipping company in an emergency call regarding a fatal rear-end tractor-trailer accident was not admissible under the excited utterance exception. The statement was not admissible even though a startling event occurred, where the employee worked for the company's security department, and was likely responsible for, and accustomed to, receiving reports of truck accidents on a regular basis.[139] By the time the declarant made the relevant statement, she likely had already discussed the accident's details with the dispatcher . . . and she was not present at the scene of the accident.[140] The residual reliability analysis for this case is that this particular individual uttering the statement allegedly had a subjective desensitization to hearing about fatal accidents so, notwithstanding that a startling event occurred, the statement was not admitted. In other words, the statement did not have a circumstantial guarantee of reliability.

The Southern District of New York used even more overt circumstantial and residual liability language in *United States v. Delvi*.[141] In that case, the court noted that although the lapse of time between the startling event and statement is relevant in determining whether the declarant made a statement while under stress of excitement, "the temporal gap between event and utterance is not itself dispositive."[142] *Other relevant factors* include characteristics of the event, subject matter of the statement, whether the statement was made in response to inquiry and the declarant's age, motive to lie, and physical and mental condition.[143] However, analogous to *Boyce*, none of these "other relevant factors" are found anywhere in the text of FRE 803(2), thereby further evidencing a masked residual analysis erroneously labeled as a straightforward application of the excited utterance exception.

The above examples are not merely outliers. In fact, legal scholarship has revealed the regularity with which courts have expanded the scope of FRE 803(2) in criminal cases, specifically in ways bearing a striking resemblance to residual reliability. Significantly, courts have imposed additional residual reliability requirements found nowhere in the FRE.[144] For instance, courts have expanded

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138. *Id.*

139. *See* Leon v. FedEx Ground Package Sys., Inc., No. 13–1005, 2015 WL 10383441, at *12 (D.N.M. Apr. 24, 2015).

140. *Id.* (emphasis added).

141. 275 F.Supp.2d 412 (S.D.N.Y. 2003).

142. *Id.* at 415 (emphasis added).

143. *Id.*

144. *See* Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision*, 76 MINN. L. REV. 473, 492–95 (1991); *see also* Morgan v. Foretic, 846 F.2d 941, 945–47 (4th Cir. 1988) (adopting the "first real opportunity" test of spontaneity on grounds that children's lack of understanding of abusive events, and the fear and guilt they experience, cause them to delay reporting);

the applicability of FRE 803(2)'s "under stress" requirement when the crime victim is a child who makes an out-of-court statement about sexual abuse.[145] Specifically, a doctrinal test of "first opportunity" has been adopted allowing the categorical requirement of being "under stress" to cover statements by a child who does not report the startling events for hours or days.[146] This means, "the lapse of time is not measured from the event itself but rather from the time of the 'first real opportunity' to report the events to a care-taker."[147] Moreover, the Fourth Circuit, in *Morgan v. Foretich*, applied the new categorical requirement of "first opportunity" in a "liberal way" by labeling statements as excited utterances where "the child waited several hours after being reunited with the mother to speak with her."[148] Additionally, *Morgan* "also invoked the discretionary trustworthiness factor by relying on the circumstantial guarantees of the trustworthiness" of the child's statements that "had nothing to do with whether the statements were excited utterances."[149] Such "circumstantial guarantees" included the child's method of "speaking—touching herself and use of vocabulary and her physical condition."[150] Therefore, as evidenced by the case law, the Posnerian model is commonly masked under FRE 803(2). It is equally noteworthy that such "masking" will probably not be acknowledged by the federal judges themselves. So, the closest one can get to discovering the masking is to focus on the "circumstantial reliability" language employed by the courts.

Despite the excited utterance exception's psychological deficiencies, and the elasticity with which federal judges have applied it, the Federal Judicial Center still "does not recommend conducting experiments about the accuracy of observation underlying [excited utterance] hearsay evidence."[151] The Federal Judicial Center provided two key justifications for this conclusion: First, "[t]he literature also posits that emotionally arousing stimuli can draw attention and perceptual resources."[152] Second:

> If an event or condition so happens to be startling to the declarant, then any contemporaneous statement the declarant makes "under the stress of excitement" and "relating to [the] . . . event or condition" will be an [excited utterance]. There is no possibility of revisiting the startling event or condition to obtain the contemporaneous statement that the declarant would have made absent the stress of excitement.[153]

United States v. Iron Shell, 633 F.2d 77, 85–86 (8th Cir. 1980), cert denied, 450 U.S. 1001 (1981); United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979).

145. *See* Swift, *supra* note 144, at 494 (citing *Iron Shell*, 633 F.2d at 85–86; *Nick*, 604 F.2d at 1202).

146. *Id.*

147. *Id.*

148. *See* Swift, *supra* note 144, at 494; *Morgan*, 846 F.2d at 947.

149. *See* Swift, *supra* note 144, at 495.

150. *Id.* (emphasis added).

151. *See* LAU, *supra* note 17, at 23–24.

152. *Id.* at 23.

153. *Id.* at 24. Relatedly, the Federal Judicial Center provided that "accordingly, even if the difference in the accuracy of observation under 'stress of excitement' and under a state of dispassion

However, the Federal Judicial Center *does* acknowledge psychological deficiencies with the excited utterance exception. Specifically, it admits that "[e]motion, as broadly defined, can impair some cognitive processes important for accurate observation. This can be particularly relevant in emotional situations where [excited utterance] hearsay evidence is created."[154] Yet, the Federal Judicial Center's memorandum is more problematic for another reason. The Federal Judicial Center does not address the examples cited above in which courts have performed a masked residual analysis while citing the excited utterance exception (i.e., the "first opportunity test"). By not discussing the current residual analysis taking place under the excited utterance label, coupled with the Federal Judicial Center's recommendation not to conduct experiments about the exception's psychological reliability,[155] the Center's memorandum serves as another obfuscation of the "truth behind the hearsay curtain."

2. Present Sense Impressions

A present sense impression must be "made *while* or *immediately after* the declarant perceived it."[156] Hence, the lingering question is what suffices as appropriate judicial criteria for determining what the words "while" or "immediately after" mean under FRE 803(1).[157] Judge Posner provides a list of cases that illuminate the rampant elasticity in which trial judges define "while" or "immediately after." As a threshold matter, *Meriam Webster* dictionary defines "immediately" as "occurring, acting, or accomplished without loss or interval of time."[158] Yet, neither a single admitted present sense impression in any case Judge Posner cites,[159] nor any statement in *Boyce*,[160] would qualify under the strict "without loss or interval of time" definition. First, addressing the statements

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could somehow be experimentally quantified, it may yield no useful conclusion about whether EU as a whole should be admissible hearsay evidence." *Id.* at 24.

154. *Id.* at 23. The memorandum elaborates in section II.C.2 on the ways in which emotion can impair the cognitive processes important for observations and cites several studies in support of this proposition. *Id.* at 13; *see also* Angela S. Attwood et al., *Acute Anxiety Impairs Accuracy in Identifying Photographed Faces*, 24 PSYCHOL. SCI. 1591, 1593 (2013); S.L. Mattys et al., *Effects of Acute Anxiety Induction on Speech Perception: Are Anxious Listeners Distracted Listeners?*, 24 PSYCHOL. SCI. 1606, 1608 (2013).

155. This is especially troublesome when providing guidance to the Advisory Committee about hearsay reform after considering that the Federal Judicial Center also indicated that "there currently is *no complete understanding* of how emotion affects mental processes, and emotion is itself a broad term that encapsulates many emotional states." *Id.* at 13 (emphasis added).

156. *See* FED. R. EVID. 803(1) (emphasis added).

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

158. *See Immediate*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/immediate [https://perma.cc/AE3B-KRWC] (last visited May 25, 2019).

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

160. *Id.* at 798 (majority opinion). While the court provided: "We need not definitively decide whether these concerns mean Portis's statements fail to qualify under the present sense impression exception because even if they did, they would still be admissible as an excited utterance," the implication is these statements did not qualify due to the declarant's opportunity for reflection before speaking. *Id.*

in *Boyce*, Portis "ran to another residence between the battery and her 911 call."[161] Accordingly, *Webster's Dictionary* cannot govern in *Boyce* if the word "delay" is given a strict constructionist reading. Moreover, the scope of the exception becomes even more obfuscated when the case law cited by Judge Posner is examined.[162] To illustrate, Judge Posner cites cases interpreting "immediacy" as encompassing periods as long as "23 minutes,"[163] "16 minutes,"[164] and "10 minutes."[165] Thus, as with excited utterances, the pivotal question becomes what characteristics about these various statements indicated trustworthiness to the presiding judges of the respective cases.

Starting with the Seventh Circuit's decision in *United States v. Blakey*, the court transparently noted "there is no *per se* rule indicating what time interval is too long under Rule 803(1)."[166] This admission again underscores the inquiry as to how a trial judge establishes a basis for determining the length of a present sense impression. Moreover, strongly implying a residual reliability analysis, the Seventh Circuit provides "the admissibility of statements under hearsay exceptions depends upon the facts of the particular case."[167] By utilizing the language of "the facts of the particular case" the Seventh Circuit is suggesting that if the precise gap in time is possibly too distant to qualify under FRE 803(1) but the facts demonstrate circumstantial reliability then the statement should still be admitted.[168] The most convincing evidence that *Blakey* employed the residual approach is that the court admitted the statement made approximately twenty-three minutes after the relevant events, in part, because of: "substantial circumstantial evidence corroborating the statements' accuracy."[169] Therefore, based upon the Seventh Circuit's language, the logical conclusion is that if there were no "substantial circumstantial evidence,"[170] the Seventh Circuit may very well

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161. *Id.*

162. *See id.* at 800 (Posner, J., concurring).

163. *See* United States v. Blakey, 607 F.2d 779, 785–86 (7th Cir. 1979) (holding tape-recorded conversation between victim and a witness, which occurred less than 23 minutes after defendants had taken $1,000 from victim and which related to such occurrence, was admissible under present sense exception to hearsay rule).

164. *See* United States v. Mejia-Velez, 855 F.Supp. 607, 614 (E.D.N.Y. 1994) (holding "The second call (statement) . . . was admittedly 16 minutes after the completion of his first call . . . [t]he requirements of Rule 803(1) were therefore satisfied . . . .").

165. *See* State v. Odom, 341 S.E.2d 332, 336 (N.C. 1986) (holding statement of eyewitness to abduction of victim was not too remote to be admissible under present sense exception to hearsay rule, where witness went to notify police immediately after abduction, officer was on scene in 10 minutes and witness then gave him statement about event.).

166. *Blakey*, 607 F.2d at 785.

167. *Id.* (citing Chestnut v. Ford Motor Co., 445 F.2d 967, 973 (4th Cir. 1971)).

168. *Id.*

169. *Id.* at 786 ("The trial court was justified in finding that the time interval was not so great as to render Rule 803(1) inapplicable to Dyer's statements. This finding, coupled with *the substantial circumstantial evidence corroborating the statements' accuracy*, indicate that the trial court acted properly in admitting these statements." (emphasis added)).

170. *Id.*

have found that the Trial Court abused its discretion.[171] One point, however, is incontrovertible: the Seventh Circuit never attempted to argue that twenty-three minutes equals "immediacy." Finally, parallel to Judge Posner's paramount concerns, the Seventh Circuit believes the statement is reliable and that the jury, presumably, could understand the statement's strengths and limitations.[172]

The Posnerian approach is neither isolated to the *Blakey* case nor the Seventh Circuit. Equivalent methodology is employed by both the Eastern District of New York in *United States v. Mejia-Velez*[173] and the Supreme Court of North Carolina in *State v. Odom*.[174] In *Mejia-Velez*, the Eastern District of New York provided that although the second statement was sixteen minutes after the first: "This call was also made without any motivation for fabrication" and the "recitation of the event was consistent with his first call and with the other testimony in the case."[175] Clearly, motivation is neither a requirement nor implied as a relevant threshold under FRE 803(1).[176] Moreover, in *State v. Odom*, the Supreme Court of North Carolina provided scant but similar reasoning to *Boyce* in admitting a statement as a present sense impression notwithstanding it being made ten minutes after the event.[177] In *Odom*, the court noted "Officer Roberts, a Durham Public Safety Officer, responded to the call and arrived on the scene ten minutes later. Mr. Hartell then described the abduction, the victim's car, and the appearance of the two assailants."[178] Consequently, by assessing the declarant's ability to accurately identify and describe the victim's car and appearance of two assailants, the court is placing a weighty emphasis on independent corroboration of the circumstances surrounding the present sense impression.[179] Thus, *Blakey, Mejia-Velez*, and *Odom*, each embody an application of residual analysis despite not using that language overtly. To reiterate, in no case did the trial court ever assert that the definition of immediacy was met.

There is also a far more fundamental concern with respect to the psychological reliability of present sense impressions even if they meet the immediacy language FRE 803(1) requires. To reiterate, the Advisory Committee Notes state that the

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171. *Id.*

172. *Id.*; *Boyce*, 742 F.3d at 802 (Posner, J., concurring).

173. *Mejia-Velez*, 855 F. Supp. at 614.

174. State v. Odom, 341 S.E.2d 332, 336 (N.C. 1986).

175. *Mejia-Velez*, 855 F. Supp. at 614 ("The second call placed by Gajewski was admittedly 16 minutes after the completion of his first call. This call, however, was also made *without any motivation for fabrication* on Gajewski's part. Indeed, his recitation of the event was consistent with his first call and with the other testimony in the case." (emphasis added)); *see also* United States v. Parker, 936 F.2d 950, 954 (7th Cir. 1991) (admission of statements under Rule 803(1) were "buttressed by the[ir] intrinsic reliability."). Although the court in *Mejia-Velez* did acknowledge the statement's "intrinsic reliability," the court also explicitly stressed the declarant's "motivation" and consistency with "other testimony" thus relying on extrinsic evidence to the statement and 803(1) textual requirements as well. *Mejia-Velez*, 855 F. Supp. at 614.

176. *See* FED. R. EVID. 803(1).

177. *Odom*, 341 S.E.2d at 336.

178. *Id.*

179. *Id.*

psychological justification for admitting present sense impressions is that "substantial contemporaneity of event and statement negative the likelihood of deliberate of conscious misrepresentation."[180] However, modern psychological evidence undermines this assertion since multiple studies show "less than one second is required to fabricate a lie."[181] While it is true that "most lies in fact are spontaneous,"[182] this fact corroborates the elevated probability that, by definition, a substantial portion of qualifying present sense impressions are fabricated.[183] Thus, of the traditional evidentiary psychological cornerstones of perception, memory, and sincerity, sincerity at least may be called into question. Such a lack of sincerity also tends to negate the benefits of accurate memory and perception.[184] This negation is especially true given the substantial increasing delays, already discussed, allowed by trial courts when admitting such a statement.[185] It is no wonder that John Henry Wigmore concluded that "to admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle."[186]

Analogous to the excited utterance exception, the Federal Judicial Center has also concluded that "experimental studies on the accuracy of observation underlying [present sense impression] hearsay evidence seem unnecessary."[187] This is because "[r]esearch literature shows that attention generally improves the accuracy of observation."[188] Yet, this recommendation does not address the separate question of whether residual analysis occurs under the *label* of the present sense impression

180. *See* FED. R. EVID. 803(1) advisory committee's note.

181. Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 916 (2001) ("Old and new studies agree that less than one second is required to fabricate a lie."). Professor McFarland cited two studies which have not been refuted to date. *Id.* at 916–17. First, "[o]ne research team reported the following response latency times: for a previously prepared lie, .8029 seconds; for a truthful statement, 1.6556 seconds; and for a spontaneous lie, 2.967 seconds." *Id.* Therefore, this showed that "the truth took longer to get out than a previously conceived lie, and that even a lie fabricated on the spur of the moment required less than three seconds to create and utter." *Id.* at 917 (citing John O. Greene et al., *Planning and Control of Behavior During Deception*, 11 HUMAN COMMUN. RES. 335, 350–59 (1985)). Second, Professor McFarland cited a study about Machiavellianism which is relevant here since it "measures the willingness of a person to manipulate others," which probably includes lying. *Id.* Once again, "all prepared liars were quicker than all truthtellers, and some spontaneous, manipulative liars were even quicker than some nonmanipulative truthtellers." *Id.* Furthermore, "[t]he slowest subjects to fabricate, nonmanipulative spontaneous liars, required *fewer than two seconds to fabricate a lie*." *Id.* (emphasis added) (citing Henry D. O'Hair et al., *Prepared Lies, Spontaneous Lies, Machiavellianism, and Nonverbal Communication*, 7 HUMAN COMMUN. RES. 325, 327–29 (1981)).

182. *See Boyce*, 742 F.3d at 800 (Posner, J., concurring) (quoting Monica T. Whitty et al., *Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication*, 63 J. AM. SOC'Y INFO. SCI. 208, 208–09, 214 (2012)).

183. *Id.* at 800–01 (quoting McFarland, *supra* note 181, at 907, 916).

184. *See* McFarland, *supra* note 181, at 916.

185. *See Blakey*, 607 F.2d at 785; *Mejia-Velez*, 855 F.Supp. at 614; State v. Odom, 341 S.E.2d 332, 336 (N.C. 1986).

186. *See* 3 WIGMORE, *supra* note 99, § 1757, at 2268.

187. *See* LAU, *supra* note 17.

188. *Id.*

exception. Specifically, the Center, in its defense of the present sense impression exception, never acknowledges that exorbitant timeframes, such as twenty-three minutes,[189] have still been interpreted as "immediate" under FRE 803(1). Therefore, the combination of the Center's recommendation to not pursue further experiments into the reliability of present sense impressions, the Center's failure to even mention the "judicial stretching" of the exception, and the fact that "no research to date appears to have tested the situational factors necessary for a declarant to successfully falsify [present sense impressions],"[190] will likely act as another vehicle in allowing federal judges to keep labeling a residual analysis under the categorical paradigm.

3. Then-Existing Mental, Emotional, or Physical Conditions

The then-existing mental, emotional or physical condition exception is purported to operate as a "specialized present sense impression" (the Advisory Committee Notes state "exception (3) is essentially a specialized application" of the present sense impression exception "presented separately to enhance its usefulness and accessibility").[191] But there are three central problems with FRE 803(3).

First, "statements about one's own then-existing mental, emotional, or physical condition are typically impossible to independently verify."[192] So, when it comes to establishing sincerity, memory and perception, sincerity will not be empirically discernable in the way that it is for present sense impressions and excited utterances.[193] The implications of this realization are best explicated by reexamining the *Boyce* decision: what if instead of Portis reporting that Boyce had a gun,[194] she merely stated that "she felt scared." With this factual alteration, there is simply no external event (i.e., the presence of a gun) that happened at a specified time and place analogous to cross-checking present sense impressions and excited utterances.[195] Therefore, the declarant who seeks to deceive law enforcement will be facilitated in doing so.[196]

A second obstacle to ensuring only accurate testimony is admitted under FRE 803(3) is that individuals may not fully understand the true reasoning behind their own actions.[197] A pertinent study asked a group of people to identify why they preferred one of four numbered articles of clothing standing up left to right in a window.[198] The people did not know the articles of clothing were identical except for their numbered location.[199] Yet, not one person mentioned the location of the

189. *See Blakey*, 607 F.2d at 785–86.
190. *See* LAU, *supra* note 17, at 5.
191. *See* FED. R. FED. EVID. 803(3) advisory committee's note.
192. *See* SAKS & SPELLMAN, *supra* note 39, at 196.
193. *Id.* at 193.
194. United States v. Boyce, 742 F.3d 792, 793 (7th Cir. 2014).
195. *See* SAKS & SPELLMAN, *supra* note 39, at 196.
196. *Id.*
197. *Id.*
198. *See* Richard E. Nisett & Timothy D. Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 233–34 (1997).
199. *Id.*

item as their reason for preference.[200] In other words, the people *could not accurately perceive* their own thought processes. This further demonstrates that individuals may provide inaccurate descriptions of motives despite honest intentions.[201] Thus, in conjunction with this psychological revelation, the Advisory Committee makes a daunting admission: "The carving out . . . of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, *resting on practical grounds of necessity and expediency rather than logic*."[202] This admission reveals the following: (1) logic is not the driving rationale behind the application of this exception; and (2) there is no mechanism for independently verifying the veracity of this evidence despite the exception's sacrifice of a commitment to logic.

FRE 803(3)'s third shortcoming emanates from the inherent weakness of an individual's statement about their intentions to perform a particular action.[203] Psychological research has revealed two key findings. First, people tend to overpredict their good behavior.[204] Second, people often make more claims about what they will do in the future than they could possibly complete.[205] Accordingly, absent independent corroboration, FRE 803(3) statements should not be routinely admitted by federal trial judges based upon a perception, memory and sincerity analysis.

Finally, federal judges frequently attempt to engage in a masked Posnerian analysis with FRE 803(3) statements. For example, in the 2016 case *Idaho Golf Partners, Inc v. Timberstone Management, LLC*,[206] the District Court of Idaho declined to apply FRE 803(3) based upon the delay that elapsed between when the declarant made the statement and the initial events causing the declarant's

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200. *Id.*

201. *Id.*

202. *See* FED. R. EVID. 803(3) advisory committee's notes (emphasis added).

203. *See* SAKS & SPELLMAN, *supra* note 39, at 197–98.

204. *Id.* at 197 (citing Nicholas Epley & David Dunning, *Feeling "Holier Than Thou": Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOL. 861, 862–63 (2000) (This study found a university had a spring fund-raising event where students purchase flowers for a charity. Students in a psychology class were asked to predict whether they would purchase at least one flower and what percentage of their classmates, they believed, would purchase a flower. Eighty-three percent of students predicted they would purchase a flower but only 43% had done so. People performed more successfully at predicting the behavior of their classmates. The prediction for classmates was 56% would purchase a flower and the actual number was 43%.)).

205. *Id.* (citing Nira Liberman and Yaacov Trope, *The Role of Feasibility and Desirability Considerations in Near and Distant Future Decisions: A Test of Temporal Construal Theory*, 75 J. PERSONALITY & SOC. PSYCHOL., 5 (1998) (Decisions regarding distant future activities, compared with decisions regarding near future activities, *were more influenced by the desirability of the end state and less influenced by the feasibility of attaining the end state*." (emphasis added)).

206. *See* Idaho Golf Partners, Inc. v. Timberstone Mgmt., LLC, No. 14-00233, 2016 WL 4974944, at *1–2 (D. Idaho Sept. 16, 2016).

confusion prompting the statement.[207] Several other cases apply a similar covert residual analysis. First*, in Batoh v. McNeil-PPC, Inc.*,[208] the District of Connecticut considered whether the circumstances of the case established that the declarant's statements were made "soon after" the relevant events as a part of the analysis for determining inadmissibility. There was no concrete definition given for what "soon after" meant.[209] Similarly, in *United States v. Rucke*r,[210] the Northern District of Illinois held that the state of mind exception did not apply, in part, because the facts did not reveal "when during the five months" a prisoner incarcerated with the declarant heard the declarant say "he was disappointed." Hence, the theme of illusory concreteness enabling residual discretion arises again.

The definition of "soon after" may at first glance appear cherry-picked and minute. Yet, the fundamental point remains that there is *nothing* in FRE 803(3) itself to provide a temporal metric to assist in determining admissibility. Relatedly, analogous to the immediacy issue with present sense impressions, the Advisory Committee did not, under FRE 803(3), define any delay limit between the occurrence of the events giving rise to the statement and when the statement was made.[211] As a result, admissibility, once again, falls within the masked Posnerian approach by the federal judiciary.[212] While the then-existing state of mind statement may not be empirically verifiable, a trial judge has the ability to determine whether the time between the statement and its pertinent events is soon enough to safeguard reliability.[213] Additionally, a trial judge has discretion to consider testimony about the declarant's demeanor when the statement was made which acts as an attempt of independent corroboration.[214] Thus, FRE 803(3) is another judicial mask of a residual application.[215]

4. Dying Declarations

Philosophical allusions to the dying declaration doctrine date as far back as 1676. For example, French dramatist and librettist Philippe Quinault states in the French opera *Atys*: "He who doesn't have another moment to live, does not have

207. *Id.* at 2 ("The "state-of-mind" exception may not always apply. For example, the Court is not persuaded that a golfer's follow-up conversation with TimberStone—reporting prior confusion of the golf courses—would be admissible as a statement of the declarant's then-existing state of mind, if sufficient time had passed from the moment of alleged confusion.").

208. Batoh v. McNeil-PPC, Inc., 167 F.Supp.3d 296, 312 (D. Conn. Mar. 10, 2016).

209. *Id.*

210. United States v. Rucker, No. 15-50202, 2015 WL 9478216, at *6 (N.D. Ill. Dec. 29, 2015).

211. *See* FED. R. EVID. 803(1), (3).

212. *See* Idaho Golf Partners, Inc., 2016 WL 4974944, at *1–2.

213. *Id.*

214. *See* United States v. Boyce, 742 F.3d 792, 798 (7th Cir. 2014). Based upon these facts there is no reason the police could not have used the declarant's emotional demeanor as independent corroboration of the statement's veracity if it qualified under the then-existing mental state exception as opposed to the excited utterance exception.

215. *Id.*

anything more to hide."[216] Additionally, a little over a century from the signing of the U.S. Constitution, the U.S. Supreme Court reaffirmed the prevalence of Christianity throughout the country[217] thereby providing at least some evidence that people had a religious fear of lying when death was imminent. However, even by the time of the Advisory Committee Notes, religious affirmation was dissolving: "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."[218]

The above paragraph demonstrates a serious concession by the Advisory Committee when coupled with FRE 804(b)(2)'s numerous other deficiencies. First, perception and memory may be impaired thus hindering accuracy since "excitation or losing mental capacity decreases accuracy."[219] Second, an individual fearing imminent death will most likely be in "less-than-perfect physical shape" in ways that would affect perception, memory, and reasoning (e.g., injured, drugged, losing blood.).[220] Third, individuals may choose to incriminate their enemies from their deathbeds believing there is nothing to lose.[221] Therefore, while it may appear redundant, it is crucial to highlight that modern cases involving the dying declaration exception also embody an application of Judge Posner's residual approach. For example, in *United States v. Angleton*, the Southern District of Texas provided that, in dying declaration cases, "the length of time elapsing between the making of the declaration and the death is to be considered."[222] While the "rapid succession of death" after the statement is made is not dispositive in determining admissibility,[223] it is clear from *Angleton* that the "length of time" was used, in part, to determine the dying declaration's reliability.[224] Moreover, the *Angleton* court quoted the U.S. Supreme Court case *Mattox v. United States* for the proposition that "circumstances" of the statement must be considered and that dying declarations should only be admitted with the "utmost

216. *See* EDGAR ALLEN POE, EPIGRAPH TO MS FOUND IN A BOTTLE (1833) (quoting Quinault, who wrote for the 1676 French Opera, *Atys*, "Qui n'a plus qu'un moment a vivre N'a plus rien a dissimuler,"meaning "He who does not have another moment to live, does not have anything more to hide.").

217. *See* Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892) ("These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.").

218. *See* FED R. EVID. 804(b)(2) advisory committee's notes (citing 5 WIGMORE, *supra* note 99, § 1443; Rex v. Woodcock, 168 Eng. Rep. 352, 353; 1 Leach 500, 502 (K.B. 1789) (Chief Baron Eyre's classic statement)).

219. *See* SAKS & SPELLMAN, *supra* note 39, at 193.

220. *Id.*

221. *Id.*

222. *See* United States v. Angleton, 269 F.Supp.2d 878, 883 (S.D. Tex. 2005) ("The length of time elapsing between the making of the declaration and the death is to be considered, although . . . [i]t is the impression of almost immediate dissolution, and not the rapid succession of death, that renders the testimony admissible" (quotations omitted)).

223. *Id.*

224. *Id.* at 883.

caution."[225] Similarly, in *People v. Mayo*,[226] the California Court of Appeals provided that there was "abundant circumstantial evidence" of the declarant's impending death including that the declarant suffered eleven close-range gunshot wounds to his back, arms, legs, and hips and that as the declarant laid down bleeding he told another person that he felt really hot and wanted a fan. Perhaps unsurprisingly at this point, FRE 804(b)(2) provides no guidance at all for how the judge is to conduct a "circumstantial evidence" analysis which means that the judge will be compelled to determine on a case-by-case basis if a particular dying declaration is reliable.

This above residual analysis, with respect to dying declarations, is not confined to *Angleton*, *Mattox*, and *Mayo*. For example, statements have been admitted as dying declarations even when no individual expressed a belief that the declarant was dying but the "*circumstances* strongly suggested the declarant likely believed he or she was dying at the time he or she made the hearsay statement."[227] Additionally, whether a suicide note constitutes a dying declaration has been held to be contingent upon whether the trial judge believed the suicide occurred "soon after writing the note."[228] The definition of "soon" is not found under FRE 804(b)(2).[229] Therefore, one is hard-pressed to fathom where this "utmost caution" and definition of a "speedy death" are to be derived from without a case-by-case residual discretionary analysis. Finally, disguised residual application probably occurs under this exception since, of equal concern with all hearsay exceptions, it only takes "less than one second" to fabricate a lie.[230] Overall, the dying declaration exception is riddled with reliability concerns and additional circumstantial verification is needed to allay these concerns.

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225. Mattox v. United States, 146 U.S. 140, 152 (1892) ("The evidence must be received with the *utmost caution*, and, if the *circumstances* do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, [the declaration] ought to be rejected." (emphasis added)).

226. People v. Mayo, 44 Cal. Rptr. 3d 497, 512–13 (2006), *cert. denied*, 549 U.S. 1289 (2007).

227. *See* James v. Marshall, No. 06-3399, 2008 WL 4601238, at *19 (C.D. Cal. Aug. 13, 2008) ("In a few cases, courts have admitted the hearsay statement even though no one expressed a belief in the declarant's impending death, where the circumstances strongly suggested the declarant likely believed he or she was dying at the time he or she made the hearsay statement.") (citing *People v. Monterroso*, 101 P.3d 956, 971 (2005) (gunshot pierced declarant's respiratory system, gastrointestinal system and liver, causing wounds which were "of a great magnitude and dangerous in [themselves]"; declarant "knew he had been shot, was in great pain and lying in a fetal position, was fearful of dying, and never spoke again" after making statement.)).

228. *See* Pittman v. County of Madison, No. 08-890, 2015 WL 557248, at *3 (S.D. Ill. Feb. 10, 2015) (citing State v. Satterfield, 457 S.E.2d 440, 447 (W.Va. 1995), a murder case, in which the court admitted a suicide note under the dying declaration exception. In *Satterfield*, questions directed toward a witness suggested the witness committed the murders. *Id.* That night, the witness committed suicide, leaving behind a suicide note declaring his innocence. *Id.*).

229. *See* FED. R. EVID. 804(b)(2) ("In a prosecution for homicide or in a civil case: a statement that the declarant, while believing in the declarant's death to be imminent, made about its cause or circumstance." Thus, "imminent" or "soon" is not defined here.).

230. *See* McFarland, *supra* note 181, at 916.

5. Statements Made for Medical Diagnosis or Treatment

Even among adamant defenders of retaining some form of the traditional categorical approach, there is widespread agreement that admitting statements "made for medical diagnosis or treatment"[231] carries significant reliability issues.[232] Indeed, it has also been conceded that FRE 803(4) is "broader than that description implies"[233] for several reasons. First, the declarant does not need to make the statement to a doctor.[234] Second, the declarant need not even "be a patient—the individual with the strongest incentive to receive appropriate treatment."[235] Third, "an amendment to the exception permits statements made for purposes of 'diagnosis' only."[236] Accordingly, even a vocal critic of the Posnerian model has admitted: "Indeed, the folk psychology lamented by Judge Posner in *Boyce* is the cornerstone of several contemporary hearsay exceptions."[237]

Despite the above analysis, the Advisory Committee Notes appear to be confident that statements admitted under this exception will be reliable by noting that "even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the *patient's strong motivation to be truthful*."[238] Herein lies the crux of reliability accusations against this exception. Clearly, any individual would realize that an exaggerated medical diagnosis could potentially result in a massive increase of lucrative damages. Thus, it is unsurprising that several modern cases uniformly reveal a residual analysis long before Judge Posner's concurrence in 2014. First, in *State v. Hinnant*, the Supreme Court of North Carolina (which has adopted FRE 803(4)), provided: "[I]n our view, the trial court should consider *all objective circumstances* of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)."[239] Undeniably, it is quite difficult to distinguish "all objective circumstances" from "residual reliability" and

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

232. *See* Richter, *supra* note 3, at 1882 (incredulously inquiring: "Statements made for purposes of medical treatment that are pertinent to such treatment are likely reliable because who would lie to a doctor?") (citing 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §8:75, at 676–77); *see also* Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception For Statements for Medical Examination In Child Abuse Cases*, 65 LAW & CONTEMP. PROBS. 47, 47 (2002) (acknowledging that there is "at least a partial disintegration" with this exception in child abuse cases.); Robert R. Rugani, Jr., *The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(4), The Medical Diagnosis Exception*, 39 SANTA CLARA L. REV. 867, 867 (1999) (acknowledging that the expanding application of this exception is resulting in "effectively making Rule 803(4) a less firmly rooted and well-established hearsay exception.").

233. *See* Richter, *supra* note 3, at 1882 n.131.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 1882.

238. *See* FED. R. EVID. 803(4) advisory committee's notes (emphasis added).

239. State v. Hinnant, 351 N.C. 277, 288 (2000) ("The trial court should consider *all objective circumstances* of record surrounding declarant's statements in determining whether he or she possessed the requisite intent to be truthful in order to obtain appropriate medical treatment, for purposes of

"circumstantial reliability," because the phrase "all objective circumstances" is found nowhere within the text of the exception.[240] Additionally, even more closely related to the Posnerian model is the District Court of Connecticut's decision in *S. Home Care Servs., Inc. v. Visiting Nurse Servs., Inc. of S. Connecticut*, which grappled with admitting a statement either under FRE 803(4) or under the residual exception.[241] The fundamental point is that the court's reasons for why neither exception applied are strikingly similar.[242] With respect to FRE 803(4), the court held the statements pertained to "a business dispute" and not a medical diagnosis.[243] For the residual exception, under FRE 807, the court provided that the declarant's statements were most likely "influenced by the product of suggestion."[244] While the court only emphasized medical history under FRE 803(4), the significant similarity is that with both exceptions the court showed great concern about circumstantial reliability and whether the statements were "the product of suggestion."[245]

Before moving on from FRE 803(4), the synthesis of perception, memory, and sincerity is germane here. Regarding perception and memory, an analogy can be made to the dying declaration exception in that circumstantial reliability is likely hindered with a vast number of these statements since the declarant may be "injured, drugged or losing blood."[246] Finally, sincerity is compromised due to litigation interests and the "product of suggestion" given the declarant's potential compelling incentive to fabricate illness in hopes of lucrative compensation.[247]

To conclude Part II, this section has revealed two central evidentiary truths: (1) numerous foundational exceptions suffer from a plethora of legal, psychological, and policy deficiencies and (2) to address those deficiencies, the federal judiciary has been applying the Posnerian model long before *Boyce* was decided.

III. THE CASE FOR OPENLY ACKNOWLEDGING TODAY'S RESIDUAL APPROACH

This Part argues for the logical corollary of Part II. The Advisory Committee, through enactment, and the federal judiciary, through precedent, should openly adopt the residual approach. In support of this argument, this Part will first highlight a select few "diamonds in the rough" of the categorical approach that should not be abolished, including the business records,[248] public

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determining whether to admit evidence under the medical diagnosis and treatment exception to hearsay rule." (emphasis added)).

240. *See* FED. R. EVID. 803(4).

241. S. Home Care Servs. Inc., v. Visiting Nurse Servs., Inc. of S. Conn., No. 3:13–00792, 2015 WL 4509425, at *4 (D. Conn. July 22, 2015).

242. *Id.*

243. *Id.*

244. *Id.* (holding the residual exception did not apply: "Given the patients' mental condition and the possibility that their statements were influenced by the power of suggestion, the statements are not unusually reliable.").

245. *Id.*

246. *See* SAKS & SPELLMAN, *supra* note 39, at 199. There is simply no reason these dying declaration concerns cannot apply to 803(4).

247. *See Southern Home Care Services Inc*, 2015 WL 4509425, at *4.

248. *See* FED. R. EVID. 803(6).

records[249] and declarations against interest exceptions.[250] Second, this Part will respond to the prominent criticism of the Posnerian approach, namely the fear of uncontrolled judicial discretion.[251] Part III concludes, finally, that the residual approach surpasses this criticism in view of judges' already frequent use of the residual approach and other existing discretionary rules (such as FRE 403 and 404(b)).

A. Diamonds in the Rough: Business Records, Public Records and Declarations Against Interest

One of the most significant statements in *Boyce* comes from the last paragraph, in which Judge Posner meticulously elucidates the residual approach. Judge Posner provides that the residual exception should swallow "much" of FRE 801–806 and "many" of the exclusions.[252] This language indicates that Judge Posner is open to digging for any diamonds in the rough in the FRE.[253] While Judge Posner did not elaborate on which exceptions should remain, this section pursues that task.

1. Business Records

Under FRE 803(6), business records consist of the following elements: (a) a record that was "made at or near the time by—or from information transmitted by—someone with knowledge;" (b) "was kept in the course of a regularly conducted activity of a business;" (c) "making the record was a regular practice of that activity;" (d) "all these conditions are shown by the testimony of the custodian or another qualified witness . . .;" and (e) "the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."[254]

The Advisory Committee Notes acknowledge that business records possess an "unusual reliability" derived from "systematic checking, by regularity and continuity which produce habits of precision."[255] Such characteristics appear to perfectly align with the Posnerian approach, given its goal of reliability.[256] Moreover, unlike the excited utterance exception, for example, the business

249. *See* FED. R. EVID. 803(8).

250. *See* FED. R. EVID. 804(b)(3).

251. *See* Imwinkelried, *supra* note 4, at 468 ("The practical problem is that Rule 807's language grants the trial judge an enormous amount of discretion.").

252. *See* United States v. Boyce, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J., concurring) ("What I would like to see is Rule 807 ('Residual Exception') swallow *much* of Rules 801 through 806 and thus *many* of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee." (emphasis added)).

253. *Id.*

254. *See* FED. R. EVID. 803(6).

255. *See* FED. R. EVID. 803(6) advisory committee's notes ("The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." (quoting MCCORMICK ON EVIDENCE §§ 281, 286, 287 (Kenneth S. Broun ed., 7th ed. 2013); Charles Laughlin, *Business Entries and the Like*, 46 IOWA L. REV. 276 (1961)).).

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

record exception appears to address the psychological cornerstones most foundational to the FRE. Regarding perception and memory, business records are composed by the declarant for the specific purpose of remembering the information. Therefore, such records are presumably compiled while the author possesses an accurate memory of the occurring events.[257]As for sincerity, the text of the exception has a unique "built-in check" on internal reliability stemming from the requirement that "making the record was a regular practice of that activity."[258] Such language safeguards sincerity because a business depends on maintaining consistently accurate records. In other words, it appears logically absurd that a business would knowingly maintain erroneous records as a "regular course of business." Moreover, should a business choose to knowingly, as "regular practice,"[259] maintain fraudulent records, such an admission would still advance the Posnerian concern for reliability by assisting the jury's analysis of the fraudulent conduct.[260] Finally, a trustworthiness check is engraved in FRE 803(6) by barring admission of the records if the opponent establishes that "the source of information or the method of circumstances of preparation indicate a lack of trustworthiness."[261] This residual language addresses reliability concerns associated with the Posnerian approach.[262] Accordingly, the first diamond in the rough should be the business record exception.

2. Public Records

The public records exception under FRE 803(8) is another diamond in the rough candidate that would serve as an invaluable supplement to the Posnerian approach.[263] Public records must set out "the office's activities," or "a matter observed while under a legal duty to report." Public records also must not "indicate a lack of trustworthiness."[264]

Based upon the rule's language, a lengthy analysis is not required to demonstrate why public records also constitute a diamond in the rough. The exception itself contains residual-like language by requiring that "the opponent does not show that the source of information or [that] *other circumstances* indicate a lack of trustworthiness."[265] Hence, if there is significant circumstantial evidence that

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257. *See* FED. R. EVID. 803(6). Specifically, it is a prerequisite that: "the record was made at or near the time by—or from information transmitted by—someone with knowledge." *Id.*

258. *Id.*

259. *Id.*

260. See United States v. Skeddle, 981 F. Supp. 1069, 1072 (N.D. Ohio 1997), for one example of the business record exception functioning, in part, as a means of exposing fraudulent business activity. In *Skeddle*, the court held handwritten notes of accounting firms satisfied requirement for business records exception to hearsay rule that record be made in course of regular business activity, in prosecution for wire and mail fraud, money laundering and conspiracy. *Id.*

261. *See* FED. R. EVID. 803(6).

262. United States v. Boyce, 742 F.3d 792, 800–01 (7th Cir. 2014) (Posner, J., concurring).

263. *See* FED. R. EVID. 803(8).

264. *See id.*

265. *Id.*

the public record is not trustworthy, then that hearsay evidence will not be admitted under this exception.[266] Furthermore, the Advisory Committee Notes explicate that "[j]ustification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record."[267] This means that analogous safeguards of reliability exist for this exception as for business records since there is the presumption, as with business records, that the purpose of their composition is to retain the data recorded.[268] Therefore, criteria for satisfying the public records exception address both Posnerian concerns of "reliability" and the jury's ability to ascertain the "strengths and weaknesses of the testimony."[269] Finally, when considering the psychological factors of perception, memory, and sincerity, the public records exception contains two internal safeguards of trustworthiness: (1) the record must address "a matter observed while under a legal duty to report," suggesting that the declarant will report the information promptly given this legal duty; and (2) the opportunity for the opponent to indicate that "the source of information or other circumstances indicate a lack of trustworthiness" exist just in case the public official does not record the information in an appropriate or reliable manner.[270] Thus, the public records exception would also serve as another supplemental "diamond" to the residual approach.

3. Declarations Against Interest

One final diamond in the rough may be the declarations against interest exception to the bar against hearsay.[271] A declaration against interest is a statement that "a reasonable person in the declarant's position would have made only if the person believed it to be true."[272] Declarations against interest were deemed reliable by the Committee based upon the intuition that people do not make incriminating statements about themselves without sufficient reason for believing the statements are valid.[273] Hence, the various psychological concerns of sincerity, memory, and perception are encapsulated in this exception.[274] The Advisory Committee Notes address sincerity by providing that declarants do not make such statements "unless satisfied for good reason that they are true."[275] For memory and perception, it is easily inferable from the Advisory Notes that the declarant

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266. *Id.*

267. *See* FED. R. EVID. 803(8) advisory committee's notes (citing Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952); Chesapeake & Del. Canal Co. v. United States, 250 U.S. 123, (1919)).

268. *Id.* ("As to items (a) and (b), further support is found in the reliability factors underlying records of *regularly conducted activities generally*." (emphasis added)).

269. United States v. Boyce, 742 F.3d 792, 800–01 (7th Cir. 2014) (Posner, J., concurring).

270. *See* FED. R. EVID. 803(8).

271. *See* FED. R. EVID. 804(b)(3).

272. *See* FED. R. EVID. 804(b)(3).

273. *See* FED. R. EVID. 804(b)(3) advisory committee's notes (citing Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965)).

274. *Id.*

275. *Id.*

would be compelled to investigate the statement's truthfulness since it is contrary to the declarant's "proprietary or pecuniary interest" and has the potential to "expose the declarant to civil or criminal liability."[276] Finally, to justify the exception in cases of criminal liability, independent corroboration of the statement is additionally required.[277]

While the Advisory Committee Notes do not focus upon the psychological concerns of perception and memory, they explicitly focus on sincerity by highlighting that "*the circumstantial guaranty of reliability* for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."[278] Moreover, when the declaration against interest pertains to a criminal case, the rule further requires that the declaration is "supported by *corroborating circumstances* that clearly indicate its trustworthiness."[279] As a result, for criminal cases, the combination of a residual analysis through "corroborating circumstances," coupled with the intuitive notion that individuals do not want to falsely incriminate themselves, aligns with the Posnerian approach. Therefore, this exception is another hearsay diamond in the rough which should be maintained under the residual approach. The only caveat is that a "circumstantial verification" requirement for civil cases would fully accomplish the residual reliability objective.[280]

Before moving on, it is imperative to note one further related corollary. One may fathom, as Liesa Richter has, that exceptions like present sense impressions and excited utterances could be modified to include an internal safeguard like the business and public records exceptions.[281] In other words, Professor Richter contends that most present sense impressions and excited utterances are reliable but that some *particular* present sense impressions or excited utterances may be shown to lack trustworthiness. Thus, the argument goes, present sense impressions and excited utterances could be *modified* rather than abolished if the exceptions allowed for the opponent of such statements to demonstrate circumstantial untrustworthiness.[282] Yet, such an argument is circular at best. Professor Richter appears to suggest that *most* present sense impressions and excited utterances are reliable in the first place and then allows for the possibility of showing ad hoc untrustworthiness on a specific occasion. In other words, Professor Richter never grapples with the litany of psychological shortcomings and judicial elasticity that all exceptions to the bar against hearsay face. In summary, the present sense impression and excited utterance exceptions are flawed on their face and

276. *See* FED. R. EVID. FRE 804(b)(3).

277. *Id.*

278. *See* FED. R. EVID. 804(b)(3) advisory committee's notes (citing Hileman v. Nw. Eng'g Co., 346 F.2d 668 (6th Cir. 1965)).

279. *See* FED. R. EVID. 804(b)(3).

280. *See* FED. R. EVID. 804(b)(3)(A)–(B). The "corroborating circumstances" requirement only applies to criminal cases.

281. *See* Liesa L. Richter, *Reality Check: A Modest Modification to Rationalize Rule 803 Hearsay Exceptions*, 84 FORDHAM L. REV. 1473, 1479 (2016).

282. *Id.*

Professor Richter's modification will not rehabilitate them because it does not address the erroneous psychological assumptions underlying these exceptions.

B. Judicial Discretion: Judges Decide as They Do

A comprehensive examination of the residual approach mandates addressing the chief criticism of the Posnerian model: that it facilitates an influx of uncontrolled judicial discretion nonexistent under the current paradigm.[283] Consequently, this section aims to establish the following two points: (1) the majority of this feared increase in judicial discretion abuse is illusory given the covert rampant usage of the Posnerian approach; (2) analogous to the discretionary standard for measuring prejudice under FRE 403 and assessing character evidence under 404(b), the residual approach is the optimal choice, despite any increase in judicial discretion.

Professor Imwinkelried has articulated a list of the varying judicial discretion critiques.[284] The most prominent critiques include: (1) judges will be compelled to apply the residual approach on a case-by-case basis, causing enormous uncertainty;[285] (2) a miniscule number of states will adopt the Posnerian approach due to judicial uncertainty of admissibility;[286] (3) settlement discussions between attorneys will be truncated, because neither party would want to "give in" based upon the ambiguity of whether a pivotal statement would be admitted;[287] (4) the present sense impression exception specifically should not be abolished because, "[a]lthough anecdotal evidence, there is widespread agreement that inadvertent errors caused by deficient memory appear to be more frequent than perjury from downright insincerity."[288]

The first two criticisms, (1) fear of hearsay being decided on a case-by-case basis and (2) that only a miniscule number of states will probably adopt the residual approach are interrelated. First, as already discussed throughout this entire note, in a plethora of cases the traditional exceptions are merely labels for the residual approach employed. To recap, one of the most striking examples discussed is the absurd assertion that twenty-three minutes satisfies the "immediacy test" under FRE 803(1).[289] This example, along with the analysis in Part II, unequivocally demonstrate that the case-by-case basis approach is already in active use by the federal judiciary. In other words, the very judicial discretion Professor Imwinkelreid is concerned about is already being copiously applied in a stealthy manner.[290] Second, and relatedly, whether the states adopt an expanded

283. *See* Imwinkelried, *supra* note 4, at 468 ("The practical problem is that Rule 807's language grants the trial judge an enormous amount of discretion.").

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 469.

288. *Id.* at 474.

289. *See* United States v. Blakey, 607 F.2d 779, 785–86 (7th Cir. 1979).

290. *Id.*; *see also* United States v. Mejia-Velez, 855 F.Supp. 607, 614 (E.D.N.Y. 1994) (holding "[t]he second call (statement) . . . was admittedly 16 minutes after the completion of his first call . . .

Posnerian approach would not prevent federal judges from changing over.[291] Therefore, most of this discretion-related criticism is a false alarm. Finally, should the categorical approach remain in place, there is no textual FRE mechanism for curtailing the disguised residual analysis already occurring.

More generally, the notion that an approach should never be adopted merely because it will require a case-by-case analysis by the presiding judge is in stark contrast to two of the most significant rules in the FRE: the evidential weighing of prejudicial value against probative value under FRE 403 and the admission of character evidence under FRE 404(b). Under FRE 403, a federal judge 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."[292] Crucially, the rule fails to define either of these criteria for determining whether the prejudicial value "substantially outweighs" the probative value, thus substantially increasing judicial discretion.[293] Moreover, under FRE 404(b), while character evidence of a previous crime is not admissible to prove "that on a particular occasion the person acted in accordance with the character," that piece of evidence may be admitted for other reasons, such as demonstrating "motive or opportunity."[294] Yet, similar to FRE 403, the judge must decide on a case-by-case basis whether the evidence fits the appropriate threshold.[295] Thus, the denial of the residual approach simply because it is discretionary would lead to the conclusion that FRE 403 and 404(b) should also be abolished. Undoubtedly, such an abolition makes little sense.

Another related policy argument raised in favor of not adopting the residual approach is the notion that doing so would render parties reluctant to settle, since neither party would "give in" without knowing the fate of the hearsay evidence left at the judge's unfettered whim.[296] However, this argument has numerous deficits. First, this argument presupposes the categorical exceptions are not applied in a residual-like manner. Indeed, since judges have been engaging in a residual-like analysis all along, they and the lawyers involved will have previous precedent on which to rely. In fact, Judge Posner's language for the residual approach opines, even if tacitly, that such precedent exists for future judges to rely upon.[297]

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[t]he requirements of Rule 803(1) were therefore satisfied."); State v. Odom, 341 S.E.2d 332, 336 (N.C. 1986) (holding statement of eyewitness to abduction of victim was not too remote to be admissible under present sense exception to hearsay rule, where witness went to notify police immediately after abduction, officer was on scene in 10 minutes and witness then gave him statement about event.). Part II of the note outlines the rest of this copious residual application.

291. *See* FED. R. EVID. 807. By definition, the States' adoptive actions do not hinder the application of the FRE in federal jurisprudence.

292. *See* FED. R. EVID. 403.

293. *Id.*

294. *See* FED. R. EVID. 404(b).

295. *Id.*

296. *See* Imwinkelried, *supra* note 4, at 469.

297. United States v. Boyce, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J., concurring).

Specifically, in referring to the abuse of the present sense impression exception, Judge Posner provides: "I don't get it, especially when 'immediacy' is interpreted to encompass periods as long as 23 minutes."[298] In other words, Judge Posner is suggesting that trial judges are fully aware that a statement often does not "neatly" fit the language of an exception but that if the statement is reliable anyway, trial judges conjure a way to admit it.[299] Therefore, a compelling counterargument, with regard to settlement, is that as the Posnerian residual approach develops its own set of precedent, the notice to parties about a statement's potential admissibility will be far more transparent than the existing regime. If Judge Posner is correct, the lawyers chiefly have to consider: (1) whether the statement is reliable based on evolving post-Posnerian precedent and pre-Posnerian precedent where the residual approach was merely a hidden label and (2) the jury's ability to evaluate the statement's "strengths and weakness."[300] Judge Posner's third factor (whether the statement will "materially enhance the likelihood of a correct outcome") appears to simply be a test of overall coherence of the evidence, since Judge Posner did not address this factor any further.[301] While not completely straightforward, especially before residual approach precedent develops, the Posnerian model provides much clearer notice than the circumlocution of: (a) whether a future trial judge will "bend" the present sense impression "immediacy test"[302] to 40 minutes instead of 23 minutes or (b) hypothesizing the limits of how long the delay may be that can still clear the excited utterance threshold of "while the declarant was under the stress of excitement."[303] Thus, any initial increased uncertainty to prospectively settling parties should not be dispositive in rejecting the Posnerian model.

The final argument against adopting the residual approach stems solely from the present sense impression exception. It has been argued that "inadvertent testimonial errors caused by misrecollection are far more common than perjurious statements caused by downright insincerity."[304] As a logical corollary, the argument goes, there are cases where: "a declarant's present sense impression is likely to be more trustworthy than the declarant's subsequent trial testimony."[305] Therefore, the argument concludes, perhaps in some cases a declarant's present sense impressions should be preferred over the declarant's live testimony as a

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298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 802.

302. *See* FED. R. EVID. 803(1).

303. *See* FED. R. EVID. 803(2).

304. *See* Imwinkelried, *supra* note 4, at 474. However, it is crucial to note the following concession embedded in the statement: "*Although there is no definitive empirical research on the subject*, the consensus is that at trial, inadvertent testimonial errors caused by misrecollection are far more common than perjurious statements caused by downright insincerity." *Id.* at 474 (emphasis added). For the sake of argument, I will concede this psychological argument is true notwithstanding the absence of empirical research.

305. *Id.* at 475.

matter of psychological memory accuracy.[306] However, this argument can be dealt with rather swiftly because it is not mutually exclusive with an elevated Posnerian approach.[307] Indeed, if evidentiary jurisprudence ever deviates in the direction of preferring certain hearsay evidence even over live testimony, to ensure reliability in certain circumstances, the residual approach can accomplish this task.[308] The residual approach is crucial to ensuring reliability and jury comprehension for any hearsay admitted.[309] This residual flexibility, therefore, can serve as an optimal vehicle for accommodating modern psychological evidence in novel situations.

When considering the shortcomings in the criticisms of the residual model discussed above, the Advisory Committee's characterization of an "an all-out discretion fest"[310] becomes necessary to examine again. By using such provocative language as "an all-out discretion fest," the logical implication is that the Committee believes courts' considering of hearsay testimony would remove a significant amount of necessary stability, should the residual approach be implemented.[311] As a corollary, lawyers also generally seem to contend that there is a time-saving aspect of the traditional model, which would no longer be present if the categorical paradigm were largely abolished.[312] However, both of these contentions are false; federal judges already frequently and surreptitiously use the residual approach as discussed throughout Parts II and III. In fact, all the evidence presented thus far reveals that judicial discretion is less ripe for abuse if one were to codify the residual approach. This is because doing so would remove the *illusion* of stability; under the residual approach, the totality-of-the-circumstances analysis taking place in any given case would be unable to hide behind a false label. Whether it is the additional, non-textual, "first opportunity" requirement used to safeguard excited utterances in child abuse cases,[313] the mutable definition of the present sense impression exception's "immediacy" requirement,[314] the circumstantial reliability used to assess a declarant's then-existing mental state[315]

306. *Id.*

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

308. *Id.*

309. *Id.*

310. Advisory Comm. on Rules of Evidence, *supra* note 13, at 118.

311. *Id.* ("One can hope that there is a sweet spot somewhere between outright rejection of a residual exception—which could result either in the loss of a good deal of reliable evidence or an unwelcome expansion and misshaping of the standard exceptions—and an all-out discretion fest as championed by Judge Posner. *The goal of the Committee's efforts is to find that sweet spot.*" (emphasis added)).

312. *Id.* at 110.

313. *See* Swift, *supra* note 144, at 494; Morgan v. Foretic 846 F.2d 941, 947 (4th Cir. 1988).

314. *See e.g.*, United States v. Blakey, 607 F.2d 779, 785–86 (7th Cir. 1979) (holding tape-recorded conversation between victim and a witness, which occurred less than twenty-three minutes after defendants had taken $1,000 from victim and which related to such occurrence, was admissible under present sense exception to hearsay rule).

315. *See, e.g.*, Idaho Golf Partners, Inc. v. Timberstone Management, LLC, No. 14-00233, 2016 WL 4974944, at *1–2 (D. Idaho Sept. 16, 2016) (declining to apply FRE 803(3) based upon the delay that elapsed between when declarant made the statement and the initial events causing the declarant's confusion prompting the statement).

or any of the additional requirements judges decide to consider in an *ad hoc* manner, there is simply no indication that these methodologies will disappear regardless of whether the categorical approach remains. This is especially true if the pattern continues that federal judges "exclude more than admit"[316] under the current, and narrow, FRE 807 residual exception but then superficially apply the categorical model through a covert residual analysis. Relatedly, even if the categorical approach does take less time to apply then the residual framework, the Advisory Committee, obviously, has never suggested that the quickest approach to admitting evidence is automatically superior to a more thorough and transparent methodology. Hence, if predictability and transparency are the chief aims of hearsay reform, the primary criticisms against the residual model, while not meritless, are insufficient to warrant the rejection of the residual approach.

CONCLUSION

FRE 102 instructs that the FRE should "promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." This note has illustrated that the Posnerian prescription in *Boyce* is an optimal vehicle for such "development." Indeed, this note established three propositions. First, there is a plethora of legal, psychological, and policy deficiencies with prominent hearsay exceptions, including present sense impressions, excited utterances, then-existing mental, emotional or physical condition statements, dying declarations, and statements made for medical diagnosis or treatment. Second, the federal judiciary already persistently employs a form of the Posnerian model, albeit covertly, meaning the adoption of the residual approach would codify existing practice. Yet, certain "diamonds in the rough" should be maintained such as the business records, public records, and declarations against interest exceptions. The third proposition is that the residual approach should not be rejected simply due to the criticism that it would result in unfettered judicial discretion or that it requires case-by-case application. Analogously, FRE 403 and 404(b) remain in existence notwithstanding that FRE 403 requires case-by-case discretion for measuring "substantial prejudice" and that FRE 404(b) is discretionary when judges evaluate character evidence. Moreover, given the masked residual model's current existing usage, it is difficult to fathom that an enormous wave of uncontrolled judicial discretion will arise upon the approach's formal adoption. Indeed, an increased residual-exception-based, Posnerian approach is an apt tool for accommodating future psychological discoveries while simultaneously providing increased admissibility notice to parties as precedent expands. Thus, this note ultimately concludes the residual approach is, and should be, here to stay.

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316. *See* Advisory Comm. on Rules of Evidence, *supra* note 13, at 125.