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The Philip D. Reed Lecture Series: Symposium on Hearsay Reform

Panel Discussion

Fordham University School of Law

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THE PHILIP D. REED LECTURE SERIES
ADVISORY COMMITTEE ON EVIDENCE RULES
PANEL DISCUSSION
SYMPOSIUM ON HEARSAY REFORM*

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I. WELCOMING REMARKS

PROFESSOR CAPRA: Good morning. Welcome. We're happy to have everybody here. I'm Dan Capra. We're pleased to be here at John Marshall Law School. I want to have Dean Corkery speak to you, and then we'll start off with the panel proceedings.

DEAN CORKERY: Thank you so much, Dan. Well, what a wonderful conference. I'd like to welcome you here on behalf of the law school. This is great. I used to teach evidence for quite a while. I loved teaching hearsay and had a lot of fun with that.

I was reading through materials last night prepared by Dan Capra and Professor Broun. I think they were really terrific, very thoughtful.

If we were having this conference in 1692, we would be discussing spectral evidence, which is the evidence of witchcraft and things like that. And I never thought that was too important, except I guess a whole bunch of people were condemned to death on the basis of that.

And at least from the materials, I think the worst that can be said—was said about hearsay—was it was sometimes ephemeral. So, I think we're okay on that.

Just some quick thoughts from me. I'll be very interested to see what you do with the present sense impression. I've never understood what the guarantee of trustworthiness for that is, and I guess there are others who share that view.

And I'm also very interested in seeing what you're going to do with the prior inconsistent statements, 801(d)(1)(A)¹ and 801(d)(1)(C),² which is the prior identifications.

Now, I think the purpose of the Federal Rule on prior inconsistent statements was to deal with turncoat witnesses, especially for federal prosecutions. I think they do a pretty good job addressing that issue when the turncoat witness has first gone before the grand jury because, then, if that turncoat witness shows up, those statements are going to walk in. And I see there's discussion in the materials about whether you want to extend that to statements other than those made in the trial, hearing, other proceeding, or in a deposition. And that's going to be interesting to me to see which way your recommendations come out.

Two cases in here that I've always liked and have had fun teaching and I'll just call your attention to briefly. One is *United States v. Castro-Ayon*,³ a very early case in the Federal Rules of Evidence. And it impacts a couple of questions. One is: What's a trial, hearing, or other proceeding? And

1. FED. R. EVID. 801(d)(1)(A) (providing that a statement is not hearsay if "[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition").

2. *Id.* 801(d)(1)(C) (providing that a statement is not hearsay if "[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . identifies a person as someone the declarant perceived earlier").

3. 537 F.2d 1055 (9th Cir. 1976).

another is: When is a prior inconsistent statement going to be enough—standing on its own—to allow a conviction?

And I know it was said these occurrences are rare, but *Castro-Ayon* is kind of interesting. Eleven illegal immigrants in a van pulled over by the Border Patrol. They get them out. The Border Patrol puts them under oath, has some kind of a hearing, and they all incriminate Mr. Castro-Ayon. Mr. Castro-Ayon was not driving; somebody else was.⁴

It comes to trial. What's the evidence against Mr. Castro-Ayon? The van was registered to him.⁵ They call, I guess, their best out of the eleven witnesses and they all become turncoat witnesses, and they're exculpatory.⁶ The result is, it looks like—can't tell for sure, but it looks like—the only evidence against Mr. Castro-Ayon, for whom he was only the registered owner of the van, is all these prior inconsistent statements, and the conviction is affirmed.⁷

Another really fun case, I think, is *United States v. Owens*.⁸ It's not so fun for the victim in this case, but it's interesting. And that's a case written by Justice Scalia.

In *United States v. Owens*, a person is severely injured. He's hit in the head with a pipe, in the hospital for a couple months.⁹ His memory is severely impaired.¹⁰ An FBI agent goes to the hospital and interviews him.¹¹ He gets nothing the first day.¹² He comes back a month later and the guy, according to the agent, identifies the defendant from five photos.¹³

Come the time of trial, this person has virtually no memory.¹⁴ He can remember identifying the five individuals in the hospital, nothing else.¹⁵ He can't remember anything that happened.¹⁶ He can't remember other visitors he had in the hospital.¹⁷ He can't remember seeing his wife at the hospital. And he's cross-examined about some indications in the hospital records that he identified somebody else as the perpetrator. Well, he can't remember that either.¹⁸ So, a great case for how much cross-examination is enough.

The Court holds that this was enough—this person whose memory was almost completely gone is enough—to satisfy the Federal Rules of Evidence and, also, to satisfy the Confrontation Clause.¹⁹ So, those are

4. *Id.* at 1056.

5. *Id.*

6. *See id.*

7. *See id.*

8. 484 U.S. 554 (1988).

9. *Id.* at 556.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 557–64.

cases I've had a lot of fun teaching, and I'm going to see how you treat those today.

Thank you so much for coming, and I welcome you on behalf of John Marshall Law School.

PROFESSOR CAPRA: Thank you.

We'd like to turn to Judge Castillo, Chief Judge of the Northern District of Illinois.

CHIEF JUDGE CASTILLO: Well, Dean, thank you for hosting this. And thank you to the Rules Committee for coming in.

Dean, all I can say is you have not lost your touch for teaching. I am just glad that you are not passing out any *Bluebooks* on your lecture.

In all seriousness, on behalf of our court—which we pride ourselves on trying cases—all I can tell you is we have a great deal of pride in seeing all of you here. What an all-star cast of academics, judges and, importantly, trial attorneys. My two favorite appellate court judges, Judge Posner sitting right next to me and Judge Sutton. I know you are going to be in good hands.

I just want to talk a little bit about three of my favorite trial judges.

So, first of all, Judge Amy St. Eve. Energetic. Has tried some of the most complicated cases we have. I think you will look forward to her presentation. All I can tell you is every time I see that a difficult case gets assigned to her, I rest easy.

Now, a surprise trial judge, Judge Posner. He has volunteered to try cases on our court, and he has drawn some very, very difficult cases. But I applaud the fact that he is willing and has somehow the spare time to contribute to our court. And, so, I am glad to see him here to address you.

And then, finally—this is the real point of me being here—and I am saddened that I cannot stay for the entire thing because things are going on across the street that will demand my attention. But a point of personal privilege—I want to welcome Bill Sessions [the Chair of the Evidence Rules Committee] here.

Bill and I have traveled in the same footsteps all the way through. And I will tell you it is not known—not well-known—that he has mentored me for quite a while. Everything there is to do as a trial attorney and as a judge, Bill has done. Very capable trial judge. Chief Judge in Vermont. Sat on the Sentencing Commission.²⁰ I was privileged to be on the Sentencing Commission with him for eleven years.

What is not as well-known is the type of sensitive person he is. And we come from different backgrounds. He was a defense attorney. I was a prosecutor. He was known in Vermont for walking criminal defendants out of very serious charges. Some say a lot of his closing arguments brought not only the jury to tears, but himself.

20. Hon. William K. Sessions III was Chair of the U.S. Federal Sentencing Commission from 2009 through 2010 and Vice Chair from 1999 through 2009. *Former Commissioner Information*, U.S. SENTENCING COMM'N, <http://www.usc.gov/about/commissioners/former-commissioner-information> (last visited Feb. 26, 2016) [<http://perma.cc/FPD2-FM48>].

But he walked out of there, according to no less a reputable witness—hopefully you will accept the hearsay I am going to make on behalf of Senator Patrick Leahy, who was a county prosecutor and a good friend of Bill—he walked out of Vermont courtrooms with a lot of NGs [not guilty verdicts]. And you are in very capable hands with him being Chair of the Rules Committee.

Beyond that, I would spend the entire morning if I told you all my Bill Sessions stories.

I think some of the things you are seeing now—that you are going to see especially on November 1st—I really attribute to Bill. What I am talking about is the reduction in drug sentences that are affecting thousands of people. Bill and I lost a lot of hair, got a lot of gray hairs. And you look at him now and he looks about ten years younger because, as Judge Posner will tell you, the best thing in the world in the federal judiciary to be is a former chief judge. And the best thing in terms of sentencing to be is a former sentencing commissioner.

And, so, I welcome you, my brother judge, Bill, with open arms. Have a great symposium. I know it is going to be exciting this morning.

So, thank you all for being here and thank you for giving me this privilege. Thank you.

PROFESSOR CAPRA: Thank you, Judge.

II. INTRODUCTORY REMARKS

PROFESSOR CAPRA: So, we have two fearless leaders here today with respect to our Committee, and they're both going to give introductory remarks. We first start with Judge Sutton.

CIRCUIT JUDGE SUTTON: Thank you, Dan.

Thank you, Ruben—Judge Castillo—and Dean Corkery for those wonderful welcoming remarks.

I have to say Dan, wow, what a great lineup you put together. I guess that counts as a present sense impression, maybe an excited utterance. I've never really understood the difference.

PROFESSOR CAPRA: Well, the “wow.” The “wow” is the excited utterance part.

CIRCUIT JUDGE SUTTON: But what if I just keep saying it in a loud voice? Doesn't that help?

But this is a great lineup here.

So, I chair the Standing Committee, and that is the umbrella committee that works with all of the Advisory Committees, including this one, the Advisory Committee on the Evidence Rules.

That committee, ultimately, is set up due to the Rules Enabling Act,²¹ which charges the Judicial Conference with establishing each of these Advisory Committees to promote proposed rules for approval by the

21. 28 U.S.C. § 2072 (2012).

Standing Committee, the Judicial Conference, the Supreme Court and, ultimately, without action, Congress.

But I thought I would, to give you a sense of why what we are doing today is really important, offer an out-of-court statement for the truth of the matter asserted. It comes from 28 U.S.C. § 331. It says, “The Conference”—when it says “The Conference,” it is referring to the Judicial Conference, which has delegated its power in this respect to this Advisory Committee.

So, it says,

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.²²

And I think if there is one thing that is absolutely critical for the Advisory Committees to be doing, it is engaging in self-examination. Do these rules make much sense? Are they easy to implement? I think the average sane individual, particularly a nonlawyer, that picked up each of these sets of rules would say to himself, “What is going on? This is a very technical practice.”

So, I really applaud the Committee for saying let’s look at all of this, including getting rid of the hearsay rule. It is going to take a little while, if that is your plan. But there is nothing beyond examination if we are willing to reconsider the nature of the hearsay rule.

So, my view of the Rules Committee work is nothing ventured, nothing gained. You never fail when you examine these broader issues because even if it turns out that it does not lead to the promulgation of a new rule, the minutes and the work that is done in the course of those deliberations is going to establish why it did not make sense to put together a rule at that time. That is very useful information to have. And it may lead to a later change. And, of course, there is the other possibility—which has happened with this Committee—that you are actually going to propose an amendment or maybe even get rid of a rule, maybe even an ancient rule.

So, I am all for it. And I think this is exactly what all the Committees should be doing. I am not sure there is a better committee among the five Advisory Committees than this one when it comes to not being afraid to reexamine what we are doing. I really congratulate Professor Capra and Judge Sessions for your leadership in that regard.

PROFESSOR CAPRA: Thanks.

JUDGE SESSIONS [Chair of the Advisory Committee]: Thank you.

22. *Id.* § 331.

PROFESSOR CAPRA: Judge Sessions.

JUDGE SESSIONS: I really want to reassert exactly what Judge Sutton said about the quality of the panels that will be presenting today. But let me begin with some things.

First, to Dean Corkery for having us here, this is a wonderful facility, a terrific room, and we have been treated extraordinarily well.

For Amy St. Eve who helped us get this panel together, your assistance was vital, frankly.

Dan, thank you for all the work you did in setting this symposium up.

And I do have to respond to Ruben. In case you could not tell, we have been close friends for fifteen years. In fact, one of the small little—I do not know if it is a historical fact—but after every meeting, I think, for eleven years on the Sentencing Commission, we would go walking, and it usually was all the way across Washington, D.C., to wherever the Commission was having dinner. And we would go over exactly what happened. And the ups and the downs of this kind of experience on a national policy level is just extraordinary. And, so, we became each other's therapists.

Now, this is an extraordinary judge. This is a brilliant guy in the first place, but incredibly dedicated, both to his community in Chicago—and he certainly had chances to go other places, frankly, but his real dedication to Chicago—and the other thing is that both of us have real dedication to our wives and to our families, and much of the conversation was that.

So, I do not want to get over-mushy because I do tend to cry during summations.

CHIEF JUDGE CASTILLO: Don't cry today, Bill.

JUDGE SESSIONS: No.

CIRCUIT JUDGE SUTTON: Was this part of the therapy?

JUDGE SESSIONS: But I would like to begin with actually reading from an opinion:

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. The “hearsay rule” is too complex, as well as being archaic. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.²³

Now, that sounds like a radical concept, but that comes from Judge Posner in *United States v. Boyce*.²⁴ And in many ways, we chose to come to Chicago to actually explore hearsay at its core. This Committee has had a history of having symposia across the country on issues of significance.

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

24. 742 F.3d 792 (7th Cir. 2014).

So, I am really excited to engage in this discussion or to watch this discussion about the future of the hearsay rule, about the future of the exceptions. And I really appreciate all of your contributions.

PROFESSOR CAPRA: Thank you, Judge.

Today we have essentially two panels. The first panel is to deal with two distinct but related issues. One is the validity of the present sense impression and excited utterance exceptions. The second question is more broadly whether to reconstruct the hearsay exceptions to get away from a categorical approach and to move toward a system in which the judge decides reliability on a case-by-case basis. Both issues were raised in Judge Posner's opinion that Judge Sessions referred to.

Then the second panel deals with what to do about the existing law on the relationship between the hearsay rule and prior statements of testifying witnesses. The idea for a panel discussion was based on the Advisory Committee's consideration of several proposals to make various changes to Rule 801(d)(1). And the idea was maybe the Committee should take an integrated view of all these changes, in order to take a systematic approach to the questions of admissibility of prior statements of testifying witnesses. So, that's why we're all here, to deal with those two topics.

I would also like to provide some thanks. I want to thank Hugh Mundy for all his help here at John Marshall. It was really helpful to us to have such organized people to get everything ready and to make this happen.

I want to thank the *Fordham Law Review*. The *Fordham Law Review* is going to publish a transcript of these proceedings, as well as articles from many of you, which we're really looking forward to having.

I want to thank Judge St. Eve, without whom this symposium wouldn't have happened.

And I think that's it. I think we're ready to go.

III. TOPIC ONE: USING AN EXPANDED RESIDUAL EXCEPTION IN PLACE OF CERTAIN STANDARD HEARSAY EXCEPTIONS

PROFESSOR CAPRA: So, I'd like to turn it over to Judge Posner.

CIRCUIT JUDGE POSNER: Well, I am pleased to be here and looking forward to the conference.

I have to say, you know, I am kind of a maverick and sourpuss. There are a lot of things I do not like about our system. I do not like trial complexity. I do not like legal jargon. I do not like the tendency of all of us judges always to be looking backward, always having our head screwed on backward. So, I particularly disapprove of the celebration of the 800th anniversary of Magna Carta.

First of all, the people who celebrate do not actually know what Magna Carta was. And it does not have any relevance today, so let's forget Magna Carta. In fact, one of our big problems is that a certain eighteenth-century document called the Constitution has almost nothing to do with today.

My views on hearsay, which I will be brief about, they come out of a general attitude about doctrine and, also, about the trial process. So, when I

was appointed to the Court of Appeals in 1981, one of the judges on my court said to me that since I did not have trial experience, I really ought to do trials as a volunteer in the district courts of this circuit. And he said John Paul Stevens had done that before he was, of course, appointed to the Supreme Court.

So, I did that starting very shortly after I was appointed. So, I have been conducting trials—mainly in the Northern District of Illinois, but in some of the other districts, as well—for the last thirty-four years. And I try to do one or two a year. It does not always work. Of course, one of the reasons it does not work is that so many cases are settled or else they are resolved on pleadings or summary judgment before trial. So, often I am disappointed. Several times when the trial was scheduled to start Monday, on Friday the parties settled the case.

Until this spring—I do not know why it took me so long—I had only done civil cases. I had my first criminal case. Chief Judge Castillo was kind enough to give me a pro se member of the Moorish—

CHIEF JUDGE CASTILLO: It was a random assignment.

CIRCUIT JUDGE POSNER: —of the Moorish Science Temple. And we had a good time, culminating in his becoming a fugitive.

But the marshals caught up with him after a month. And, so, I got to sentence him.

So, anyway, it was an eye-opener. It was very interesting. I enjoyed it a great deal. The government prosecutors were great. So, I have another criminal trial scheduled.

Now, many of my trials have been jury trials. And I thought, by way of background, how I approach the hearsay question. I thought I would say something about things I do in trials that I do not think are generally done, although, I do not know, maybe they are.

So, in the pretrial phase, I compress discovery. So, I ask the lawyers how much discovery you want. And they say a year. And I say, you can have three months. And they are very quick to accede to that.

I do not delegate discovery supervision to a magistrate judge. I worry that they may not be tough enough on the lawyers.

In all the cases I have had in which there are technical issues, I have appointed a neutral expert under Rule 706.²⁵ I do not like most of the Rules of Evidence, but I like Rule 706.

And the way I do it is I tell the parties to have their experts get together—each side get together—and nominate two or three people whom they agree are neutral. And, then, I interview them and I appoint one. And they are very good at that. They are very good at that. The experts—the party experts—still on opposite sides work together well in giving me good nominees.

25. FED. R. EVID. 706(a) (providing that “[o]n a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations”). The Rule goes on to state that a “court may appoint any expert that the parties agree on and any of its own choosing.” *Id.*

Of course, the parties are entitled to depose the neutral expert.²⁶ That is fine. But I preside at the deposition, because otherwise the neutral expert might feel he had to hire a lawyer to protect himself. So, that has worked fine.

Again, when a judge is presiding at a deposition, the lawyers are very polite, very civilized. They are not always like that when they are in a room by themselves with no judge.

Now, unfortunately, because so many cases settle or are disposed of pretrial, I have not actually had a trial where my neutral got to testify. So, I feel a little uncertain. I am sure they would do well.

I tell the lawyers what I was going to do with the neutral. I would have him testify first. And I would explain to the jury that he is neutral, how I selected him, he is not beholden to either party, they are going to split his fee fifty-fifty, and so on, but that the jury should also listen carefully to the party experts.

But as I say, I have not had a chance actually to observe this process.

Also, before trial, I try to resolve all the objections to documentary evidence. I also tell the lawyers you are going to have to limit the documents that you show the jury to what you can fill a binder with. That is it. One binder for each litigant—each party—for each juror and give the juror the binder at the beginning of the trial, and they can look at the documents as the documents are introduced.

I also, before trial, do the instructions conference. And I write my own instructions. I do not want the lawyers doing it. They can make suggestions, criticisms, but I do the instructions. And no jargon. I hate jargon. I never say, for example, that the determination of facts is the province of the jury. Nobody speaks like that except lawyers—province of the jury. Jurors do not know what a province of a jury—what their province is. That is ridiculous.

And I do not use the pattern instructions for the same reason.

I impose strict hour limitations on the trial. I do not want it to go on and on and on.

I voir dire the members of the jury panel myself. I tell the lawyers they can suggest questions that I will ask the prospective jurors, but only twenty questions. I am not going to ask more than twenty questions.

I want the jurors to feel like real participants in the process, not bumps on a log, so I let them ask questions. They ask questions rarely, but the questions they do ask, in my experience, have been fine.

Another thing that I have to concern myself with the jury is explaining to them why they should not do internet research for the case. Now, I am a bad person to say that because I do internet research. I get criticized for it, and so on.

But I do not want to tell them the way, I think, many judges do—it is illegal, it is terrible, they must not do that. What I tell them is, look, the

26. Expert witnesses “may be deposed by any party.” *Id.* 706(b)(2).

problem with doing your own internet research is you are going to find information, but the other jurors are not going to have it; and, the lawyers are not going to know what you found, so they will not be able to rebut it. Right?

So, what I tell them is, look, if you have a question you feel the lawyers are not addressing, you ask me what the question is and I will make sure you get answers to it; but, do not try to answer it all by yourself. So, that way I am not threatening them, not being angry. I am explaining to them why it is a bad idea for them to do their own research.

I also administer the oaths that the witnesses take myself, rather than leaving it to the courtroom deputy. I think that may make the oath seem a less perfunctory part of the process.

So, as far as the actual Rules of Evidence objections, I tell the lawyers that if they want to make an objection, it has to be one word. I do not want them to make a speech. If it is a complicated issue, we can have a sidebar. I do not want them using the occasion for an objection to argue their case.

I find that the lawyers make few objections. One of the reasons I think is that they realize that if an objection is sustained, the jury may decide something interesting and important is being withheld from them. They may take that out on the side whose lawyer made the successful objection.

But as I said, I find the objection—I also find—my usual response if the objection seems to have some merit is to say to the lawyer, “Well, can’t you ask it in a different way?” That usually works. So, I have not had problems, I do not think, with evidence.

But I do not like the Rules of Evidence. There are sixty-eight of them. They cover 117 pages in this very horrible volume that you are all familiar with, civil procedure rules and evidence rules. I mean, really, they are horrible.

And seven of them are hearsay rules; but, of course, the hearsay rules have many subdivisions. I like a few. I like 403²⁷: balance probative value with prejudicial effect. That probably is all we need in the Rules of Evidence, although I like 407,²⁸ subsequent remedial measures not admissible to show negligence. That is very sensible. I like the ones 412 to

27. *Id.* 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

28. The Rule states:

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

Id. 407.

415,²⁹ which are about prior crime evidence of sexual predators, child molesters, and the like. And, of course, I like 706.

And I am sure there are others that I would like if I knew what they were.

But, actually, I do not think there needs to be a hearsay rule. Most of what we know is hearsay, right? The expert witnesses are allowed to use hearsay. But most of what we know is hearsay. Some of it is gossip and rumors, and so on, and third degree or fourth degree or fifth-hand or what have you. But much of it is perfectly good evidence. And I think the judge should make a judgment whether the hearsay evidence that a party wants to introduce passes the 403 test: it has probative value; the prejudicial effect is much less.

There is a little more to it than that. You cannot allow trial—well, this is connected with the hourly limit on trials. You want to remind the lawyers that they can explore hearsay, try to introduce hearsay; but, they have limited time to present a case, not a limited amount of hearsay that comes in.

The notion that we do not need a hearsay rule is not entirely new. There is an article, for example, by Richard Friedman—recent article, *DePaul Law Review*³⁰—in which he recognizes that in criminal cases, you have the Confrontation Clause, which relates to hearsay in a negative way; but, apart from that, in civil cases, Friedman thinks it just should be discretionary. Right? You may be suspicious of hearsay, but there should not be rules against it.

And his article, by the way, it is called, *Jack Weinstein and the Missing Pieces of the Hearsay Puzzle*. He attributes this view that the hearsay exclusion should be discretionary to Weinstein.

So, if you have seen my concurrence in *Boyce*—so, I was dealing with the present sense impression, excited utterance exceptions. So, these are exceptions. They are not the hearsay rule itself. And I thought they were bad exceptions. That the notion that somehow if you are excited, you tell the truth, you do not lie; or, that if you say something right before about something you have just seen, you do not have time to formulate a lie, I mean, there is no basis for that. And there is actually a substantial academic literature which concludes that these exceptions are just unjustified.³¹

29. *Id.* 412(a) (providing that “evidence offered to prove that a victim engaged in other sexual behavior; or evidence offered to prove a victim’s sexual predisposition” is inadmissible in a criminal or civil trial). Rules 413, 414, and 415 require admission of evidence of a defendant’s past sexual offenses as relevant to the question of the defendant’s sexual conduct on a specific occasion. *Id.* 413–15.

30. Richard D. Friedman, *Jack Weinstein and the Missing Pieces of the Hearsay Puzzle*, 64 DEPAUL L. REV. 449 (2015).

31. See, e.g., 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); see also Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 362–66 (2012); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432, 437 (1928); Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 916 (2001); I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the*

So, I do not really have anything to add to what I said in *Boyce* about that.

And, of course, what complicates things is the very end of Rule 807, which really creates open-ended exceptions to all the hearsay—to the entire hearsay rule, the entire apparatus, all the hearsay rules. But why complicate life by—I think there are four different grounds at the end of 807 for admitting hearsay.³² Why not just say, “Yes, it is discretionary to exclude hearsay evidence just as other evidence of dubious reliability”?

So, I would like to see that general—as I say, I just dealt with the two exceptions because those were the ones involved in the case, but I do not think there is any hearsay rule or hearsay exception that ought to be mandatory.

So, that is all I have to say.

PROFESSOR CAPRA: Thank you, Judge.

It’s heartening to see that one’s work product is so respected by the federal judiciary.

So, now we’re going to explore those thoughts, and we’re going to go to Judge Schiltz.

JUDGE SCHILTZ: Thank you, Dan.

I am a rare district judge who was a law professor before I became a district judge. For some reason, law professors do not get appointed to the district bench much. They are not thought to have the requirements. And I was an exception.

I taught evidence for eleven years before I became a trial judge. And I would spend several weeks, when we covered hearsay, trying to convince my students that we should abolish the hearsay rule and just treat hearsay evidence like we treat any other evidence, just subject it to 403 and other Rules of Evidence.

So, Dan has given me a generous five to ten minutes to make that case for you. So, let me at least try to highlight a couple of things.

As a general matter, I believe that if jurors are capable of addressing the strengths and limitations of an item of evidence, then the trial judge should not keep that item of evidence from them. Only if there is some reason, a reason that we can identify and articulate, why the trial judge is substantially better suited than the jurors to assess the strengths and

Proposed Federal Rules of Evidence, 1970 UTAH L. REV. 1, 27–29; Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717 (2015).

32. Rule 807 provides that hearsay should not be excluded if:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (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; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

FED. R. EVID. 807.

limitations of a piece of evidence should the trial judge exclude that evidence.

And as a general matter, I believe that the Federal Rules of Evidence should not categorically exclude a type of evidence unless there is some public policy at play, as there is with Rule 407—which Judge Posner mentioned—or 408³³ or 409;³⁴ or, unless you rulemakers are, for some reason, in a better position than me, the trial judge, to assess the strengths and limitations of the evidence.

And I think that will almost never be true because you rulemakers have to address evidence in the abstract and categorically, where I, as a trial judge, can address actual real items of evidence in the context of real trials; and, I can do so on an item-by-item basis.

Now, hearsay is said to suffer from many problems that diminish its usefulness to a jury. We are all familiar with those: it is not given under oath; it is not given in the presence of the parties; the jury is not able to see the demeanor of the declarant at the time the statement is given; and, the attorneys are not able to question the declarant at the time the statement is given.

All of these are, indeed, problems with hearsay, although I might add, as I am sure you are familiar with, there has been a number of studies that suggest these problems are not nearly as serious as common law judges thought when they came up with these rules. But I would just like to note a couple of things about these problems.

First, attorneys would have no difficulty whatsoever pointing out these problems to the jury; trial judges would have no difficulty instructing jurors about these problems; and, jurors would have no difficulty identifying, understanding, and assessing these problems with hearsay. Jurors are quite familiar with hearsay. Every day every one of us hears a lot of hearsay, and every day every one of us routinely decides how much weight we will give to hearsay.

Indeed the most important decisions we make in life—whether to buy a particular house, whether to attend a particular college, whether to undergo a particular surgical procedure—are decisions that we make on the basis of hearsay. Every piece of evidence that jurors hear has problems of some kind, and we trust jurors generally to identify and assess those problems. I see no reason why jurors would be any less able to identify and assess the problems with hearsay.

33. *Id.* 408(a) (“Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.”).

34. *Id.* 409 (“Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.”).

The second thing I would point out is that the problems with hearsay vary dramatically from item of evidence to item of evidence. Sometimes the problems with hearsay render a piece of hearsay evidence essentially useless. Other times those problems barely affect the value of hearsay. Everyone in the courtroom recognizes that hearsay is quite valuable despite the traditional problems with hearsay.

The trial judge is in a far better position than the Rules Committee to decide whether a particular piece of hearsay should be considered by a particular jury on a particular issue in a particular trial.

Finally—and this is what I wanted to emphasize the most today—is I think abolishing the ban on hearsay would have a very positive effect on trials. Most evidentiary issues arise at trial. An attorney has a couple of seconds to spot the evidentiary problem, to object, to get to her feet, and to formulate her objection. And if her opponent is afforded an opportunity to respond, he has a couple of seconds to get to his feet and formulate his response. Attorneys simply cannot do this unless they have a lot of experience trying cases, unless the Rules of Evidence have become second nature to them. But attorneys today do not have a lot of experience trying cases.

All of you have heard of the phenomenon of the vanishing trial. Over the years, the number of both civil and criminal trials in the federal courts has dropped dramatically. Well, the number of attorneys has risen even more dramatically. So, we have this tiny and shrinking number of trials to spread among the huge and growing number of attorneys.

And I see the result of this phenomenon in the courtroom during trials. In almost ten years of trying cases now, I have never heard the vast majority of the Rules of Evidence even mentioned in my courtroom. Not once. Attorneys just do not know the rules well enough to use them in the context of a fast-moving trial.

What I do hear are lots and lots and lots of Rule 403 objections. And this is not surprising. Professor Burns wrote an article recently in which he said this about the Rules of Evidence: he said, “It is not too far wrong to say that we mainly have just Rule 403, with quite some number of guidelines for its application.”³⁵ I think that’s exactly right.

Now, I do not think this is a bad thing. The beauty of Rule 403 is it allows the attorneys and me to discuss what really matters, what we should be discussing. When a Rule 403 objection is made, the objecting lawyer describes all of the bad stuff about the particular item of evidence; the proponent describes all the good stuff about that item of evidence; and, I decide whether the bad stuff substantially outweighs the good stuff. That is the way decisions about evidence should be made, I think.

Now, I want to contrast that with the way I decide issues of hearsay. So, here is how a hearsay issue typically arises at trial.

35. Robert P. Burns, *The Withering Away of Evidence Law: Notes on Theory and Practice*, 47 GA. L. REV. 691, 708 (2013).

A witness takes the stand and the attorney asks the witness, “What did Joe say then?”

Now, no matter how few cases an attorney has tried, she knows that that is hearsay. So, I always hear, “Objection. Hearsay.”

Now, I do not have any idea what the witness is going to say that Joe said to him, so I have no idea whether it is hearsay or not. So, up to sidebar come all the attorneys to discuss the hearsay objection. We have to do this almost every time there is a hearsay objection.

So, when the attorneys get to sidebar, I ask the proponent, “Well, what is the witness going to say that Joe said outside of the court?”

Often the attorney will say, “I’m not really sure, Judge.”

So, we have to send someone scurrying over to the witness to ask the witness, “If you’re allowed to answer the question, what will you say?” And the witness says what he will say.

And, then, the person scurries back and tells us all what the witness will say if I allow the witness to answer the question.

So, now we at least know what the witness is going to say. And sometimes, obviously, the attorneys can tell me what the witness is going to say.

Then we will discuss whether what that witness would say will be hearsay. In other words, we will discuss whether there is a nonhearsay purpose for the statement. And I use the word “discuss” loosely because most attorneys do not remember enough about hearsay to be able to think through and discuss with the judge—and it is, obviously, under pressure in trial—whether there may be a nonhearsay use for this statement.

If I decide that this testimony is hearsay, I then ask the proponent, “Well, are you contending this fits within an exception to the hearsay rule?”

Often I get back a blank stare. Sometimes the attorneys will identify an exception to the hearsay rule, and then we will work our way through the elements of that exception to see if each is met. And this discussion also is generally not a very productive discussion because few attorneys remember much about any exception to the hearsay rule, except statements of a party opponent—they always remember that—business records, and dying declarations. Everybody remembers dying declarations. It does not come up much, but everybody remembers it.

So, when I have hearsay objections at trial, the three of us—the two attorneys and I—have this clumsy conversation about half-remembered technicalities, and then I rule on the objection.

Now, contrast that with the discussion I have with the attorneys when someone objects under 403. That discussion is about evidence. What is good about the evidence, what is bad about the evidence, and whether the bad outweighs the good. And that is the discussion that we should be having about hearsay evidence. About all hearsay evidence, not just hearsay evidence that escapes through one of the exceptions to the hearsay rule.

And that is the discussion we would be having about hearsay evidence if we repeal the ban on hearsay and we instead just treated hearsay like any other evidence. That is what I would do—I am under no illusion that that is going to happen in the next six months—but that is where I would like to see the Rules of Evidence go.

PROFESSOR CAPRA: Judge Castillo.

CHIEF JUDGE CASTILLO: Dan, just to tag on to the two great judges you heard from, I just want to tell you in my twenty-one years of being a trial judge, many times the answer comes back when there is a hearsay objection, “Judge, it is not offered for the truth of the matter asserted.”

And I think it behooves the Rules Committee to know that then you are left to the discretion of every single trial judge in the country. And some judges will call it one way, some will call it another way. And if the testimony is allowed, then you are left instructing the jury, “Ladies and gentlemen, I want you to know I am going to allow this answer, but it is not being offered for the truth of the matter asserted.” An instruction that, I think, is almost pointless.

JUDGE SCHILTZ: They have no idea what you mean when you say that.

CHIEF JUDGE CASTILLO: So, I just want to add that.

PROFESSOR CAPRA: And that whole analysis comes under 403 anyway, whether it’s offered for the truth and prejudicial effect, et cetera.

So, this would be an easy amendment for you, Judge Schiltz. You run a line through from 801 basically to the end of Article VIII.

JUDGE SCHILTZ: I’ve got a legal pad and pen here, and if you just give me a minute, I can take care of it for you.

PROFESSOR CAPRA: There is no wordsmithing involved at all. It’s quite enlightening.

So, let’s go next to Professor Allen.

PROFESSOR ALLEN: Thank you.

I’m really pleased and honored to be here. Those of you who like the Rules of Evidence will be happy to hear I’m a great admirer of them and actually even more a great admirer of the Rules process. What the Rules Committees do is quite impressive in the care, diligence, and the results.

I’ve been involved in—intensely involved in—the law reform processes of various countries, most intensely in Tanzania and China, but also New Zealand, Australia, and Colombia. And in doing these things, I have done a complete review of the evidence law reform processes worldwide since the 1970s. I think I’m fluent with every single one of the efforts that has occurred. And in every single one of these, the Federal Rules of Evidence has played an important role as a model. Sometimes rejected, but always rejected respectfully, or more or less adopted.

Now, having said that, I have my own criticisms of the Federal Rules. But I think we ought to try to understand them and then decide what to do in light of that understanding of them. And I have, to hopefully facilitate that process, eleven points to make, but first three qualifications.

One, I'm not talking about the Confrontation Clause or confrontation issues. I think hearsay, especially given the mess that the court has made of confrontation areas, should be dealt with just internally in terms of the law of evidence itself.

Secondly, I'm talking about the hearsay problem. When I say hearsay, what I mean is all of Article VIII.³⁶ I don't mean the hearsay exclusionary rule, but the entire ball of wax. And I'm not talking about Judge Posner's opinion, except where I specifically note that I am. I should note here that it's really quite interesting that there's a big difference between what was suggested today by Judge Posner and what was suggested in *Boyce*. 403 and 807 are not the same rule.

And, then, thirdly, one of the problems that the law of evidence has is it's transsubstantive in a sense, and there's a big difference between civil and criminal cases because of access to evidence. The way in which Rules of Evidence operate is different when everyone has access to evidence versus not having access to evidence. But I don't have time to pursue that nuance.

Point number one: to intelligently analyze what changes to the hearsay rule should be considered, you need to consider four things. First, the overall objectives of the field of evidence—not the law of evidence, but the field of evidence; second, the implementation of those objectives in a body of law; third, how the hearsay rule advances or retards those objectives; and, then, fourth, the sense and sensibility of any proposed changes.

The overall objectives of the field of evidence are usually thought to be epistemological, advancing accuracy and outcomes. And this is, very importantly, a dominant objective, but it's not the sole objective. There are governance objectives. You actually set rules for primary behavior. I find it interesting that one of Judge Posner's favorite rules, 407, is, in fact, a rule designed to affect primary behavior.

More importantly, there's an organizational implication to the law of evidence. The law of evidence allocates power and discretion and, thus organizes the relationship between the parties and the judges, between trial judges and appellate judges, between the judiciary and whoever writes the rules.

For example, a detailed set of rules written by whoever—whether it's the rulemaking process, the legislature, the common law—locates decisions over evidentiary problems in whoever is writing those rules. Discretionary rules, by contrast, locate decision making in whoever exercises that discretion. This can have interesting implications.

Detailed rules maintain control over the evidentiary process, say, in the legislature; but, at the same time, they allocate power to the party. One of the advantages of the hearsay rule today is categorical rules of admission essentially, which is what the exceptions are. There's no fuss, no muss. You can admit present sense impressions and so on with arguing over the particulars.

36. Article VIII of the Federal Rules of Evidence contains all rules related to hearsay evidence. FED. R. EVID. 801–07.

Now, what were the objectives of the Federal Rules? There were basically three overarching objectives. One is solved—that's the problem of *Erie*,³⁷ which is now gone; but, second, sweeping away the ossified common law and, particularly, rules of relevancy generally; and, third, facilitating the free flow of information to the fact finder.

One can criticize the Rules of Evidence today, but one ought to be asking what the alternative is. If you compare the Federal Rules of Evidence to what was replaced, the Federal Rules of Evidence were a gigantic leap forward.

At the end of the day, by the way, I'm not going to dissent from reviewing these issues as 403 issues; but, I again want you to understand the context of what you are dealing with.

Now, the present hearsay rule, Article VIII, fairly effectively accomplishes these purposes. There's this idea that the hearsay rule is a complex rule of exclusion. That's ridiculous. The hearsay rule is a rule of admission. It's a rule of admission that transformed the British fetishism with firsthand knowledge into a rule, making just about every form of reliable hearsay categorically admissible.

What's odd about the hearsay rule is its structure, is its form of regulation. You have a promise to exclude hearsay that is then unredeemed by the exceptions that destroy it.

This is not the only area in which you see this structure. You have the same problem with character evidence.

Now, since the seventeenth century, there's been nothing but the accretion of more and more exceptions to the hearsay rule. The only two exceptions to this are the dying declaration.³⁸ We went through a transformation from a sectarian to a secular public stance, if you will. And, so, it was restricted a little bit. And now, apparently, the Committee is proposing the first elimination of a hearsay exception just about in the history of the Anglo-American tradition since the seventeenth century with your ancient documents³⁹ possibility.

PROFESSOR CAPRA: It's a bold step.

PROFESSOR ALLEN: It's a bold step. No, I like it actually.

Just think of how broadly these hearsay exceptions sweep. Every single statement any party makes or any person in a whole host of relationships to that party is admissible, civil and criminal. Present sense impressions, excited utterances, business records, public records, all the statements that show who your mother is. You don't actually have firsthand knowledge of

37. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The *Erie* Court held that a federal court sitting in a diversity case must apply state substantive law, including state common law, and federal procedural law. *Id.* at 76–80.

38. FED. R. EVID. 804(b)(2) (providing that “[i]n a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant’s death to be imminent, made about its cause or circumstances” is not excluded as hearsay).

39. *Id.* 803(16) (providing that “[a] statement in a document that is at least 20 years old and whose authenticity is established” is not excluded as hearsay). The Advisory Committee has proposed the elimination of Rule 803(16).

your mother, I don't think. I don't. I don't remember being born. All that's hearsay. That's the sea of hearsay that we live in.

The hearsay rule admits most of this. And what it excludes is basically the information that is completely unreliable—seventeen telephone conversations in a row and so on.

These are all laudatory developments because you cannot operate intelligently a legal system without gobs of hearsay. This point's already been made, so I'll go on.

Moreover—and this is the organizational point I was making—this is accomplished with relatively low transaction costs. These are categorical rules. You don't argue much about present sense impressions and excited utterances and business records. You argue a little bit, but not much, because they're categorical rules of admission.

One of the things you should think about is that for any rule change you might make, what are its implications for the efficiency of the system that's going to be operated under those rules? And one of the advantages of categorical rules of admission that cover the waterfront is it's the parties, not judges, who are making complex decisions.

Now, under present law—this is point number six if people are keeping track of my eleven points—you have this categorical rule and the capacity to adjust at the margins. In particular, Rule 807 allows you to make up a hearsay exception when there's some hearsay that doesn't fit within a categorical exception but you think should be admitted.⁴⁰

Now, just briefly about the *Boyce* case. Dick expresses an understandable—but I don't think fully informed—reaction to the weirdness of the structure of hearsay, because he neglects these points I made above. There are real advantages to the present hearsay rule.

Dick was not suggesting in *Boyce* Rule 403 for regulating hearsay. He was suggesting a modified Rule 807 approach. I'm not quite sure here because I thought what Dick was talking about was increasing the admissibility of hearsay. When you say "I don't like 801(1) and 801(2)," and suggest eliminating them, that sounds to me like decreasing the amount of admissible hearsay. So, I'm a little confused.

But if it's increasing the amount of admissible hearsay, you don't want to take all the information that comes in with low transaction costs now and overlay transaction costs on it by making these more detailed determinations as to reliability and this, that, and the other thing. You may want to increase the categorical admission of hearsay—that's fine—but not by increasing these transaction costs that presently don't exist.

And, frankly, if we're going in this direction, I prefer 807 to the actual proposal in *Boyce*. The proposal in *Boyce* is that you should admit evidence—hearsay evidence—when it's reliable. May I say that's exactly wrong. You should exclude evidence when it's clearly unreliable. The 807 approach flips over what ought to actually be occurring whenever the jury can understand strengths and limitations of evidence.

40. *See id.* 807.

I have been examining the evidentiary process for forty years. Not only internally from the normal point of view of legal scholars, but from the perspective of every pertinent cognate discipline that I'm aware of—cognitive science, cognitive psychology, artificial intelligence, computer science. There's not a whit of evidence that, generally speaking, judges are any better than anybody else at inferential practices in a manner relevant to the legal system.

There's a lot of evidence that the quality of inferential practices is highly correlated with education, wealth, the absence of debilitating diseases, a few other things. And if you compare the average judge to the average juror, obviously the judge has a stronger correlation with those factors. But you're not comparing the average judge to the average juror. You're comparing the average judge to the average jury. When you take into account the implications of small group dynamics, we're back to where I started a second ago. There's literally no reason to believe judges are better at that than juries.⁴¹

When you start throwing into your rule things like will this evidence materially advance the likelihood of a correct outcome, I think this is dangerous territory. It sounds like you want the judge to decide what the correct outcome is and then admit evidence that is consistent with that outcome. Maybe I misunderstand the phrase, but I don't think that's what you want to do.

There is one last concern with the 807 idea, which is that there's a risk that you're going to end up reproducing exactly what gave rise to the Federal Rules in the first place, which is a series of complex appellate decisions that are called precedent. One of the advantages of the Federal Rules of Evidence is it wiped all that away, made exclusion rare and discretionary in the trial judges and pretty much, again, no fuss, no muss.

In my opinion, it would be plausible to continue the process of expanding largely unreviewable admission of hearsay either by expanding the exceptions or, I actually agree, moving toward a total elimination and letting these things be decided by 403, but not 807. There's a critical difference between those two.

I do think that the idea that we dispose of these exceptions because a justification for them that was articulated a hundred years ago turns out to be disverified by a recent article on psychology misses the point.⁴² You ought to be thinking about these larger issues that I have discussed, not just whether it's true that people can spontaneously lie.

This study that Dick cites deals with people talking in casual conversation and different forms of media.⁴³ It shows that people do lie;

41. See, e.g., Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655 (1992); Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165 (2006) (systematically demonstrating that there is no good reason to think that judges collectively are significantly better at fact-finding than juries).

42. See Whitty et al., *supra* note 31.

43. See *id.* at 208–09.

but, those lies generally are ones that flatter themselves or flatter the person that they're talking to. What does that have to do with a 911 call?

If you go through the cases on excited utterances and present sense impressions, what you find are things that have nothing to do with the situations raised in the study and which, in case after case after case, the hearsay is confirmed by other evidence. The real empirical study you ought to do is of your own cases. You'd find that the statements are relatively reliable. At least as reliable as compared to witnesses that have months and months and months to be coached.

Let me finish by saying I think the dogmatic slumber—Kant's reaction to Hume—that the legal system ought to wake from is not these hundred-year-old folk psychology notions of hearsay exceptions that might be disproven by—or disverified to some extent by—some recent study. The dogmatic slumber is that you should stop treating jurors in such a patronizing way. If there's evidence that you want to pay attention to, it's the empirical evidence time and time again that jurors, generally speaking, are quite adept at dealing with the strength and limits of hearsay.

Last point. A lot of the points I made today, I learned late last night, were anticipated in an article that hasn't yet been published by Liesa Richter.⁴⁴ So, I just want to acknowledge that point.

So, thank you very much.

PROFESSOR CAPRA: Thanks, Ron.

So, now let's turn to terms of transaction costs of changing the hearsay system to a different model. Let me turn to Professor Mark Brodin to talk about the English system.

PROFESSOR BRODIN: Thank you, Dan.

I want to thank Dan Coquillette [Reporter to the Committee on Rules of Practice and Procedure] and Dan Capra for their very kind invitation to me here. I also want to acknowledge two distinguished barristers, Jeffrey Bennett and Peter Sussman, who shared their insightful observations about British practice with me for purposes of my comments.

I do have to say, regarding Judge Schiltz's comments, as an evidence teacher going on thirty-five years, I find it very depressing that our students are not able to take what we teach them in class and translate it into effective advocacy with regard to the evidence rules.

JUDGE SCHILTZ: They don't try cases anymore. That's the problem.

PROFESSOR BRODIN: That is indeed a problem.

But I think it's clear that few are content with the state of the hearsay rule and its thirty, of what one commentator long ago called "stone age," exceptions.⁴⁵ Dean Morgan demonstrated many, many years ago through a series of hypotheticals that the exceptions both exclude probative evidence

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

45. 4 CHARLES FREDERIC CHAMBERLAYNE & HOWARD CLIFFORD JOYCE, A TREATISE ON THE MODERN LAW OF EVIDENCE: RELEVANCE § 2733, at 3751 (1913).

and at the same time admit dubious evidence.⁴⁶ As Judge Posner has emphasized here and elsewhere, the premises behind some of these exceptions are certainly at odds with social science's learning about human behavior.

But the common law structure has been a cornerstone of American and Anglo-American law for centuries. And I'm reminded of the great Justice Jackson's famous warning about tinkering with the character evidence rules: "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."⁴⁷

So, the dilemma we face here is that hearsay is, indeed, I think we'd all agree, second-best evidence in most situations. It's not subject to cross-examination or view of demeanor. And the sense of unfairness about using hearsay goes back very, very deep into our history. In fact, my colleague Frank Herrmann has traced this hearsay prohibition back to Roman and canon law.⁴⁸

And I think it's embedded in our sense that there's something wrong about resolving a dispute among the parties, criminal or civil, with regard to secondhand evidence, yet some evidence of a hearsay nature is clearly reliable and may very well be necessary to the resolution of the matter.

So, the challenge is: How do we regulate its admission with an eye toward maximizing the accuracy of fact-finding?

Talk of reforming the rule goes back at least to Jeremy Bentham, who proposed a best evidence approach.⁴⁹ Eleanor Swift some years ago advocated complete abolition of the prohibition, leaving it to trial judge discretion, but she worried about the ability of trial judges to have enough information about the declarant and the circumstances to make a meaningful decision about reliability,⁵⁰ which I think is a substantial concern.

And, of course, Jack Weinstein's classic *Probative Force of Hearsay*⁵¹ in 1961 argues for the 403 approach, which Richard Friedman, as has been noted, has recently revisited and readvocate.⁵²

In short, many of the finest minds in our field over the years have lined up as skeptics regarding the categorical approach to hearsay evidence. And selfishly, as an evidence teacher, if we abolish the hearsay exceptions, it would save me twelve classes.

We can't underestimate, though, the complexity of the issue of reform because while it's pretty easy to discredit the common law exceptions, with

46. See Edmund M. Morgan, *The Future of the Law of Evidence*, 29 TEX. L. REV. 587, 594-98 (1951).

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

48. Frank R. Herrmann, *The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure*, 36 VA. J. INT'L L. 1 (1995).

49. 1 JEREMY BENTHAM, RATIONALE OF EVIDENCE 60-61, 449-53 (Five Volume Ed. 1827).

50. See Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495 (1987).

51. Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

52. See Friedman, *supra* note 30.

their faults they do give us a degree of consistency and predictability, which is not an insignificant matter.

And, then, there is, of course, the problem of the criminal defendant because ever since Sir Walter Raleigh, the hearsay rule has been intimately tied, of course, to the right to confront one's accuser.

Well, when I thought out what would the world look like if we abandoned the common law approach in favor of ad hoc screening by trial judges, I thought about Stephan Landsman's very clever article some years ago in which he used the Clarence Thomas confirmation hearings—remember that food fight?—to envision a world without any evidence constraints at all.⁵³ So, I thought it would be interesting to similarly use the example of the U.K. to see how their adoption of what basically is Jack Weinstein's approach has worked out there.

Judge Weinstein's approach has been adopted entirely in civil litigation in the U.K. So, as of 1995 with the Civil Evidence Act, in civil proceedings "evidence shall not be excluded on the ground that it is hearsay."⁵⁴ So, they've abolished the hearsay rule in civil litigation. Lawyers have not risen up. But the caveat, of course, as many of you know, is that the Brits have not only given up on the hearsay rule in civil litigation, they've also given up on jury trials.

In any event, more pertinent to our experience, then, is the Criminal Justice Act of 2003.⁵⁵ Those cases are usually tried to juries, although some to magistrates. And the Criminal Justice Act of 2003 is what I want to focus on in the remaining few minutes.

Its thrust is to discard rigid rules in favor of judicial discretion. The legislative history is to "send a clear message that, subject to necessary safeguards, relevant evidence should be admitted when that is in the interests of justice."⁵⁶ And the interest of justice is the theme that runs through this thousand-page document called the Criminal Justice Act: more evidence is better; trust the jurors to weigh the evidence; they're just as adept at weighing the defects of hearsay as the trial judge.

But oddly enough, the Brits still keep the structure of an exclusionary rule with several categorical exceptions. And, thus, this 2003 Act has suffered the fate of most halfway compromises. It doesn't go far enough for the proponents of pure judicial discretion, but it goes way too far for those who look back nostalgically at the comfort of the old regime.

Let's take a moment to look at what the Criminal Justice Act actually does. It does preserve eight, what some have called a ragtag bag, of common law exceptions: public documents; public works; common enterprise, which is our conspiracy; admissions by agents; confessions; statements of physical and mental condition, including *Hillmon*

53. Stephan Landsman, *Who Needs Evidence Rules, Anyway?*, 25 LOY. L.A. L. REV. 635 (1992).

54. Civil Evidence Act 1995, c. 38, § 1 (Eng.).

55. Criminal Justice Act 2003, c. 44 (Eng.).

56. 28 Jan. 2003, Parl Deb HC (2003) col. 602 (UK).

statements;⁵⁷ information relied on by an expert comes in for the truth; and, most importantly, *res gestae*.⁵⁸ More to say about that later.

Engrafted on these preserved exceptions, one wonders about the discussions around the conference table of how these were preserved and the others were rejected. But, in any event, other than that, it does give the trial judge very wide discretion to admit hearsay in the interest of justice and to exclude it for the same reason, particularly where it would result in a waste of court time or where the trial judge determines it's unreliable. So, there's a two-way door that the trial judge is given explicitly with regard to the exercise of discretion.

Like our Federal Rules, the Criminal Justice Act distinguishes between available and unavailable declarants.⁵⁹ But it gives far more space for admission for both of those.

So, for example—and this struck me when I first looked at this Act—the prior statement of an unavailable witness comes in as long as the declarant is identified.⁶⁰ And it goes further in defining what is meant by unavailability, because unavailability includes a witness who is in fear of testifying.⁶¹ I don't think we have that as a definition of unavailability, but it goes even beyond that because the statute specifically provides “‘fear’ is to be widely construed [to include] fear of death or injury of another person or of financial loss.”⁶²

And in one notable case⁶³—which, again, attracted my attention—a woman kidnapped from her home made a statement to the police after she was thankfully released, but she later refused to testify, claiming that she was in fear of the perpetrators. But when she was questioned, it turned out that her fear of the perpetrators was not based on anything that they did or said or anything that their associates did or said. She said she didn't want to testify because the arresting officers told her that these guys were really dangerous and you don't want to mess with them.⁶⁴

Nonetheless, her statement is read to the jury. Their conviction is upheld because she was deemed unavailable by virtue of fear.⁶⁵

Now, I think that's a result that goes against American sensibilities if you look at *Giles v. California*⁶⁶ and Rule 804(b)(6).⁶⁷ We've been very careful

57. *Mutual Life Insurance Co. of New York v. Hillmon*, 145 U.S. 285 (1892), created an exception to the hearsay rule for statements regarding the intentions of the declarant; it is codified in Rule 803(3). FED. R. EVID. 803(3) (providing that “[a] statement of the declarant’s then-existing state of mind (such as motive, intent, or plan)” is not excluded as hearsay).

58. Criminal Justice Act 2003, c. 44, § 118 (Eng.).

59. *Id.* §§ 116–120.

60. *Id.* § 116(1)(b).

61. *Id.* § 116(2)(e).

62. *Id.* § 116 (3).

63. *R. v. Marquis & Graham*, 60 E.H.R.R. 31 (Eur. Ct. H.R. 2014).

64. *See R. v. Horncastle*, [2009] EWCA (Crim) 964 (Eng.).

65. *Marquis & Graham*, 60 E.H.R.R. 31.

66. 554 U.S. 353 (2008) (holding that forfeiture of the right to confrontation could be found only if the defendant acted wrongfully with the intent to keep the hearsay declarant from testifying at trial).

to limit the notion of forfeiting one's confrontation right or hearsay objection to conduct of *that particular* individual and, indeed, beyond that, to conduct that was deliberately intended to render the witness—the declarant—unavailable.

There is wide room for business records under the British Act, even in criminal cases, and even when the business record is prepared explicitly for the criminal proceeding. As long as the recorder is either unavailable or cannot reasonably be expected to have any recollection of the matter, the business record comes in.⁶⁸

Now, turning to available witnesses, a victim's contemporaneous statement describing the crime and the perpetrator comes in under the *res gestae* provision,⁶⁹ which is way broader, I think, than our 803(1)⁷⁰ or 803(2).⁷¹ It's defined in the Act as a statement "made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded."⁷² That's an extraordinary ruling for a trial judge. I don't envy any trial judge having to make a ruling under that standard.

But as a result, in domestic violence cases, their 999 call transcripts—the equivalent of our 911 transcripts—are now routinely admitted, rarely even objected to. And it apparently doesn't even matter if the declarant is not just available to testify, but actually sitting in the courtroom. Because in one notable case, she is sitting in the courtroom; she refuses to testify out of fear of her boyfriend; and, her 999 calls come in.⁷³ Neither party, for strategic reasons, was willing to call her. But in the absence of them calling her, the hearsay was admitted.

Video evidence comes in under this new Act where a witness to the offense, with the leave of court, gives evidence by means of a video recording made when the events are fresh in his memory.⁷⁴ All that has to happen is that that individual get on the witness stand and view the video and say, "Yes, that's the way it happened."

Diary entries are admissible because the definition of hearsay is the making of a statement with the purpose *to convey* information to others.⁷⁵ This is the familiar kind of problem we get in terms of—is it a "statement."

67. FED. R. EVID. 804(b)(6) (providing that when the witnesses is unavailable, "[a] statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result," is not excluded as hearsay).

68. Criminal Justice Act 2003, c. 44, § 117 (Eng.).

69. *Id.* § 118(1)(4).

70. FED. R. EVID. 803(1) (not excluding as hearsay "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it").

71. *Id.* 803(2) (not excluding as hearsay "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused").

72. Criminal Justice Act 2003, c. 44, § 118(1)(4).

73. *Barnaby v. DPP*, [2015] EWHC (Admin) 232 (Eng.).

74. Criminal Justice Act 2003, c. 44, § 137.

75. *Id.* § 115(3).

But they've deliberately excluded from the hearsay rule any statement, like a diary entry in a personal journal, that's not intended to be seen by anybody else.

Now, beyond these very generous exceptions is the power of the court to admit hearsay "in the interest of justice"—this is what was called in the legislative discussions the "safety valve."⁷⁶ It's akin to, but way broader than, our 807. It's informed by a number of statutory factors of the kind that you would guess would be there: weighing the probative value, what other evidence is available, et cetera, et cetera. But it gives wide leeway, of course, to the trial judge to admit evidence that doesn't come within any established exception.⁷⁷

Advance notice has to be given, and we'll talk a little bit more about how that operates.

The legislative history—just as it is with our residual exception—the legislative history was you've got to keep this exception to a narrow confine of cases. The safety valve is to be cautiously applied,⁷⁸ but that has not been the case in practice.

So, as the Criminal Justice Act clearly intended, more hearsay is coming in. Peter Sussman, Queens Counsel, tells me that in criminal cases he rarely hears objections to hearsay anymore. His explanation of that is that it's to the practical advantage of the defense to be able to tell the jury that the witness didn't appear here; wasn't cross-examined; the evidence, therefore, wasn't tested; who knows what other information might have been given helpful to the defense if I had had the opportunity to cross-examine her. And the judge, according to Peter Sussman, typically confirms that those concerns should be considered in his summing up to the jury.

So, what are the consequences for criminal defendants in this regime? Well, there's predictable consternation among some defense counsel, at least about the downgrading of the right to confrontation. And, interestingly, the conviction rate in the U.K. has gone up significantly since this Act took effect. But establishing a causal connection would be a challenge to even the most sophisticated multiple regression analysis. So, I don't claim to connect the dots there.

There is an escape clause which the Parliament wrote into Act. The judge is required to direct a verdict of acquittal when a conviction is based on hearsay evidence that is "so unconvincing that, considering its importance to the case against the defendant, his conviction of the offense would be unsafe."⁷⁹ I think "unsafe" is an interesting term. But the law since has made it clear that lack of cross-examination doesn't equate automatically to unsafe.

76. Di Birch, *CJA 2003: Hearsay—Same Old Story, Same Old Song?*, 2004 CRIM. L. REV. 556, 558–60.

77. Criminal Justice Act 2003, c. 44, § 114(2).

78. See *R. v. Riat*, 1 Cr. App. R. 2, 22 (2012) (Eng.); see also *R. v. Z* [2009] EWCA (Crim) 20 (Eng.).

79. Criminal Justice Act 2003, c. 44, § 125(1)(b).

There have been many convictions under the Act that have been appealed to the European Court of Human Rights, with very mixed results. That court takes the position that there's no absolute right to confrontation, but merely a question of whether the hearsay deprived the defendant of a fair trial.

So, in conclusion, what are the lessons of this experience? Well, the Criminal Justice Act was driven by a concern that the evidence rules were getting in the way of the war on crime. So, it's not just this that was changed. Believe it or not, double jeopardy is abrogated for murder cases where there's new evidence found. Moreover, the prosecution gets to appeal acquittals.⁸⁰ So, we've got a fear of crime, thousand-page statutory enactment here. And I believe it's a perilous road, of course, to make evidence rules on the basis of that consideration.

Then there's the problem of inconsistency that has been referred to before. How do lawyers prepare for trials in that world of unpredictability?

Moreover, the preservation of some of the traditional exceptions has muddied up the waters. We've got a hodgepodge of the old and the new.

So, two observers complained in 2010, "For years the [English] courts had struggled but failed to provide a clear, watertight definition of what was or was not hearsay at common law. . . . [But] the new concept of hearsay [under the Criminal Justice Act] is no more satisfactory [O]ne set of complexities has merely been exchanged for another."⁸¹ Moreover—and I think this is the point of note here—the Criminal Justice Act significantly increases "the chances of a trial"—criminal trial—"being influenced by second-hand evidence of which the witness in court has no first-hand knowledge."⁸²

Now, if indeed, as has been stated here, the goals of the criminal trial are truth finding, accuracy, and avoidance of wrongful convictions, I think we'd all agree that we should give some pause to moving to that kind of a regime.

Moreover, the reforms of the British type, I think, would bump up against the culture of generations of American lawyers who have been used to a different regime. Do we need forty years in a desert to acclimate to a new system? The reforms in Britain, keep in mind, have gone on for—this is a very gradual process, starting in the 1960s.

And, then, there's the question of public acceptance, the Sixth Amendment backdrop. And if we did move to a discretionary regime, we'd have to be meticulous about protections like advance notice, requiring the judge to assure actual unavailability of declarants, and requiring jury instructions about the limitations of untested evidence.

80. *Id.* §§ 75–83.

81. Diane Birch & Michael Hirst, *Interpreting the New Concept of Hearsay*, CAMBRIDGE L.J., Mar. 2010, at 72.

82. *Id.* at 76.

I want to just conclude with a cautionary note. This is an article out of a British newspaper involving a notorious racial murder case. The accused had already been acquitted:

Police investigating the racist stabbing of Stephen Lawrence are examining whether hearsay evidence could lead to a fresh trial of the five main murder suspects. Changes in legislation since the last time the prosecution case was offered against the suspects mean that potentially vital evidence is now admissible in court. The admissibility of the hearsay evidence means that statements which previously had to be disregarded as gossip could now implicate the defendants.⁸³

The defendants were retried and convicted. That's another grounds for pause. As much as we want to prosecute crime, we certainly don't want to do it on the basis of gossip.

So, let me conclude, then, with the point that what we need is a regime that admits relevant and reliable hearsay, that has appropriate standards, and with some degree of predictability. The guiding principle must always be all relevant evidence should come in, unless there's a good reason to keep it out. But the British experience should inform our quest for that kind of regime.

PROFESSOR CAPRA: Thanks, Mark.

Now we're going to turn to a roundtable discussion with some distinguished practitioners and talk about transaction costs and other concerns that might arise if we change the hearsay rule so that it's a discretionary rule administered by the court.

And I'd like to introduce them:

Dave Stetler, Dan Gillogly, Larry Desideri, Ron Safer, and Reid Schar. And we're really happy to have them here.

I would like to start with Dan, and talk about what would happen under a new regime if you had a system where application of the hearsay rule was discretionary with the judge and you had to argue to the judge as to why a particular hearsay statement should be admissible. And we're going to take the facts of *United States v. Boyce*⁸⁴ and what kind of arguments you would have to make.

83. Mark Townsend, *Law Change Could Mean Stephen Lawrence Retrial*, GUARDIAN (Sept. 9, 2006), <http://www.theguardian.com/uk/2006/sep/10/race.ukcrime> [<http://perma.cc/AX7B-5GRF>].

84. After a footchase in which an officer saw Boyce throw a handgun that was later recovered, Boyce was convicted of being a felon in possession of a handgun and ammunition. *United States v. Boyce*, 742 F.3d 792, 793 (7th Cir. 2014). Evidence supporting this conviction included a 911 call in which Sarah Portis, the mother of Boyce's child, asked that police come to her residence because Boyce had just hit her and was "going crazy for no reason." The 911 operator asked, "Any weapons involved?" to which Portis responded, "Yes." The operator asked what kind, and Portis said, "A gun." The operator said, "He has a gun?", then "Hello?", and Portis responded, "I, I think so. 'Cause he just, he just." After the operator said, "Come on," Portis responded, "Yes!" twice. The operator again inquired, "Did you see one?" and Portis replied, "Yes!" The operator then cautioned Portis that if she wasn't telling the truth, she could be taken to jail. Portis responded, "I'm positive." After giving a description of what Boyce was wearing, the operator asked where he was at the

So, under a system without categorical exceptions, you can't make an argument anymore that, "Your Honor, it's the excited utterance exception." What do you do?

MR. GILLOGLY: My assignment was to take a look at it as under Rule 807. So, with no regard for 803(1) or (2) or the principles—at least the underlying theory or bases for the rules—in other words, that people don't lie on the fly—take a look at Rule 807. And I think there are a number of arguments I would make for the admission of this 911 tape.

First, we know precisely what the declarant said. There's no question, no fudging about what words she used. We know precisely how she said it. We know her tone of voice. We know her sense of excitement or the sense of fear that—

PROFESSOR CAPRA: What does that have to do with admissibility, the sense of excitement?

MR. GILLOGLY: All right. Because it tends to show that at the time she made the statement, combined with the rest of these conditions, that she was acting in an emergency situation that was right in front of her.

PROFESSOR CAPRA: We've already rejected that under our new hypothetical system. We got rid of the excited utterance exception.

MR. GILLOGLY: I understand that. But the notion that she is saying it and we know precisely what she said and how she says it actually adds to the indicia of reliability—

PROFESSOR CAPRA: Okay.

MR. GILLOGLY: —I think.

Third, we know the progress of how the information came out. Now, I have a copy of the transcript from the *Boyce* case, and you can see that there was a progression of information that came not in response to leading or suggestive questions, but basically open-ended questions which were answered in a fashion that did not suggest that she was making something up or that she was trying to accede to or agree with the 911 operator during the conversation here.

Thirdly, it's generally risky for someone to make a knowingly false 911 report. In this case, it's particularly risky because she actually asked for the police to come. So, if they show up there would be consequences—and she was warned actually on the 911 tape, "Listen, if this is false, they're going to arrest you." It was clear as could be.

So, she asks for the police to come, which tends to show that this was not a knowingly false or made-up kind of thing.

Now, those reasons are pretty strong. I've got a pretty good case for admission of the 911 tape.

Now, the *Boyce* court went on to add in this case the facts were particularly egregious. They were substantially corroborated. When the officers showed up just a few minutes later, her demeanor was such that she

moment. Portis responded that she "just ran upstairs to [her] neighbor's house" and didn't know whether Boyce had left her house yet.

Id.

was clearly upset. She was clearly frightened. I realize we're coming back, circling back to that—

PROFESSOR CAPRA: Yes, you're circling back to excitedness.

MR. GILLOGLY: —I know—to 803(2), but I think it's not irrelevant in this totality of the circumstances under 807.

PROFESSOR CAPRA: Well, then once you keep throwing excitedness in as a factor for the court, in about twenty years then you're back to the categorical excited utterance exception.

MR. GILLOGLY: Well, we might get there, except that we now have to have some grander view of the evidence to determine whether or not it has that indicia of reliability.

And the second bit of corroboration was that the defendant was basically leaning on her to change her story and to lie for him. And that evidence came out at trial.

So, there was corroboration, which the court noted in *Boyce* was not needed for 803(1) or (2), but for just, again, additional indicia of reliability ultimately at the end of the day.

PROFESSOR CAPRA: Okay.

MR. GILLOGLY: So, we have a situation here where I think there's a very strong case for the admissibility of this particular 911 tape, looking at 807.

Some practical difficulties that, I think, coming up as a practitioner—and I'm coming down from 50,000 feet—

PROFESSOR CAPRA: Yes, good.

MR. GILLOGLY: —to ground level here.

PROFESSOR CAPRA: We want you on ground level for this.

MR. GILLOGLY: Okay. All right.

So, you've got a situation, if we keep 807 and the notice requirement, then every time I've got some evidence that I'm going to offer under 807, assuming we keep that regime, then there's going to be a lot of notice requirements here. We're going to see a lot more motions in limine.

I think the prudent prosecutor, anyway, that has got some very important evidence is going to want to have some degree of certainty that the evidence is going to come in. So, it's going to be teed up in a motion in limine. So, we'll have some debate about that. We may even have a Rule 104 hearing⁸⁵ ultimately to determine whether or not it's going to be admissible.

PROFESSOR CAPRA: This issue of uncertainty, because it's judicial discretion, it requires greater preparation, and more motions in limine. But there already is a Rule 403 discretionary balancing which applies to other evidence. Why should hearsay be any different? Why does hearsay require a more categorical approach?

MR. SAFER: There is a 403 overlay to everything. But the hearsay rules—the exceptions to the hearsay rules—give you some guidance as to how that's going to be applied at trial. If you take that away, I think—and

85. FED. R. EVID. 104(a) (requiring the judge to decide questions of admissibility).

maybe this is a desired effect—you will have more trials. There will be much less certainty as to outcome in advance—and somebody's going to roll the dice, say, well, look, I'll take a chance because the evidence might not come in. There's going to be many more, as Dan says, pretrial hearings.

I think the perspective that Judge Posner brings is valuable and is great, especially when you're trying one case at a time. But if you've got 350 cases, I think it's almost an impossible burden to put on the court without some guidelines that you can adhere to. And that's all the rules are, are guidelines.

Now, if we decide that those guidelines have no meaning, then jettison them. But, frankly, I think the fact that somebody is excited or describing something not an hour later but as it's happening, doesn't that make sense that it is more reliable than in other situations? It's no guarantee of reliability. It's just a guideline that that's going to be more reliable.

MR. DESIDERI: I think that eliminating the rule is going to increase uncertainty, as Ron just said; but, it's also going to increase the cost of civil litigation, at just about every stage of the proceedings. Because you're taking something where there's firm rules now that you can, in some instances, certainly count on to some degree and you're just saying that there's an argument now that anything comes in.

From a civil perspective, consider, for example, third-party personal emails. If I've got a case and there's some damaging information—third-party emails—about my client, I can look at it and say, okay, this isn't a business record. Let's assume under present rules it's not admissible.

Now, my opponent's going to have, or if it's me—anyone can think of an argument on why it should be reliable. So, now you have a system where every single piece of evidence is fair game. You're going to have arguments on things you would never have brought up under the categorical system.

You have to have credibility. Right now if you don't have an exception, you can't just stand up there and say it's really good for me so admit it. But if it changes to a judicial determination of reliability, you have a rule that says you can make an argument about most any statement.

So, at every stage of the proceedings there is extra cost. Start with discovery. Now you have to wonder, well, do I have to go take discovery about this email that otherwise would never come in? I've got to fly to California, or wherever, and try and rebut this just in case they try and bring it in.

Then you get to the summary judgment stage. Now you're going to have every single exhibit—every exhibit or every statement—can now possibly be used in support of summary judgment, and then you will have to brief about whether it should be in or should not be in because there's no rules. Presently if it's not a business record and it's an exhibit and there's no other exception, you know—

PROFESSOR CAPRA: It's not worth the trouble.

MR. DESIDERI: You lose credibility. You lose time. You use space. You just don't do it. Under a new system, I think you'll have more briefing on whether it's good evidence or bad evidence because there's no rule to guide it.

PROFESSOR CAPRA: What do you tell your client about the outcome?

MR. DESIDERI: I mean, it's very uncertain. It increases uncertainty. It's very difficult not to make the argument, okay, if there's a chance of winning, we have to take it. I mean, with the rule as it is you can say, well, look, there's rules. If it comes in and doesn't fit an exception, there's a good argument on appeal. Now, if it turns into a situation where, well, it could, might, might not, then why not do it.

Then I think presently, in the pretrial order stage, I think a lot of exhibits fall out at that stage. A lot of people put hearsay on the exhibit list to see if it draws an objection. If you draw the objection and there's no real good exception, you just don't offer it at trial. Under a different system, what's the downside to offering it at trial?

So, the court has more rulings to make.

PROFESSOR CAPRA: For trial judges, I guess it's be careful what you wish for.

CIRCUIT JUDGE POSNER: Could I ask a question—

PROFESSOR CAPRA: Sure.

CIRCUIT JUDGE POSNER: —of Mr. Safer?

Where do you get this idea that people when they are excited are more likely to tell the truth?

MR. SAFER: The idea is that when the event comes up, somebody's being attacked in the 911 tape, the possibility that they have concocted a story is less likely. Not impossible—

CIRCUIT JUDGE POSNER: Where do you get that?

MR. SAFER: —but less likely.

CIRCUIT JUDGE POSNER: Where have you derived that? Is this just some intuition of yours or, what?

MR. SAFER: In part. In part, it's—

CIRCUIT JUDGE POSNER: What if I don't share your intuition?

MR. SAFER: Well, right.

CIRCUIT JUDGE POSNER: Then where are we?

MR. SAFER: Right.

So, we have common human experience, right? And it's my intuition enforced by my personal experience as a prosecutor, as a defense attorney, as a human being. Maybe that's wrong and the Committee will decide that's baseless. Right.

CIRCUIT JUDGE POSNER: I do not understand.

MR. SAFER: So, we have to develop a set of—

CIRCUIT JUDGE POSNER: No, we do not.

MR. SAFER: —principles—well—

CIRCUIT JUDGE POSNER: I do not understand that.

MR. SAFER: Then—

CIRCUIT JUDGE POSNER: I know you want rules.

PROFESSOR CAPRA: Right, they want rules.

CIRCUIT JUDGE POSNER: You want—you are desperate for rules—

PROFESSOR CAPRA: Yes.

CIRCUIT JUDGE POSNER: —right?

PROFESSOR CAPRA: Yes.

CIRCUIT JUDGE POSNER: Why are you desperate for rules? Why don't you use your own imagination?

MR. SAFER: Because it leads to a chaotic process.

CIRCUIT JUDGE POSNER: I do not get this rule mongering of lawyers.

MR. SAFER: It's a chaotic process at that point because there is then no guidance. And how does the judge decide—

PROFESSOR CAPRA: Right.

MR. SAFER: —or then how does the jury decide?

CIRCUIT JUDGE POSNER: It is called common sense, right? If you have arbitration, you do not have these rules.

MR. SAFER: But my common sense apparently is different than yours, because it makes common sense to me that that person does not have the opportunity to lie when excited due to an emergency.

CIRCUIT JUDGE POSNER: It is your view. Of course, the judge's view is going to govern, right?

PROFESSOR CAPRA: Is the judge relying on social science when they do that?

CIRCUIT JUDGE POSNER: Well, there is some social science.

PROFESSOR CAPRA: But is the judge relying on the social science—

CIRCUIT JUDGE POSNER: There is some social science literature, which I think we ought to consult, yes.

PROFESSOR CAPRA: When Dan makes those arguments about reliability in the *Boyce* facts, do you go to your social science or do you just decide?

CIRCUIT JUDGE POSNER: Well, I am interested in social science, not all judges are.

PROFESSOR ALLEN: Well, I looked at the social science. It's not very helpful.

But, in any event, two points. If you have this competing intuition problem, which you do, it seems to me that what the preference ought to be—not a flat rule, but the preference ought to be—for the admissibility of the evidence. Again, you ought to go back to the foundations of what generated the Federal Rules in the first place, which is to increase the flow of information to juries, let parties work out these problems, and not engage in this intuitional conflict.

Secondly, you have a really good data set. Go look at your own cases. Go look at your excited utterance cases. Almost every single one of those

are cases in which the excited utterance is verified by facts found on the ground.

So, that is not the same as having an ordinary phone call and lying on it. It's just not the same. The dynamic is different. The context is different. And your cases indicate there's a high reliability.

Now, you can critique those cases for methodological reasons, talk about selection bias and the like. Okay, fine. But it's an interesting data set that indicates the reliability of those kinds of statements.

PROFESSOR CAPRA: So, as an evidence concept, excited utterances are reliable when corroborated.

Dave Stetler, what is your view on new exceptions based on judicial determination of reliability?

MR. STETLER: Well, let me make an observation of this last discussion between his Honor and Mr. Safer.

My recollection of the 911 tape, I think, supports the view that it's real easy to make it up on the fly. And just because somebody's emotional, that doesn't mean they're not lying. As I recall, the call came in and it was the police receiver of the call who says, "Is there a weapon involved?"

Now, if I'm involved with my significant other, the mother of my four children, and I'm having a fight, okay, and she calls 911 on me, and she doesn't immediately say, "My boyfriend's got a gun," I read something into that. And when the dispatcher has to say, "Is there a weapon involved?" and she goes, "I'm not sure," I think there was some—

PROFESSOR CAPRA: Good point.

MR. STETLER: —there was some doubt there in her first answer. She didn't immediately excitedly say, "Oh, my God, a gun. I'm going to get shot."

MR. GILLOGLY: Actually, she did.

MR. STETLER: Well, she said that later, I believe.

MR. GILLOGLY: No. Right away.

MR. STETLER: But I think what we've got to do is recognize that jurors have a lot of common sense. They really do. And maybe I'm naive in thinking that they have so much common sense.

And in my experience, jurors tend to filter out stuff that they don't like, that they think is unreliable.

How many times have you heard somebody say, "Oh, I think so-and-so is guilty, but, boy, it really bothers me. I don't think I could ever convict anybody on hearsay evidence"?

Now, your ordinary juror doesn't know what hearsay is, but they know that if somebody says that somebody else said, it's not of the quality that they would prefer. Now, I'm the prosecutor in *Boyce*, I want to get it in because it just sounds great. It's dramatic. It's awful for the defendant.

I wanted to mention another case where there was hearsay evidence that was even more dramatic, I think, because this defendant made quite a

celebrity of himself.⁸⁶ There was a local suburban policeman by the name of Drew Peterson. He was accused of killing his third wife.

At trial, the minister of the fourth wife who is now missing, says, “Stacy told me”—that’s the fourth wife—“told me that Drew admitted he killed Kathleen,” the third wife.

That’s not very good news for a defendant to have the fourth wife saying to her minister. And there was battle after battle over that statement. And people who were watching it like me were thinking, “Oh, man, this is going to be one hell of an appeal, this is so damaging,” and so forth.

The dispute got diffused because the last witness who was called in the case was called by the defense in an effort to discredit Stacy and give her a financial motive to falsely claim that her husband had admitted that he killed the third wife. So, they called Stacy’s divorce lawyer who said, “Oh, yeah, she told me all about how Drew admitted that he killed Kathleen.”

In an effort to salvage something, I suppose, they said, “And you warned her she needed to be careful because she could be in trouble herself?”

And the lawyer said, “Yeah, that’s right.”

And defense counsel said, “Well, and you meant that she could be charged with extortion for making up the silly story about Drew admitting it in connection with the divorce?”

And he said, “No, I meant in connection with hiding a homicide in this case.”

So, I think the major issue on appeal in that case is not going to be a big hearsay issue. It’s ineffective assistance of counsel.

PROFESSOR CAPRA: Judge Sutton had a question.

CIRCUIT JUDGE SUTTON: I guess maybe this is really for Judge Schiltz, or maybe Judge Posner as well. But this point about civil practice, you know, most cases are, on the civil side, resolved through summary judgment or settlement. We’re not having these trials. And it’s pretty frequent on a summary judgment motion on appeal to be talking about what evidence you can consider or not.

And I take it the implication—now, maybe this is good. We will have more trials. But I take it the implication if you go just to 403, you would always say you could consider it because the point of 403 is to assess it at the time of trial. You could never assess it in a way of saying I would not allow it at the time of summary judgment.

Isn’t that basically right? So, you would end up with a situation where you would want to consider all of that evidence at summary judgment, even though the trial judge may decide down the road, “I’m not going to let that in.” But given the way 403 works—

CIRCUIT JUDGE POSNER: Well, if the judge reading the summary judgment papers was concerned that there seemed to be evidence that if it

86. Defendant’s Motion to Bar All Testimonial Hearsay Statements from Evidence, *Illinois v. Peterson*, No. 09 CF 1048 (Ill. Cir. Ct. Oct. 29, 2009).

was believed, you could not grant summary judgment, but if it was dubious evidence, he could have a hearing on that.

CIRCUIT JUDGE SUTTON: So, the trial judge, during summary judgment motions, has a hearing about what we are going to do about that? But if it is 403-like stuff, you could not even know at that hearing what it would actually look like at trial. You are just not going to be able to duplicate at summary judgment how things are going to appear at trial.

JUDGE SCHILTZ: There's nothing that would keep us from ruling on a 403 objection at summary judgment. Summary judgment briefs often argue that that particular piece of evidence is not admissible in trial. And we rule on that and can exclude it. And, then, we look at what is left and we ask whether a reasonable jury could or could not do it.

CIRCUIT JUDGE SUTTON: You could do the 403 analysis at summary judgment?

JUDGE SCHILTZ: I agree that 403 is so contextual.

PROFESSOR CAPRA: And a Rule 403 determination must include what other evidence is going to be admitted and considered. How can you do that at the summary judgment stage?

CIRCUIT JUDGE SUTTON: I do not understand how you could ever do it. If you say the whole hearsay rule is a 403 proposition, I do not understand how any of it gets screened out at summary judgment.

JUDGE ST. EVE: I think you are right, Judge Sutton. Part of 403 often is, are you going to make any kind of a credibility determination, which we certainly cannot do—

PROFESSOR CAPRA: Right.

JUDGE ST. EVE: —at the summary judgment stage or we will get reversed and it comes back.

CIRCUIT JUDGE SUTTON: I am saying this as if it is bad. It may be that it is actually really good. It is going to lead to lots more jury trials and lots more denied summary judgment motions.

PROFESSOR CAPRA: So, I want to hear from Reid Schar on the summary judgment issue.

MR. SCHAR: I think it's exactly right that a Rule 403-type analysis of hearsay will preclude summary judgment in many cases. What trial lawyers, and particularly civil lawyers, are looking for is consistency, certainty, and an ability to understand what the outcome may very well be so they can limit their clients' risk and costs.

And, so, what we have right now is a set of rules that does provide some consistency. But I think what you're theoretically talking about doing is taking away all that consistency and taking away some degree of certainty. And if you've got a good case, that's really a problem. If you've got a very bad case, some degree of chaos could arguably be helpful for you. And I think you will have, as Judge Posner may want, additional trials.

The point that was made by Judge Schiltz concerns me a little bit—and I'm not sure it's meant to necessarily reject the rules, though—is the lack of

people with experience with the rules or lack of people who are learned in the rules.

I think that because the hearsay doctrine is in a set of rules, this makes learning them easier. It's not difficult. You've got case law that's developed around the rules, and you've got plenty of treatises around the rules. So, you have a set of rules. If you really want to be a good trial lawyer, you can go out and learn very well and you can understand.

And maybe it's because there's still actually baseball in Chicago in October for a while, but I can't envision a world in which we would say let's take the rule book out of baseball and we'll let umpires, who are very well trained and very good, make the calls as to whether they think it's fair that the person is out or not.

PROFESSOR CAPRA: That's an interesting analogy. You'd have people running the wrong way around the base paths.

MR. SCHAR: Or someone was startled and if they hadn't been startled, they would have made it to first base—so my decision is you're going to be awarded first base, even though the ball got there first.

PROFESSOR CAPRA: This was great. We're going to take a break, and then we'll start with Professor Richter and then Professor Saltzburg and then move on to the next topic, of prior statements of testifying witnesses.

[Break]

PROFESSOR CAPRA: We still are finishing up our panel discussion on structural reform of the hearsay rule and its exceptions. I'd like to turn to Professor Liesa Richter who will continue the discussion.

PROFESSOR RICHTER: Good morning. And, first of all, thank you very much to the Advisory Committee for convening this symposium. I'm really delighted to take part in this conversation.

I think, as Professor Brodin has carefully laid out, the criticisms of the categorical model for hearsay exceptions have been around since prior to their conception and have continued unabated since their adoption. And if we look at the law review literature in the evidence field, the articles that criticize the categorical approach to hearsay exceptions or particular categories within that regime are almost too numerous to count.

And I think the judges, who unfortunately aren't here right now, might agree with me that if it were only law professors like me criticizing those categorical exceptions, we might dismiss that as much sound and fury signifying very little indeed, as those of you who have read law review articles might be willing to attest.

But to my mind when judges who depend upon these hearsay rules to conduct the business of a trial every single day are highly critical of the exceptions, that does merit a closer look and exploration as to whether we may yet do better. And I was very pleased to hear Judge Sutton's remarks at the beginning about this Committee's commitment to reexamining the rules and to keeping them fresh. I think that is important.

We've talked a lot today about one particular alternative, one modification that we might make, in terms of just eliminating categories

and allowing Rule 807, the catchall, to really replace those categories and serve in its stead. And that would allow judges the freedom, as we've heard, to make individual determinations about particular hearsay statements in particularized contexts and admit as they see fit.

Now, as Professor Allen has noted, I had some concerns about the costs that would be associated with that modification and many of the concerns that were articulated by our group of practicing lawyers, but thought that such a scathing criticism from such a respected quarter deserves some theorizing about potential alternatives to that one modification that might address some of the concerns about the integrity of the categorical exceptions, but perhaps do less harm to the system that we have today.

So, I've been exploring one concept. I will briefly explain that to you and how it would work if it were to be adopted and, then, give you just a few reasons why I think this could be a more constructive path forward if the Committee were inclined to make changes to the categorical exceptions.

So, the concept I've been exploring is utilizing the trustworthiness exception or escape clause that is an existing feature of the business⁸⁷ and public records⁸⁸ exceptions and expanding it to apply to additional categorical exceptions. Perhaps, at first, the much maligned present sense impression and excited utterance exceptions; but, I think there could be potential benefits to utilizing it in connection with additional Rule 803 exceptions.

We're all familiar with that trustworthiness exception that exists in the business records exception. A proponent of a business record currently has to satisfy several requirements in order to have that record admitted for its truth at trial, much like the other hearsay categories.

But a distinguishing feature of the business records exception, of course, is that it permits the opponent then to come forward and demonstrate to the judge that there's something about the particular record that is not deserving of those presumptions of trustworthiness—the source of information that went into it, the motivations that would have been surrounding its creation—and then the judge has the freedom to reject and exclude that business record notwithstanding that it satisfies the typical categorical requirements.

As we all know, that trustworthiness exception grew out of a pre-Rules Supreme Court case⁸⁹ in which I think the Supreme Court recognized reality—that most business records created routinely for a business purpose are very trustworthy, but they can't all be, right? There will be that exceptional circumstance where even an enterprise has some doubtful motivations and their records are not deserving of admission into evidence.

87. FED. R. EVID. 803(6)(E) (providing that a business record is admissible if, along with other requirements, “the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness”).

88. *Id.* 803(8)(B) (providing that a public record is admissible if, along with other requirements, “the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness”).

89. *Palmer v. Hoffman*, 318 U.S. 109 (1943).

And, so, that's how the trustworthiness exception found its way into the Rules of Evidence.

And I think some of the concerns that we heard this morning about the validity of the present sense impression are very similar to the concerns that animated that trustworthiness exception. We see some disagreement as to whether present sense impressions deserve respect and are reliable. But to the extent that we think that most are or many are, I think we would all agree that not every present sense impression is reliable.

So, potentially adding that trustworthiness exception to exceptions like the present sense impression or excited utterance would allow judges and litigants to take that reality into account. We've heard about the literature. Humans may be capable of lying instantaneously and spontaneously. I've done my own research. I have two teenagers, and I find that to be a fact that humans are capable of instant lies.

So, it would work much in the same way the business records exception works. A proponent could come in with a present sense impression and say, "This is a declarant who was observing an event and speaking contemporaneously with that observation." That's a classic fit for 803(1). And yet this would allow the opponent to say, "Well, hold on a minute, your Honor, let's take a look at this particular event and declarant.

The event was an accident, and the declarant was not only an observant but a participant in the accident. And at that very contemporaneous moment at which the declarant was speaking, that declarant would have appreciated their motivations and their self-interests. And if we look at the statement, it appears to be self-serving."

So, notwithstanding that it satisfies those technical requirements of the present sense impression, a judge would have the freedom to exclude it based upon that reality. So, that's how it would work.

A few of the reasons that I have been exploring this as a possible middle ground or compromise, if you will, to address these concerns are these: First, it would enhance the substantive rationality or integrity of the exceptions that Judge Posner, in particular, has called into question, allowing us to recognize reality that these assumptions that we have in our categorical exceptions are imperfect or fallible. It would permit some individualized assessment of the hearsay statement.

Secondly, this would enhance judicial discretion. It wouldn't maximize it to the extent that the purely discretionary approach would, to be sure; but, it would eliminate that rigidity that underscores our current exceptions that seems to say if the statement fits, you must admit, at least over a hearsay objection. And, so, that would be an improvement in terms of judicial discretion.

Now, crucially for me, to my mind, this modification would preserve the procedural integrity that recommended the categorical exceptions in the first place. So, we would still have those requirements that would make the hearsay statements presumptively admissible that litigants and lawyers could depend upon in developing their trial strategy. Placing the burden on the opponent of the evidence to demonstrate the unreliability or lack of

trustworthiness of the hearsay statement would maintain some predictability—as is currently the case with the business and public records exceptions.

And I think the framework for decision making—first consider the requirements; then shift the burden to the opponent to look at the individualized context; and, only then allow the judge to exclude—might preserve consistency across courtrooms. So, similar evidence in one courtroom before one judge in the federal system likely to come out the same way under that framework in any other courtroom within the federal system.

It, of course, would still allow quick decisions, talking about the resources that it takes to make a decision about reliability. The last sort of reason that I've been exploring a trustworthiness exception as a possible compromise is that if the Committee is inclined to perform surgery on the categorical regime, this modest modification is a much less invasive procedure than excising whole categories.

It's reflecting the comments, the quotation you delivered, Professor Brodin, about removing one misshapen stone could cause a large sort of disruption in the system, and this would be less of a disruption.

So, in sum, I think it's a wonderful conversation to be having. I think that there are many alternatives that could be explored to improve the categorical regime, and that this very modest modification is worthy of further exploration or consideration to help restore perhaps some confidence in the current system of hearsay rules and categorical exceptions.

PROFESSOR CAPRA: And you'd have to figure out what exceptions you'd do it to, right?

PROFESSOR RICHTER: Absolutely.

PROFESSOR CAPRA: Like the state of mind exception seems like a good candidate.

PROFESSOR RICHTER: Absolutely. There has been case law on that area, as well.

PROFESSOR CAPRA: Paul Shechtman.

MR. SHECHTMAN [a member of the Advisory Committee]: I'll be real quick.

If you are writing on this for the *Fordham Law Review*, there are states—New York is one of them—that have a trustworthiness requirement attached to the present sense impression.⁹⁰ Some of them actually have the federal rule, but added a trustworthiness requirement.

PROFESSOR CAPRA: Right.

MR. SHECHTMAN: I'd be curious to know whether there is any case law in which something was admissible under the present sense impression

90. *People v. Brown*, 610 N.E.2d 369, 370, 374 (N.Y. 1993) (adopting the present sense impression exception, and holding that “there must be some evidence in addition to the statements themselves to assure the court that the statements sought to be admitted were made spontaneously and contemporaneously with the events described”).

statement that a court kept out under the trustworthiness component of it. I'm actually curious to know whether there's any business record case in which a federal court said it's in, but I'm keeping it out under the trustworthiness requirement. In other words, I understand the reason for adding the requirement. I'm just curious to know in those states that have it, does it have any bite?

PROFESSOR CAPRA: Well, in the business records exception, the answer would be yes.

MR. SHECHTMAN: There's some in the business records.

PROFESSOR CAPRA: For example, preparation of a business record in anticipation of litigation renders it excluded under the trustworthiness clause.

MR. SHECHTMAN: But I'd be curious in other states whether it actually does anything.

PROFESSOR RICHTER: Thank you.

PROFESSOR CAPRA: Thank you.

Now we turn, to conclude the panel, to my coauthor, Professor Stephen Saltzburg, who is going to defend the exceptions we have.

PROFESSOR SALTZBURG: I am going to do that. Hearsay can be reliable. It can be totally unreliable, as Dan telling me that no one would speak more than five minutes.

PROFESSOR CAPRA: That wasn't hearsay. That's an unreliable opinion.

PROFESSOR SALTZBURG: So, let me begin this way: I tried my first case in 1972. I tried my first class action case the next year. And I've had a chance to try cases ever since, as well as writing about cases, evidence. I sat as a special master in D.C. in the largest employment discrimination case that succeeded against the federal government and sat as a trial judge for almost fifty trials.

What I have discovered over the years is that one of the great advantages of having these rules—I don't like the term "categorical" as though there's something terrible about it. What I've really liked about these rules is I can walk in any courtroom in the country—any federal courtroom—and most of the states, because they're very similar, and I know what's going to happen when hearsay issues arise, for the most part. I rely on it.

I know that I've never met a federal judge who didn't have at least some predilections one way or the other. We call it implicit bias now. And I know that on the margin, they're going to vary how they're going to rule on 403 issues. I also know they're not going to vary hardly at all when it comes to the hearsay that falls within the rules that we now have.

I really think that's a good thing. I think it is one of the things that assures us the promise of equal justice. When I represented every prisoner of Virginia, it didn't matter whether the judge liked my case or not. I was getting in what I needed to get in. And they knew that they were going to get the same treatment as wealthy people who could actually afford a

lawyer as opposed to a lawyer appointed by the court to represent them. And that mattered to me a lot.

So, when I look at the Federal Rules of Evidence, I would just tell you anyone who thinks that the hearsay exceptions are all based on some reliability or trustworthiness theory just doesn't understand them.

There are three reasons we have hearsay exceptions. Number one, for reliability reasons, yes. If we have a reason to believe that out-of-court statements are reliable, that's one reason we let them in.

The second reason is necessity. For example, when we have people who come to this country and don't have the kind of records of birth or marriage that we would expect—the formal records—we have hearsay exceptions that allow them to prove who they are, where they came from, who their parents were. We need that. And we even have some groups in this country that still need those kinds of records.

But if you asked me—if I turned to Rule 803(11),⁹¹ a statement of birth or family history contained in some religious organization's records, is that always reliable? No. It's not always reliable, but it's often necessary.

And if I look at family records, you're going to tell me that every engraving on a ring or an urn is reliable? How would you know that? We have necessity.

And the third reason—and this is where present sense impressions and excited utterances kick in, in my view. The third exception—Ron Allen touched on this—is where we have a foundation that is sufficiently explored that the trier of fact can actually make a reasonable judgment about how to weigh the evidence.

In other words, when it comes to an excited utterance, the foundation you have to lay enables a jury to consider, yes, the excited state. Did that enhance credibility? Did it detract from the person's ability to observe? They can make a judgment about that. Because the person laying a foundation has to lay a sufficient foundation for the judge to find that the exception applies.

When it comes to present sense impressions, I think the same is true if we have the corroboration requirement that virtually every federal court has added to the rule. And why is that important? It's not just reliability. It's partly reliability, but it's the foundation requirement—and, Dan Gillogly, I think you touched on this when you were trying to make your 807 argument on the *Boyce* facts—that corroboration gives you more confidence and more information that enables a trier of fact to make a judgment.

I thought one of the most interesting exchanges was to hear Judge Posner and Mr. Safer. I don't want to have to walk into a courtroom when Judge Posner is a trial judge and have to get into an epistemological discussion with him about whether the present sense impression or excited utterance

91. FED. R. EVID. 803(11) (providing that “[a] statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization,” is not excluded as hearsay).

makes sense. I'm glad he's bound by them. He may not like them, but they make sense.

And I have to say that it is true—it is true—that, as Judge Schiltz says, that we have a lot of lawyers who don't get a lot of trial experience. That's too bad in a way. But we can exaggerate how complex hearsay issues are. I mean, in most cases you don't have forty-two hearsay issues. In most cases, you know going in—if it's a big issue, by the way, it's going to be the subject of a motion in limine. It's going to be argued in advance if everybody anticipates it.

And if it's a typical diversity personal injury case and the issue is going to be statements made to a doctor, everybody's going to know what the rule is that you're fighting about. It's not going to be a huge surprise.

I tell my students that you don't have to memorize twenty-three hearsay rules under Rule 803. Just look at the ones that are likely to be applicable in the case that you're trying. It may be that excited utterances and present sense impressions will have nothing to do with an employment discrimination case. It may be the big issue is going to be agent statements and whether the scope of employment applies. You'll know that going in.

It is not that complex. I hate to say this because it costs Dan and me money—you don't need to have our five-volume treatise or Weinstein's multi-volume treatise in order to prepare. I'm sorry. It's just not that complicated.

And, by the way, if you want to know historically why it matters that we have rules, one of the cases that I like to remind people about was a case decided in 1813 called *Queen v. Hepburn*.⁹² If you don't know *Queen v. Hepburn*, you ought to take a look at it. It was, in my judgment, Chief Justice John Marshall's worst decision.

The issue in the case was whether the plaintiffs, who alleged that they were no longer slaves because their mother had been taken to free territory, were entitled to their freedom.⁹³ They relied on statements made by the mother and family about their family history.⁹⁴ Of course, slaves didn't have the ability to make fancy recordings and formal records. All they could do was pass things down by word of mouth. And that's what they did. And eight to one, the United States Supreme Court, in an opinion by Chief Justice Marshall, held that the testimony was properly excluded as hearsay.⁹⁵

There was one dissenter, Justice Duvall.⁹⁶ I never heard of him. And, so, I decided I want to look into him. Who was Justice Duvall? Justice Duvall served on the Supreme Court about twenty years.⁹⁷ He wrote a total

92. 11 U.S. (7 Cranch) 290 (1813).

93. *Id.* at 293–95.

94. *Id.* at 294–95.

95. *Id.* at 295.

96. *Id.* at 298 (Duvall, J., dissenting).

97. See Irving Dillard, *Gabriel Duvall*, in 1 JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 159, 165 (Leon Friedman & Fred L. Israel eds., 4th ed. 2013).

of eighteen opinions. He twice dissented from Chief Justice Marshall's opinions.⁹⁸ Only twice. And one of them was this case.

And what he said was if I have to choose essentially between freedom and slavery and it turns on whether or not evidence should be admitted, it should be admitted.⁹⁹ And today it would be admitted under Rule 804(b)(4).¹⁰⁰ That's important. That's why we need to have rules.

My last point is I have great respect for Liesa's alternative. But it's dangerous. And I will just tell you where I see the danger and a bias I have.

We have a rule like that now. It's called *Daubert*.¹⁰¹ It's codified in Rule 702 of the Federal Rules of Evidence.¹⁰² And for my money, it's one of the worst things that's ever happened to the Federal Rules of Evidence. It basically allows a trial judge to exclude anything that he or she decides is unreliable enough. There's no reliability standard that's written in the rule. It just says reliable. Nothing is totally reliable. And, so, there is an opportunity to basically exclude anything you want.

That would be true with a trustworthiness standard. I don't think we need it. I look around and I ask how many bad cases—how many bad decisions—have there been because evidence that fit within the current exceptions was admitted? Now, we can't answer that, of course. Ron Allen would say that if you look at the reported cases, it doesn't appear to be bad at all. Jurors have done a pretty good job of dealing with what we now admit.

And I do want to say that I don't agree with Professor Brodin that hearsay, we should regard it as second-best evidence.

I have no doubt—and I've written about this—that a 911 call in some circumstances is far more reliable than the spouse who at trial refuses to testify that she was assaulted. That 911 call followed up by the police visit is enough evidence to convict. And, fortunately, good prosecutors are convicting on the basis of that evidence.

So, for me, bottom line, I don't regard statements of present physical condition, I don't regard statements made to doctors, as inherently reliable.

98. Justice Duvall dissented in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). See Dillard, *supra* note 97, at 161.

99. *Queen*, 11 U.S. at 298–99.

100. FED. R. EVID. 804(b)(4) (providing that when a declarant is unavailable to testify, “[a] statement about: (A) the declarant’s own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person’s family that the declarant’s information is likely to be accurate” is not excluded as hearsay).

101. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

102. FED. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”).

Not all of them. There are lots of reasons people are going to lie about their present state of mind, their present condition, what they tell their doctor. They're necessary. We wouldn't know someone's state of mind or state of condition but for one of two things: how they act and what they say. We need evidence of their statements in some cases. And that's one of the reasons we have some of the hearsay exceptions.

So, for me, it's a combination of three things. We rely on reliability; we rely on necessity; and, we rely on substantial foundation evidence. And all three of them are sufficient to justify hearsay exceptions.

And, unfortunately, a hearsay approach based on judicial discretion seems to assume that reliability is the only thing that matters. And that's really, in some ways, a distortion of what we have now in the other exceptions.

PROFESSOR CAPRA: Thanks, Steve.

JUDGE SESSIONS: Could I just ask a more subtle question?

Is really what is behind this debate in some ways an issue of power?

I am reminded of Professor Allen's observations. It really is who makes the decisions. Is it the lawyers with rules that they can interpret it or is it the judge who necessarily has the discretion?

And Judge Schiltz is arguing we should be able to decide that as judges, and you are basically suggesting that really practitioners need to be able to decide these issues in advance.

PROFESSOR SALTZBURG: I would like to respond to that. I think I'm pretty much where Professor Allen was on this, which is: I think it's healthy that judges are bound by rules.

Twenty-five years ago, long before Judge Posner raised this issue, I was on a CLE program with Judge Sam King from Hawaii, who was then chief judge. He looked out at this audience and he said, "I've got two rules. 401 says I can let anything in I want, and 403 says I can keep anything out I want, and that's all I need."

And, you know, he was only half kidding. The fact is, though, that it's very hard—and I think Professor Allen said this—it's very hard for a trial judge—and it should be—to keep out hearsay that actually fits those exceptions. And I think that's good.

It isn't because I think lawyers should have power. It's because I think there is an arrogance that after 200-plus years of experience with evidence law, this Committee and its predecessor committee basically said we have patterns that tell us that judges over time have sent this message that the hearsay rule with its exceptions as developed over time makes sense. And, personally, I think that that's pretty good evidence that the exceptions make sense.

I prefer them to leaving to however many hundred federal district judges we have individual decisions based on each of his or her predilections. Judge, no offense, but—

JUDGE SESSIONS: None taken.

PROFESSOR CAPRA: None taken, I'm sure.

So, that ends our panel on the hearsay rule, on the residual exception, and expanding judicial discretion, and I hope you enjoyed it. I thought it was very productive.

IV. TOPIC TWO: EXPANDED ADMISSIBILITY
FOR PRIOR STATEMENTS OF TESTIFYING WITNESSES

PROFESSOR CAPRA: We're going to move on to a more particularized inquiry; that is, the issue of how and whether the hearsay rule should cover prior statements of testifying witnesses. There are a number of kind of subtopics. One is: Why should prior witness statements be hearsay at all, in that the person who made the statement is subject to cross-examination?

Secondly, should there be some movement in the exception 801(d)(1)(A), which is for prior inconsistent statements, because the federal limitation on substantive admissibility of prior inconsistent statements is quite broad?

And those are the questions we're going to get into today, but we also might have time—we hope to have time—for talking about prior consistent statements and what the effect of the amendment that the Committee put forth in 2014 has had and will have.¹⁰³

So the basic question is where if anywhere to go from here in the treatment of prior statements of testifying witnesses, and we start off with Judge St. Eve.

JUDGE ST. EVE: Thank you, Professor Capra. And thank you to you and Judge Sessions for inviting me to come today.

I also want, since I feel somewhat responsible for them, to thank all of the distinguished lawyers who have come here. For those of you who are not from Chicago, just so you know, you have some of the best of the best before you. And I have been privileged to have all of these lawyers appear in my courtroom and most of them try cases before me. They really are outstanding and the best of the best in Chicago.

I also want to thank my court reporter Joe Rickhoff who is transcribing this. Joe has been with me for over thirteen years, from day one, and I do say he is my right hand, and I mean that. And Professor Capra and Professor Allen, if you were in my courtroom, I have to tell both of you that you would be getting looks from Joe and he would have told you many times by now could you please slow down.

PROFESSOR ALLEN: Well, a ten minute limit is a problem, even if you ignore it.

JUDGE ST. EVE: Before I turn to the prior inconsistent statements, I want to just touch on the change in hearsay rules, the prior topic, now that Judge Posner is gone—because he can and would reverse me, I know, on this position.

As a trial judge of thirteen years, trying well over a hundred cases, and a trial lawyer before that, I believe that the rules really give certainty to the

103. The amendment to Rule 801(d)(1)(B), effective December 1, 2014, provides that a prior consistent statement is admissible substantively whenever it is properly admitted to rehabilitate a witness. *See* FED. R. EVID. 801(d)(1)(B)(ii); *see also infra* note 105.

lawyers and great guideposts for the judges. And they are there for a reason. And my concern is that in this expensive litigation society that we live in, doing away with the rules, as some of the practitioners noted, really is going to increase the costs of litigation because all of a sudden everything will be litigated.

A lot of the issues on admissibility of documents the lawyers agree on in advance because they know what the rules are and they know the business records are coming in anyway, or they know certain pieces of evidence are coming in anyway, so there is no sense in losing their credibility trying to argue something before the judge. So, they tend to agree on a lot of this in advance and just fight over the issues where they might be on the borderline. My concern is if we do away with the rules, we are going to see a lot more fighting, both in advance and during trials, which is just going to increase the cost of litigation.

So, as a trial judge, I like the rules. They certainly could use a few tweaks, and I commend the Committee for looking at them. There are certain of the hearsay exceptions that I have never seen or never heard. A couple of them I went back and looked at, I completely forgot were in there. But as a whole, I think they are a good idea and it is good to give the lawyers and the judges certainty in this area.

As to prior inconsistent statements, the way that the current rule reads, 801(d)(1)(A), if someone is testifying and is subject to cross-examination, a statement inconsistent with that witness's testimony that was previously given under penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, can be used not just for impeachment purposes on cross-examination, but also as substantive evidence to come in for the truth of the matter asserted.

This rule is used quite frequently in trials. I know we have experienced litigators over here who are going to talk a little bit more about the criminal context, but prior inconsistent statements are admitted as substantive evidence in the civil context quite often where a witness testifies inconsistently with what she said during her deposition. And, so, on cross-examination, the lawyer gets up, brings out the deposition, and brings out the prior inconsistent statement.

Of course, other inconsistent statements that were not made under penalty of perjury can be used to attempt to impeach, but they cannot be admitted for substantive purposes. I understand the Committee is looking at whether to broaden the rules to allow these other statements—that were not made under penalty of perjury—to come in as substantive evidence.

One problem that I know some of the scholars have talked about in considering whether to change the rule is the issue of jury instructions, and the confusing nature of jury instructions that judges have to give now when dealing with prior inconsistent statements, given that they are treated differently if they are made previously under oath or if they are made not under oath. So, I went through the patterns of all the circuits on prior inconsistent statements and pulled up a couple just to illustrate that point.

One of them reads as follows: You have heard the testimony of “blank” —for the name of the witness. You have also heard that before this trial, he made a statement that may be different from his testimony here in court. This earlier statement was brought to your attention only to help you decide how believable his testimony was. You cannot use it as proof of anything else. You can only use it as one way in evaluating his testimony.

Another one: you may consider statements given by—the party’s name—before trial as evidence of the truth of what he said in the earlier statements, as well as in deciding what weight to give his testimony. With respect to other witnesses, the law is different. If you decide that before the trial one of these witnesses made a statement not under oath or acted in a manner that is inconsistent with his testimony here in court, you may consider the earlier statement or conduct only in deciding whether his testimony here in court was true and what weight to give to his testimony here in court.

And another one—although I think I made the point. But another one: you have heard evidence that before the trial, a witness made a statement that may be inconsistent with the witness’s testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of the witness’s testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

So, Rule 801(d)(1)(A) presents an issue or a challenge for judges with jury instructions. But I am not sure that the jury instruction problem is a rule problem. I think it is a jury instruction problem and something for judges to consider when instructing and putting the instructions in more understandable language and not talking about truth of the matter asserted and other legal-sounding phrases—terminology that the general layperson does not understand.

I am not sure that is a reason to change the rule, given the costs of such a change.

I know the lawyers are going to touch on the criminal cases and considerations of changing the rule in the context of criminal cases. I want to bring up one issue that I hope the Committee considers in looking at changing this rule. It echoes a little bit of what Judge Sutton said before in the civil context. I know there’s been a lot of focus on criminal for obvious reasons, given the rights that are involved in criminal cases and the reliability of bringing in prior inconsistent statements that are not made under oath.

But in the civil context, I have concerns particularly at the summary judgment stage because, as a trial judge, when we are considering summary judgment motions, we cannot make credibility determinations.

And, so, I hope the Committee considers with a summary judgment motion, if all prior inconsistent statements are admitted as substantive evidence, you run a risk. In particular, a pro se plaintiff may testify a

certain way during her deposition and may not realize legal implications of that; and, then, at summary judgment, when those issues are raised, may try to submit an affidavit saying, well, I also said *X* which was inconsistent with what I testified to in the deposition. As a district court judge, that would tie our hands a little bit because, again, we cannot make a credibility determination at the summary judgment stage, at least in the Seventh Circuit.¹⁰⁴ We have to consider self-serving statements of plaintiffs if they are substantive evidence. If they are admissible only for impeachment, we don't and can't consider them at all.

This self-serving affidavit could now create an issue of fact if the prior inconsistent statement is substantive evidence. So, there might be cases at the summary judgment stage that really should not be tried.

And, Judge Sutton, to your prior point, I am not trying to keep out anything that should be tried. I love trying cases. I am happy to try cases. But there might be an end-around that certain parties could be able to achieve surviving the judgment stage when they really should not if we broaden the rule of substantive admissibility for all prior inconsistent statements.

So, I hope that is something that the Committee considers.

PROFESSOR CAPRA: Thank you, Judge St. Eve.

Ron Allen?

PROFESSOR ALLEN: Can I just make one small point?

Those are very intelligent remarks. And I really like the humility reflected in your taking responsibility for these jury instructions thinking that that's a problem for judges. May I say—and I hope this is consoling—it's not your problem. The problem is it's conceptually bankrupt, what you're trying to communicate.

You have a statement at trial that says *X*. You have an inconsistent statement that says not *X*. You admit not *X* to reduce the credibility of the witness. If you reduce the credibility of the witness, what happens? The probability of *X* goes down; the probability of not *X* goes up. That's the problem, the instruction is impossible to follow.

And it's not only here. One of the most remarkably stupid things that we do is the same thing with expert testimony, where we say you can—the expert—can testify on the basis of material that's not admitted, but you the jury can consider it only for the effect on your appraisal of the opinion. Well, you know what? The opinion only makes sense if that evidence is true. It doesn't make any sense if it's not true. So, you have a conceptually bankrupt problem. It is not a problem of instructions.

JUDGE ST. EVE: Well, in terms of putting it in so it is understandable, I do feel like that is a trial court's responsibility to convey it. You may be saying you are never going to be able to make it understandable.

PROFESSOR ALLEN: Because it's not understandable.

104. See, e.g., *Springer v. Durlinger*, 518 F.3d 479, 484 (7th Cir. 2008); *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 922 (7th Cir. 1996).

The only point of admitting not *X* is to prove not *X*. It's just one step in between. That's the only reason to admit it. So, you can't, I don't think—good luck trying, but I don't think you can do it.

PROFESSOR CAPRA: One of the points of the 2014 amendment to Rule 801(d)(1)(B)¹⁰⁵ was to do away with the need for limiting instructions and the especially confusing one where a prior consistent statement is only for rehabilitation, but not for its truth. And I remember Judge Schiltz saying that he could see jurors' eyes gloss over when he'd give an instruction like that. Now that one need not be given anymore. So, that's at least some advance.

JUDGE ST. EVE: That is a good thing there, although I see the prior consistent statements a little bit differently. First of all, those are rarely used. I think in thirteen years I can count on one hand how many times that has come up during the course of trial. So, those are not used that often. It is a prior consistent statement, so the jury has already heard what the witness is going to say.

So, I think it is a combination of—and I completely agree with the change that was made on that rule—but the combination of those factors and the prior instructions that made complete sense. Here, it is a little different.

105. The current Rule reads:

(d) *Statements That Are Not Hearsay.* A statement that meets the following conditions is not hearsay:

A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

...

(B) is consistent with the declarant's testimony and is offered:

- (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
- (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground

Id. 801(d)(1)(B). Prior to the amendment, the Rule had only allowed for substantive use of prior consistent statements under the circumstances described in Rule 801(d)(1)(B)(i). The Advisory Committee Note to the 2014 amendment explains:

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

...

The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

Id. advisory committee's note to the 2014 amendment.

PROFESSOR CAPRA: I'd like to give a shout out to Judge Shadur who was kind enough to be with us today. Judge Milton Shadur has a long history with the Advisory Committee. He was one of the original members, I believe—from 1993?

JUDGE SHADUR: That's right.

PROFESSOR CAPRA: Yes. One of the original panel with Steve Saltzburg, as well, and Ken Broun, who is here. We've got old home week here.

And Judge Shadur, I was proud to be his Reporter while he was Chair for four years, I believe. I think it was four.

JUDGE SCHILTZ: Probably seemed longer.

PROFESSOR CAPRA: It seemed longer, yes.

Anyway, we're so happy to have him here and we want to thank him for coming.

So, we've got to move it along and we're going to go to Professor Hugh Mundy, who is going to talk about practice perspectives, limiting instructions, and the like, as applied to prior witness statements—which fits right in here.

Hugh.

PROFESSOR MUNDY: It's certainly an honor to be here. And I want to thank the Committee.

In my teaching, I use jury instructions quite frequently to help my evidence students distinguish between the admissibility and uses of certain kinds of evidence. I do not use jury instructions in the 613,¹⁰⁶ 801(d)(1)(A) context because I have not found any that clarify the issue such that the students understand it better after than before.

I really just want to talk quickly from a practitioner's perspective about the danger of admitting prior inconsistent statements not made under oath at a qualifying proceeding or subject to another hearsay exception, for the truth of the matter asserted.

In my practice experience as a criminal defense attorney for many years, many prior inconsistent statements offered against a defendant under Rule 613, for impeachment only, originate in a witness's or victim's alleged accusations to law enforcement, which are then memorialized in a report. The statements were not only made without the benefit of cross-examination or the protection of an oath or in the framework of a structured proceeding, but in an inherently, what I would submit is a coercive environment, or at the very least, one in which only one side of the justice system is represented.

106. FED. R. EVID. 613 (“When examining a witness about the witness’s prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party’s attorney. . . . Extrinsic evidence of a witness’s prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.”).

Further, there is another issue of reliability in terms of the transcription of the witness or victim's alleged statement—typically by law enforcement.

In most circuits, if not across the country, a witness may later be impeached with silence if that witness or a reasonable person would have been expected to speak out or provide greater detail. Even post-arrest, pre-*Miranda*¹⁰⁷ silence, as you know, is admissible to impeach. And even suppressed statements that were taken in violation of *Miranda* may also be used to impeach a witness's testimony.

I submit that the inconsistent trial testimony only further undermines the indicia of reliability of the earlier statement.

And, so, for that reason, I think that the distinction should stand and perhaps juries can be instructed that a prior inconsistent statement admissible only for impeachment does not advance the government's burden of proof and is only used to test the credibility of the witness's statement.

I did find a Federal Judicial Center pattern jury instruction from all the way back in 1987 that I thought had the best language for these instructions.¹⁰⁸ So, maybe I'll sit with Judge St. Eve afterward and we can craft one together.

Thank you.

PROFESSOR CAPRA: I do like the one about "doesn't advance burden of proof" instead of "can't be used as substantive evidence or as proof of the fact or as proof of the matter asserted." It's more understandable; I think the jury might get that one.

PROFESSOR MUNDY: I made that up myself.

PROFESSOR CAPRA: That's a good idea.

Okay. Thank you.

Now, John Vaudreuil, the United States Attorney for the Western District of Wisconsin. We're happy to have him here, and thanks very much for coming.

MR. VAUDREUIL: Like everybody said, I'm really honored to be here. As I look around the room, I wonder if I should even be here.

But I represent rural America. There's ninety-four districts, ninety-three U.S. Attorneys, and Chicago is well represented by my good friend Dan Gillogly and Judge St. Eve and others.

So, I want to talk a little bit about how this works in a different setting perhaps. I'm only going to talk about criminal cases.

I did start in 1980, when I was twelve, at the U.S. Attorney's Office.

107. *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that statements obtained from defendants during incommunicado interrogation in a police-dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination).

108. FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 40 (1987), http://federalevidence.com/pdf/JuryInst/FJC_Crim_1987.pdf [perma.cc/N5VQ-SZ7Q].

It's the only job I've ever had. With all these wonderful resumes, I told Judge St. Eve mine should say John started in 1980 and in 2009 he got a new desk.

But it strikes me that the civil side that's been discussed, it's much easier to preserve and generate the statements that could be used under the present rule—depositions, obviously. I just want to talk a little bit about how I've seen it play out over all my years.

The most prevalent way to preserve a statement for substantive purposes is the grand jury. There's sometimes related civil cases that flow into criminal or 341 hearings, bankruptcy proceedings—but usually it's the grand jury.

It is the prosecutor's insurance policy under the present rule. We take, in my district, pretty much every key witness—all the wobblers, the ones who you got a great interview from, somebody six hours away, you've never seen them, but they're a drug customer, they're a friend of the defendant. They're the kind of people when they look out at the defendant at trial, they're going to go, "Holy cow, I can't say what I said before." Maybe correctly so.

The present rule as it stands in a largely rural district—which is why I emphasize that, I guess—there's really quite a bit of time and expense necessary to preserve the testimony, because of the requirement that it be made under oath at a formal proceeding.

I just had a case. We just went to guilty plea in a synthetic—a drug analogue case. I'm in a small district. I can still do cases. So, it's my case. I brought about forty witnesses from Ashland. Ashland is on the shores of Lake Superior. At best, if it's not winter, it's a six hour drive. And all these folks—all these drug users—came down because I, quite frankly, thought I should see them and didn't really trust them.

So, they had a couple of days. They had hotels. They had travel. They had child care. A lot of them being people who would really have trouble dealing with that in their lives.

So, as we try to generate prior statements so that, if they end up to be inconsistent with the witness's trial testimony, we can use them as substantive evidence—there's a fair amount of witness time, AUSA time that is necessary. And the way our grand jury works, I would say that 80 percent of the witnesses are people we're bringing in to lock in, not, gee, we don't have any idea what they're going to say, but they've given a good interview and we think we'd better preserve that.

So, I think that's being done. And for the most part—and I think Judge St. Eve would agree—while we use prior inconsistent statements from time to time, for the most part they're not used. In 90 percent of the cases there is a guilty plea; and in most of the other ones, the witnesses come down and tell the truth.

I do think there is still some benefits to the process of locking in their testimony by presenting them to the grand jury. It's maybe not the focus of this Committee. But the result is that the grand jury hears more live testimony. We just don't have agents saying, "We interviewed these thirty

people and here's what they said." In my experience it's harder for witnesses to recant at trial if they testified at the grand jury. They've gone under oath. They've looked you in the eye. They sat there. And it's just a little harder, I think.

When we do use the prior statements it's much easier at trial because they were made under oath at the grand jury. I'm thinking of a woman named Lisa Fair who recanted everything as soon as she came and looked at her boyfriend, the defendant. And I would simply say, "Were you asked this question at the grand jury and did you give this answer?"

"I don't remember. I don't remember."

And, then, we moved that portion of the transcript in. There was no quibbling about the words, and whether the statement was ever made. And I think Professor Mundy mentioned this.

I happen to think the new rule—a change to the rule—would be useful. Wisconsin and Professor Blinka will talk about that. I will just give some anecdotal stories from a very good colleague of mine who is a Wisconsin prosecutor for twenty years. There, all prior inconsistent statements are admissible for their truth. The jury instruction—as Professor Blinka, I'm sure, will talk about—is avoided.

The variants that are in Professor Capra's memo, I thought, were fascinating, such as expanding admissibility to statements that are signed or recorded or at least sworn to. Those to me seem to be useful. And just from a practical side, let me tell you why I think so.

For federal prosecutors, it might save some of that time and expense involved in bringing the witness to a grand jury. We might use a signed statement, get the agent out there and just have the witness sign it or notarize it or something like that. It might save a little long time travel and that sort of expense.

I might be wrong in this. I'll be interested to see what John says. It strikes me that the rule change would help the defense.

Under the current rule, defense counsel would have a difficult time creating statements that could be used substantively. They can't bring a witness to the grand jury. With a rule like the federal rule, all defendants can do is impeach, unless for some reason they could use our grand jury transcript.

Some of the costs, I guess, to expanding admissibility, as I alluded to, it's possible the grand jury would see more hearsay instead of live testimony. People criticize the grand jury for lots of things, and one of them is you just bring an agent in and they just repeat all these statements. And I suppose that that's possible that we would have more of that.

I do think the biggest effect to expanding would be the time it would take at trial. If a witness says, "I said it was red," and previously had said it was blue and we have to call an agent or a police officer or somebody, or defense investigator, to prove up that prior inconsistent statement, there's going to be direct; there's going to be cross; there's going to be, "Did you really say that word? I don't remember if you said that word."

If it's a signed or recorded statement, that's probably not quite as much of an effect. But I do think as judges and litigators, we should recognize that it takes more time than just moving in a transcript.

Very briefly, then, the next couple of minutes, as I said, Professor Blinka will talk much more about Wisconsin. But I talked to one of my colleagues who I said was a state prosecutor, and what she told me was fascinating. She said that in her nineteen years of practice, she, like many careful Wisconsin prosecutors with the rule that simply says if it's inconsistent, you know, it's ollie ollie in come free, she said she still took key witnesses or wobblers to make sure they testified at a preliminary hearing.

Prelims are waived a lot, which would be under oath, of course, with a transcript. If they're waived, she'd try to get a signed statement. She took the witnesses to what I will call a Wisconsin equivalent of a grand jury. It's not really, but the defense attorney's with her.

But, again, none of this was required. She could have just used a statement to the police. But she went to extra effort because it was easier to prove up the inconsistent statement if there was a shift at trial. You didn't have to go through, "Well, didn't you say to the cops" and bring the cop on.

She found that by doing these steps it was easier to prevent recanting. They either said it at a prelim or they signed something. There's a little more motivation for the witness to just say, "Yeah, yeah, you're right." And as I said it was easy at trial.

She said the real use of the broad admissibility for inconsistent statements in her experience was in domestic abuse cases. You get the victim interview. The victim describes what happened. Then later she says, "I'm not talking to you again; I love him," so on and so forth, all the stuff we know. And to the extent the inconsistent statement is used without any sort of other work being done, it's usually those sorts of cases.

I think—and then I'll wrap up—if the federal rule was changed to expand to perhaps either just inconsistency only or maybe a little bit more with the signed or recorded, I think careful prosecutors may still go to the grand jury. We would have an option, of course. I see it as perhaps more persuasive to the trial jury to say, "See, they said something different, but they said it under oath before." But an expansion would give another option.

I think one reason to get the grand jury statement is it's just so much easier to prove it at trial. I do think the big effect would be seeing more, perhaps, signed statements from defense investigators where they could just move it in.

Judge St. Eve very graciously spoke to me on the phone the other day, so I knew she was going to cover the limiting instruction question. I said to Professor Capra in one of my emails, "I can talk about how confusing these jury instructions are." Like any good professor, he said, well, basically, "Have I done some studies on whether jurors understand them?" I'm like, "Well, no. What do you think I've got time to do?"

But I sit there and I give closing arguments a lot—or have—and then I watch the jury instructions being read by one of our judges; and, when we

get to that part, I see them thinking, “Do we get lunch before we deliberate?”

So, that was my anecdotal evidence. And I told him I wouldn’t talk about it.

PROFESSOR CAPRA: That’s valid evidence for the Committee.

MR. VAUDREUIL: So, I think the key thing is if it was just that prior inconsistency is enough for substantive admissibility, I think it might take a little bit more time and that might not be a good thing.

PROFESSOR CAPRA: Thank you, John.

So, we have a Wisconsin contingent here, which we’re lucky to have, being in Illinois. Wisconsin has a rule that is one that the Committee has been exploring. So, I’m turning to Dan Blinka to talk about the Wisconsin practice.

PROFESSOR BLINKA: Thank you.

And I want to thank Professor Capra, as well as the Committee, for giving me this opportunity.

Let me put on my hat as a historian for just a moment. Some historians like counterfactuals. How would the world be different today, if at all, if we had taken this route instead of that route?

As I’m sure everybody in this room is aware, the original draft of the Federal Rules in 1972 provided that any inconsistent statement would be admissible for either impeachment purposes or as substantive evidence provided the declarant testify under oath subject to cross-examination. The predecessor of this Committee was strongly supportive of that ’72 rule. When Congress revised the rule to its current form, this predecessor of this Committee in 1974, I think it was, wrote a rather compelling dissent to the narrowing of substantive admissibility, arguing that the congressional changes should be rejected and the original rule reinstated. That didn’t happen.

In the meantime, Wisconsin was drinking the Kool-Aid, as it were, of the Federal Rules of Evidence. In Wisconsin, I believe we adopted the Federal Rules of Evidence in 1973, and they went into effect in early ’74. And the rule that we adopted for prior inconsistent statements is the original rule that was in the ’72 proposal.¹⁰⁹ And in a few words—actually four words—the Wisconsin Supreme Court has looked at this rule relatively recently and has spoken in glowing terms, saying it is “simple,

109. The Wisconsin statute reads:

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant’s hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

WIS. STAT. § 908.06 (2016).

straightforward and workable.”¹¹⁰ And that is high praise for most evidence rules, but in particular, I think that it reflects forty-one years of experience that we’ve had in Wisconsin working with this particular rule.

I also think it reflects something that Professor Saltzburg said earlier when he talked about, in general, jurors do a good job with hearsay. And I think that it has been our experience that, despite problems with either whether the statement was made or what weight to give it, jurors, with the assistance of good trial lawyers, don’t seem to have much of a problem.

I have looked at all of the cases, published and unpublished. I’m very active in judicial education. And I’ve taught judicial education workshops and evidence with judges for the last twenty/twenty-five years. And this rule has never surfaced as any kind of a problem.

Let me make a few points. First of all, if we look at the number of appellate cases, there are relatively few. Since 1974, there have been a grand total of thirty-seven cases, published and unpublished, that talk about prior inconsistent statements. And I cast the net as wide as I could, so these deal with confrontation issues, sufficiency of the evidence issues, as well as questions involving admissibility.

Only twenty-four of the thirty-seven cases even cite the rule or talk about the foundation. And even those discussions are pretty straightforward, because the rule itself is so simple and straightforward. So, in the forty-one years, twenty-four cases that we’ve had reflect no problems for judges or trial lawyers really working with the rules.

Now, second point. An interesting artifact. And this surprised me. All twenty-four of those cases were criminal cases. Not a single civil case. Yet what we know is, from trying cases, that virtually every civil case and criminal case involves some sort of a prior inconsistent statement by somebody during the course of the trial.

But these are all criminal cases. And I think it signals a couple of things. First of all, no admissibility problems in civil cases, period. And in criminal cases, what we tend to find is when the issue surfaces, it, I think quite sadly, usually is a product of ineffective assistance of counsel where, when the court is taking up the rule, it’s because the complaint has been that, well, my trial lawyer didn’t bother to object or didn’t make the proper objection. And, so, the issue isn’t so much how does the rule work as whether or not counsel is ineffective.

Now, in reading through the cases, one of the things that I was looking for, and quite surprised by the findings, is how many cases, civil and criminal, turned on or seemed to turn on the substantive use of a prior statement. And what surprised me is the answer is exactly zero. And not any criminal cases. At least in the criminal cases what you’d find is usually abundant corroboration. And I think that’s because if prosecutors are doing a good job, they aren’t relying on something like a prior inconsistent statement to determine the case. They’re bringing in other witnesses, other physical evidence, assuming they think that this is a triable case.

110. *State v. Beauchamp*, 2011 WI 27, ¶ 43, 333 Wis.2d 1, 796 N.W.2d 780.

In the civil cases, there's nothing. This rule isn't arising in summary judgment. It isn't arising in civil trials. I wondered, though, about the sham affidavit problem, which is the risk that a party is going to blow up summary judgment by saying, "That's what I said? Well, I'll come in and I'll just—now I remembered it differently." And that has not been anything that the courts in Wisconsin have had difficulty with.

The closest I could come to a case that turned on substantive use was, of all things, an arbitration involving insurance coverage. The arbitration panel decided against the plaintiff, finding no coverage. The plaintiff appealed the arbitrator's award to the circuit court. And, as we all know, unless your name is Tom Brady, that's not going anywhere, right?

But at any rate, the court looked at it and said the arbitration panel was quite reasonable in using a prior statement by a witness to show no coverage.

There have also been no significant problems arising in the case law from proving prior inconsistent statements, especially the oral statements that are involved. And I think that what you find is any number of cases involving forgetful witnesses who forgot what they may have said to an individual.

There's one case that deals with a signed statement given by a witness; and, in that case, when he testified at trial, he looked at the paper, said, "Yeah, I kind of remember that. Yeah, that's my signature. But you know what? I was so drunk when I talked to the cops, I was so drunk when I signed that statement, I don't remember what I said. I don't remember what happened." And that's, I think, another good problem for a jury to resolve using their common sense and life experiences.

I think that when we're looking at Rule 801, let's also keep in mind Rule 613, which requires that the witness must be subject to examination.¹¹¹ I think the better cases, at least in Wisconsin, are ones that have insisted upon lawyers actually examining the witness about the prior statement, especially an oral statement, and not just saying, well, good enough. There was an opportunity for somebody to cross-examine the witness or to do a redirect examination later on.

A final point is that—and I think this might interest the Committee—if you go back to the original federal rule, what we find in cases is that the substantive use of the prior inconsistent statement is a coupler for other hearsay exceptions. And, so, there are any number of cases in which the prior inconsistent statement exception was used as substantive evidence to prove the truth of a confession by a defendant (a party-opponent statement). And, so, putting those evidentiary Legos together, prosecutors are able to get in some critical evidence.

So, again, my own view—and I think the Wisconsin experience has been—that the original federal rule was an excellent idea in the early 1970s.

111. FED. R. EVID. 613(b) ("Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.").

I think it's borne out by forty years of experience in Wisconsin. It's simple. It's straightforward. It's workable. And it avoids the fantasy of a limiting instruction, as well as squabbles over whether lawyers are really using a statement to impeach or just trying to get it in as backdoor substantive evidence.

PROFESSOR CAPRA: Thank you, Dan.

Ken Broun has some follow-up, because he's done some research on the federal side.

PROFESSOR BROUN: Just to follow up and consistent with that, I took a look at federal cases to see—and some state court cases, to see—whether there were cases in which the conviction was based solely on the substantive use of a prior inconsistent statement. And the answer is, not really. There are some cases in which the courts talk about it, but for the most part, it just doesn't happen.

Theoretically, yes, I guess it could happen and there may be one case in which it did happen. But for the most part, from all of the federal cases that I looked at, the substantive evidence was used, but there was corroborating evidence of some kind and so the prior inconsistent statement was not found sufficient on its own.

PROFESSOR CAPRA: So, now we have our mini-roundtable to talk about the effects, in terms of practice, of any possible change of admissibility regarding prior inconsistent statements.

I'm going to start with—we have Lori Lightfoot here from Mayer Brown, and we have John Murphy, Federal Defender. We're so happy to have them here.

Lori, I'll let you start off.

MS. LIGHTFOOT: I really don't think that the existing rule works poorly. And I have great concerns about allowing in other forms of prior inconsistent statements for substantive use. And let me step back a moment and I'll, I think, draw upon some of the comments that were made earlier in the earlier topic.

In the current state of litigation practice where everything is trench warfare and a lot of lawyers take on as their guiding principle that the ends always justify the means, bringing in all sorts of other additional prior inconsistent statements that haven't been properly vetted through more of a truth-telling process, either under oath or otherwise, I think, really has the potential to invite a lot of mischief. I don't want to cast aspersions on my fellow members of the bar, but I think you all see the realities of litigation practice today played out every day in—

PROFESSOR CAPRA: I've got a question. How would that work? So, you think somebody is cooking up a prior inconsistent statement. What do you do?

MS. LIGHTFOOT: Well, I think it's difficult. And some of it is, when do you find out about the inconsistent statement.

PROFESSOR CAPRA: When would you?

MS. LIGHTFOOT: Well, I think if you're going to expand admissibility of prior inconsistent statements, you've got to require notice so that it's properly vetted before—certainly before—the trial. I'm thinking about it in the trial context.

PROFESSOR CAPRA: Right.

MS. LIGHTFOOT: I often refer to a comment that Judge Castillo made a while ago. You want to make sure that the judges are equipped with the best circumstances, the best evidence, and enough time to make the right decisions. If it's trial by ambush—which I clearly worry about—and the inconsistent statement is cooked up and not given notice ahead of time—particularly in the context of a criminal case—I think it's a potential for chaos. And I think you're going to get a lot of really, really bad results as a consequence.

I wanted to talk for a moment, if I can, about the other larger question—

PROFESSOR CAPRA: Sure.

MS. LIGHTFOOT: —that the Committee is considering; and, that is, I think it's true that Judge Schiltz made this comment that less and less lawyers are well trained as trial lawyers, less and less opportunities to actually try cases. You know, I come from a very large law firm, but I've been fortunate—both because of my prior experience as a federal prosecutor, but also, frankly, in the context of big firm practice—that I actually get to try cases.

That's not universally true. There are lots of people who are partners in law firms that are running large pieces of litigation that appear in court who have very little trial experience. And I think that's increasingly true of this latest generation of lawyers because there's less opportunities to try cases, particularly in the context of large law firms.

So, I worry about abandoning rules—and, again, I'll draw upon the comment that Professor Allen made—rules of inclusion. They're bright-line rules. We get them. We use them appropriately. The lawyers really do manage the litigation a lot outside of what appears in front of the judges. And to basically have a presumption of admissibility and that the judges are going to then have to make these calls on the fly—which, I think, would be catastrophic, but even if it's in the context of a pretrial hearing—it's absolutely going to run up the cost of litigation exponentially.

But I disagree with the comments that were made from some of my colleagues that there would be more trials. I think it would actually be fewer trials, but they're going to be settled at a much higher price.

The lack of predictability, the lack of certainty, and, also, frankly, really throwing open almost every major evidentiary decision to the vagaries of who the trial judge is and what their predilections are, what their level of experience is, if I'm advising my client, I'm not going to roll that dice unless I have a really, really good understanding of who that judge is. And I think you can't really. You can't really add in that level of predictability.

So, abandoning the rule, relying upon the residual or 403, I think, is a big mistake.

PROFESSOR CAPRA: Thanks.

John.

MR. MURPHY: Yes, thanks.

I want to just briefly make a general comment about the discussion that we've had overall today, and then I'll talk about the prior inconsistent statement.

There's been much made about the need for change, and I think one of the terms that I heard talked about was it would be helpful to make these changes to essentially eliminate the hearsay rules and to change the prior inconsistent rules because it would enhance judicial discretion.

With all due respect to all the judges here, lack of judicial discretion isn't really a problem in the current system. I mean, the judges are making the decisions about whether something meets the hearsay rule or not. And let's face it, a lot of the judges take in the trustworthiness and the reliability. It's built into their ruling.

So, I don't think honestly that courts are hamstrung, as we've heard today by at least one judge, by requiring the application of these rules.

With respect to the prior inconsistent statement and, I will also say, generally with respect to the rules, I'm a lifelong Federal Defender, which means I have my sea legs. I am accustomed to dealing with really bad evidence really coming in most of the time. So, whether or not there's Federal Rules of Evidence or there's no Federal Rules of Evidence, I'm ready for it.

So, now specifically—and I know this is what Dan wanted me to talk about—how would you deal with the admissibility of prior inconsistent statements substantively or prior consistent statements, if we were having the discussion go that far? And I think John touched on this.

I believe what would happen is I, as a litigant, could not rely on the fact that there was no prior precedent that substantive admission of prior inconsistent statements don't lead to conviction. I, as the litigant, have to assume if it's coming in and I'm the opponent of it coming in, it's downright damaging. And I have to be able to confront that.

I can't really confront it on cross-examination. I mean, the statement is what it is. What I have to do is to attack the person who made the statement, their sense of—their character. We're going to be getting into a lot more 608,¹¹² 405¹¹³ matters if we're allowed to do this. I'm going to have to attack the circumstances surrounding the statement.

112. FED. R. EVID. 608(a) (providing that “[a] witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness”). The Rule provides that this testimony is only permitted “after the witness’s character for truthfulness has been attacked.” *Id.* 609(b).

113. *Id.* 405(a) (providing that “[w]hen evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion”). The Rule further provides that “[o]n cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person’s conduct.” *Id.*

What had previously been essentially, I think, minutia that we often disregarded, minor discrepancies between one statement or another become much more important because, frankly, I think there's a fundamental false dichotomy when we talk about prior consistent and inconsistent. In my experience, statements lie in a world somewhere in between, and the prosecutor is saying it's inconsistent, and I'm saying it's consistent or vice versa. And, so, I have to try to highlight those discrepancies to try to make whatever my argument is.

The point I'm trying to make and the character evidence I think we would have to get into, it would require, I think, a certain sea change by trial judges in terms of what latitude they give litigants. I think they'd have to broaden the latitude they give litigants to bring in extrinsic evidence to attack the witness, to attack the statement. We can't just stand on the denial any longer. It's going to be too powerful. It's substantive evidence. It's too potentially powerful.

So, I believe that the court would have to broaden—and, frankly, getting all the federal judges across America to begin to buy into this is going to be difficult, but they would have to broaden—the way they allow us to bring in evidence.

Quite honestly, I think, as I thought through this—and maybe this is way too radical, but I think 608(b)'s ban on extrinsic evidence¹¹⁴ would have to be, if you're going to make this change, taken into consideration. Is that wise under these circumstances?

At the end of the day, I believe the broadening of substantive admissibility of prior inconsistent statements benefits the U.S. Attorney's Office more than it does defendants' lawyers. And one of the reasons, is there's the dilemma of access to evidence.

The statements, and even prior statements, are largely in the hands of the prosecutors. We can get some. But on balance, most of the evidence is coming through law enforcement; and, law enforcement isn't going to talk to us. It's very rare. So, we're not going to have the same kind of access.

So, these are all very important problems that are raised by any change. I won't get into the issue of the instructions. They're complicated, I grant you, and sometimes nonsensical. But the reality is, I believe if we can get an instruction that says you can't use it for the burden of proof, for the truth of the matter asserted, whatever you want to say, I will find a juror that I believe understands that rule, and I will beat it home with that juror in closing argument in the hopes that that juror will be very, very careful with their colleagues in the jury room. Maybe that works. Maybe that doesn't. But that's the system we have. And I think it makes sense to continue on that way.

114. *Id.* 608(b) ("Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness.").

So, unless there is a broadening—an understanding of the need to broaden and widen the trial—which is going to make trials longer, I believe—I'm in favor of remaining with the rules as they stand now.

PROFESSOR CAPRA: Lori, follow-up.

MS. LIGHTFOOT: Just a couple more small points.

I think John is 100 percent right that the fight many times is defining what is actually inconsistent. And we wage wars on that narrow question. So, I think that's also going to be an issue. And there's got to be some definition around that. It sounds like it would be an obvious point, but it's really not; and, many times it's very, very nuanced.

And I think the final point, again, to the larger issue is—and we've touched around this—many lawyers are trained on the Federal Rules regardless of what law school they go to. Certainly at this law school, other law schools across the country. If you're going to change the process radically and say there are really no rules, it's just 403 or 807, the problem, I think, is you're going to have to phase it in gradually because people are still going to be relying upon what they understood, what they were taught, what they practiced on. It's not going to be so easy to just simply say one day it disappears and we are not going to use it. I think it's going to be very akin to what happened in the post-*Booker*¹¹⁵ world. We still see in criminal cases people still rely upon the Guidelines and that's what the conversation is about at sentencing.

I think if you blow up the hearsay rules, people are still going to be relying upon them regardless and there's still going to be a lot of deference and discretion given to that. It's not going to be so easy to unring that bell.

PROFESSOR CAPRA: Yes, Ken. Thank you.

PROFESSOR BROUN: Just for a second I want to talk about an alternative universe. In the state in which I've taught and practiced for the last forty-seven or forty-eight years, North Carolina, all prior statements are admissible, period—but, admissible only for purposes of impeachment or corroboration. It just automatically comes in.

And, Judge St. Eve, the jury instructions are baffling. I mean, the jury is instructed that they may consider this evidence for corroborative or impeachment purposes and not for any other purpose. I have thought about giving a final examination in which I ask the law students to tell me what that means.

The bottom line is the lawyers have learned to deal with that. And I believe that there are no fewer people found guilty or innocent in the North Carolina courts than in any other courts.

Does it make a difference? I think it makes a difference in some cases. But that's the alternative.

PROFESSOR CAPRA: We turn now to Steve Saltzburg who is going to talk about the difficulty of cross-examining witnesses who have made prior inconsistent statements.

115. *United States v. Booker*, 543 U.S. 220 (2005) (holding that the Federal Sentencing Guidelines are advisory, not mandatory).

PROFESSOR SALTZBURG: One of the things I think we all realize is that lawyers can adjust to almost everything. I'm not surprised at all that in Wisconsin you found that a different rule is working. And it's not surprising there aren't a lot of appellate cases, because they're not going to take appeals most of the time when the rules are very clear. And *California v. Green*¹¹⁶ established there are no confrontation issues as long as the person who made the out-of-court statement is present in court to be examined.

So, here's the problem. The easy case shouldn't cause us any concern. The easy case is where someone gets on the stand and says, "I didn't rob the bank," and he or she made an inconsistent statement which was "I robbed the bank." Well, in that case, it doesn't matter what rule you have. Either you believe one or the other, right? There's no way for somebody to choose. You could, I suppose—you couldn't disbelieve them both, right? He either robbed the bank or he didn't rob the bank.

Those cases shouldn't cause us any worry because it won't make any difference what the instruction is. Everybody will get it.

Here are the cases that matter. Cases that matter are, typically a criminal case, where a witness takes the stand and is asked, "Did you have drugs?"

"Yes."

"Where did you get them?"

The witness says, "I got them from John Doe."

Well, John Doe is not the defendant. The prosecutor then says, "Well, did you make a prior statement to an FBI agent that you got them from Jane Roe?"

"Never made that statement."

Now, what's the defense supposed to do? What is John Murphy supposed to do at that point? He can't cross-examine. What are you going to say? There's no cross-examination. It may be that the witness is lying, but you can't cross-examine.

And, by the way, I disagree with Ron Allen on this. This one is not that if you disbelieve the witness on the stand, you know it increases the probability that the prior statement was true.

In my model I gave you, there are three reasons we let statements in: reliability, necessity, and sufficient foundation. The problem here is the witness has denied the statement. You can't cross-examine. The next thing that will happen is an agent will be called. Now the witness has denied it, and the agent will say that the witness made the statement. Can the agent say why? No. And the statement comes in.

And the question is: Does that make a lot of sense? Is there any reason to take that prior statement and treat it as reliable, necessary, or as sufficient foundation? My answer is no.

And that is not just a small problem, because the current situation is that John Vaudreuil knows if a witness has told him that the witness is going to

116. 399 U.S. 149 (1970).

testify unfavorably, he can't call that witness for the purpose of introducing an inconsistent statement that is admissible only for impeachment. That's unethical. Because that's the only reason you'd be doing it, to smuggle in the statement. He knows that.

And this is where John Murphy and Ron Allen are right that you have to ask yourself in the long run, who benefits the most if you decide to change the rule and let in these prior statements? It generally is going to be the government.

Civil cases, I think Judge St. Eve is really right. Civil cases would change dramatically. But let me first deal with criminal.

The government is going to have more access. Agents tend to develop statements. Agents also tend to be believed by juries when they say there was a statement that was made. And then you have a swearing contest between the agent and the witness and there's no way, as I say, for the cross-examination to take place.

California v. Green itself is worth going back to look at because Melvin Porter was the witness in that case.¹¹⁷ He was hopeless. When he got on the stand, he couldn't remember anything—or at least he said he couldn't.¹¹⁸ He said he was under the influence of LSD at the time that he got the marijuana that he definitely had.¹¹⁹

He had made two other statements. One of them was while in custody—in juvenile custody—he supposedly made a statement to an officer who had been undercover and then surfaced. That, under California law, was admissible as substantive evidence.¹²⁰

He also testified at a preliminary hearing inconsistently with his prior statement to the officer and his trial testimony.¹²¹

And the end result was that Green was convicted on the basis of prior statements which are all inconsistent with each other.¹²² And the Supreme Court of the United States said, fine, it's not a confrontation issue—and I think that's right—it's a hearsay issue.¹²³

I never have liked that California rule. And if you will, when you look at the transcript of that case, I think a lot of people would not like it.

On the civil side, I think Judge St. Eve points out a huge problem. Today it's pretty easy for her in a case—and for all the district judges, in a case—where there's a motion for summary judgment and there's been deposition testimony by a party that essentially ends the case. If a party only has to submit an affidavit saying, "You know, I was wrong when I testified"—right now you disregard it as hearsay and you also say, come on, you can't impeach yourself, right? But there would be a different result if it becomes substantive evidence. That can't be a good thing in a system.

117. *Id.* at 151.

118. *Id.* at 151–52.

119. *Id.*

120. *Id.* at 151.

121. *Id.*

122. *Id.* at 153.

123. *Id.* at 168–70.

And if I thought, by the way—on the criminal side, if I thought—the balance of advantage was equal, that defendants would actually be able to get statements in that juries would be likely to believe, I'd be more inclined to say, well, maybe. But the world I was in, that's just not going to happen. It's just not the way the world operates.

And as to jury instructions—one thing about jury instructions that I wanted to just mention. I tell my students this all the time. I say sometimes, you're better off asking the judge for this: if the judge admits a prior statement for impeachment only, ask her not to give an instruction. Just ask her to tell the other side they can't argue that as substantive evidence. Because those instructions not only are confusing, I think they cause jurors to focus more on statements than they otherwise would.

I mean, there's no requirement that a judge give an instruction, and I think most judges would refrain if asked. And I think most litigants often are better off if they forgo the instruction.

The problem with forgoing it is that lawyers are so concerned with being charged either with ineffective assistance or malpractice later, they ask for an instruction that tends to do their client more damage than good because it's self-protective. Not a subject for this Committee, but it's true.

PROFESSOR CAPRA: Thanks, Steve.

Paul Shechtman, did you have a comment?

MR. SHECHTMAN: Question for Steve really.

Why is it easier to cross-examine if the statement is under oath in a grand jury than it is if it's given to a police officer and it's a written statement?

PROFESSOR SALTZBURG: I will answer that.

In my experience, a witness almost never denies having testified before the grand jury. They almost never deny it because they are fearful they're going to be charged with perjury, that the prosecution will allege that they are falsely testifying they don't remember.

PROFESSOR CAPRA: So, you're saying it's not that it's easier, it's just that it's less frequent.

PROFESSOR SALTZBURG: It's unheard of basically. I mean, I suppose there are witnesses who have mental breakdowns and come in and they say, "I don't have any recollection of what happened at the grand jury." And they're hard to cross-examine.

MR. SHECHTMAN: I have a signed affidavit from the fellow. Currently it can't be used substantively. Is cross-examination different in the two cases?

PROFESSOR SALTZBURG: The signed affidavit, under penalty of perjury, maybe. I wouldn't rule out—I wouldn't rule that out, except one of the things about the grand jury process, the formality of having somebody there, having the reporter, means that you don't get into the same contest that you could get into between—particularly in the criminal side—agent and person when the person says, "I just signed what he told me to sign, period, and I didn't read it."

MS. LIGHTFOOT: That last point is exactly right. It's no different than when the officer or the agent writes out a statement for the person, the person even initials every page, every paragraph and signs it. They're a lot more likely to walk away from something like that than they are when you raise your hand and swear the oath. It makes a huge difference.

PROFESSOR CAPRA: Yes, A.J. Kramer.

MR. KRAMER [member of the Advisory Committee]: Steve brought up something that concerns me about the instructions because there are two kinds of prior inconsistent statement cross-examination. There's the one, I think, where the person says to the police at the scene, "I saw the shooting. Joe Smith wasn't there." And that's pure impeachment—and I agree completely with Professor Allen. That makes it less likely when the person then comes on the stand and says, "Joe Smith was there." You want that as substantive evidence that Joe Smith wasn't there.

But then there's the impeachment—and it could be under oath—where the cooperating witness or an agent says three times in front of three different grand juries—or whatever it is, preliminary hearing—Joe Smith was in the back passenger seat; Joe Smith was in the front passenger seat; Joe Smith was in the rear driver's seat—and you want none of those to be true. Your argument is that the person is just making them all up and that none of those are substantive evidence and they're admitted solely for impeachment. I think Steve is exactly right. You don't want the instruction. But it's very difficult to talk the judge out of giving the instruction that that's substantive evidence. And if that's substantive evidence, you've just—

PROFESSOR CAPRA: You've put the person in the car.

MR. KRAMER: It's nothing but pure impeachment that the person is making it all up, that none of it's substantive evidence. And I don't know how that's dealt with.

PROFESSOR CAPRA: Well, that's an interesting challenge for a rulemaker, right?

MR. KRAMER: Yes.

PROFESSOR CAPRA: It is.

We have Liesa Richter now who will talk about prior consistent statements, which is a good idea because the Committee is reviewing all prior witness statements. And Liesa has done a lot of work on prior consistent statements. And, then, we'll be done.

PROFESSOR RICHTER: Thank you, Dan. I'll be brief because I know we're running out of time.

Clearly, the Committee with this conversation this morning is focusing rather narrowly on Rule 801(d)(1)(A) and the problem of prior inconsistent statements and the original rule as described by Professor Blinka and the possibility of returning to that.

Of course, we all know whenever the topic of prior witness statements comes up, there's been considerable argument that those statements shouldn't be defined as hearsay at all because, of course, the declarant

speaker ultimately is going to show up in trial and be subject to cross-examination with their demeanor on display and under oath.

And if that course were taken, that would mean that prior consistent statements, as well as inconsistencies, would become substantively admissible. It looks like the Committee has decided that that would be problematic. And I would just chime in briefly to echo that conclusion and say that the course to focus prior inconsistent statements at this point appears to be the wisest.

First of all, we've heard a great deal of debate about the benefits that could potentially accrue for changes to prior inconsistent statements. These limiting instructions that are so confusing and nonsensical would be eliminated. And I would argue there's just really no identifiable benefit to extending the substantive admissibility of prior consistent statements beyond their current admissibility.

And the reason for that is the recent 2014 amendment that the Committee proposed and that was adopted to 801(d)(1)(B), that basically says any time a prior consistent statement has real value to a case in repairing or rehabilitating a witness whose story has been attacked, it will not only be admitted, but it can be used substantively, meaning that there is no need for a limiting instruction that might confuse the jury and send them in the wrong direction.

So, there's really no benefit to prior consistencies beyond the rehabilitation benefit we're already fully getting.

Some might think that if you're going to make changes and expand 801(d)(1)(A), remove those limitations that Congress initially injected into the rule, that it would be asymmetrical to change prior inconsistencies without changing prior consistent statements. But the rules would operate perfectly symmetrically, without change to the rule on consistent statements, even if this debate concluded with a proposal to eliminate the substantive limitations on inconsistent statements. Prior inconsistencies, when they are admitted for their nonhearsay impeachment purpose, would be fully available without the need for a limiting instruction. And, of course, that matches completely the current version of 801(d)(1)(B), which allows substantive admissibility of prior consistent statements that are admitted for their nonhearsay purpose. And the recency of that amendment also, I think, counsels caution to allow it to expand further.

And I will make one final point, which is that the benefit of excluding hearsay is that it also incentivizes the presentation of robust live testimony. And one oft stated concern about prior consistent statements is if they were freely admissible, there would be more of an incentive for parties to create those detailed pretrial statements and to rely on them and for the focus to shift to the out-of-court statements.

I was particularly interested, Professor Brodin, in your remarks about the English practice of making videos and having this detailed video made by the witness; and, then, you just put the witness on and say, yeah, yeah, that's how it happened, really shifting the focus to that prior consistency rather than the live testimony.

PROFESSOR BRODIN: Very troublesome.

PROFESSOR RICHTER: Yes, that's very troublesome.

And I think if we think about Justice Stone's famous quote in the *Saporen*¹²⁴ case about falsehoods tending to harden and becoming unyielding to the blows of cross-examination, that is a condemnation of the free and open ease of prior consistencies rather than inconsistent statements.

So, I think I would just support the Committee's current examination of prior inconsistencies and their direction and leaving consistent statements alone for the time being.

PROFESSOR CAPRA: I think the Committee did a great job—

PROFESSOR RICHTER: A great job.

PROFESSOR CAPRA: —and doesn't need to revisit that.

So, we've saved time here at the end for comments from Judge Shadur, who sat patiently through all these presentations. And I think he can provide us some perspective. I know he can, actually.

JUDGE SHADUR: Well, Dan, I think this is the first time I have ever sat for two hours without saying anything.

And I have heard a lot. I have heard a lot on each side of two issues that, I think, are in a sense irreconcilable. So, what is the old saying?—I have heard from my friends on one side and friends on the other side. I agree with my friends.

The point that I had that led, I guess, to my being invited here, other than old times, by Dan was that I had sent him a draft of an opinion that I was in the process of writing. And I confess to having spent three decades as a practitioner and something over that as a judge, and I was astounded today to think that it's possible to get a new idea.

In this opinion, I told Dan that all of us knew that the hearsay exceptions had developed from a recognition that literal application of the definition didn't make any sense in a lot of situations. I also referred then, of course, to Holmes's classic statement that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry the IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”¹²⁵

Now, I had said to Dan that I thought that it would make a lot of sense—I know the term “transsubstantive” is used a lot, although it is not a term in Merriam-Webster dictionary at all. But it makes a lot sense in many ways for a rule to be different in civil cases than in criminal cases.

But the idea that came to me on listening to all of you was this: I generally would favor a substantial expansion of 807. I have always thought that way. And it seems to me that it is possible really to go back to

124. *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939) (“False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.”).

125. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

something that was rejected and say that 807 in a modified form would be the universal rule.

The people who despair about the inability of lawyers and judges to deal with the exceptions of the hearsay rule could well be served by the fact that you do not have to throw that stuff away. It is possible to have a rule that would be an 807 rule that would call attention to the existing—the preexisting—exceptions, the case law that is developed under it, and state essentially that all of us are going to pursue that route and use those exceptions as guidance in applying Rule 807.

And that means that it would be stupid for lawyers not to study that case law and the factors supporting the preexisting exceptions. It would be stupid for them not to be prepared to cite that information. It would be stupid for them not to raise issues about believability, for example, and point to exceptions that used to exist, in this theoretical world that I've just now suggested. And it seems to me that there is a lot to be said for that more flexible approach.

Having lived through the early days of the resuscitation of the Advisory Committee, when it had been out of existence for two decades and then Chief Justice Rehnquist reconstituted it, it seems to me—that expanding the residual exception but still encouraging reference to the factors that have supported the categorical exceptions—may well be an approach that a committee ought to think about.

Now, it is heresy. I recognize that. But I have been a heretic for an awfully long time and I am not going to stop now.

That is it.

PROFESSOR CAPRA: Thank you, Judge.

It's with a tremendous sense of relief that I say this was a good conference. It worked out well. And I want to thank the Advisory Committee for sitting so patiently through it. We got a lot of excellent ideas. And I really want to, from the bottom of my heart, thank everybody who took all this time and effort to do this symposium.

I'm going to turn it over to Judge Sessions.

JUDGE SESSIONS: On behalf of all of us, we have listened and engaged. This was just an extraordinary symposium. You are all very much to be commended. You all had great insight. It raises great issues. And I have got to say I really enjoyed it. And I will say that during the course of the discussion at one point, a person on the panel whispered to me, "Boy, I really love this stuff."

So, I will not identify that person next to me, although it was in my right ear as I remember. [The reference is to Judge Sutton, the Chair of the Rules Committee.] With that, I just thank you very much.