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Rethinking the Rationale(s) for Hearsay Exceptions

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RETHINKING THE RATIONALE(S) FOR HEARSAY EXCEPTIONS

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I. HEARSAY UNDER THE FEDERAL RULES OF EVIDENCE

Federal Rule of Evidence 802[1] sets forth the basic hearsay rule and is similar in principle to the basic rule in most states. It reads as follows:

> Rule 802. *The Rule Against Hearsay*.
> - Hearsay is not admissible unless[2] any of the following provides otherwise[3]:
> - a federal statute;
> - these rules; or
> - other rules prescribed by the Supreme Court.[4]

A. Nonhearsay Hearsay

The thirty-seven principal provisions that permit out-of-court statements to be admitted for their truth under the Federal Rules of Evidence are found in Article VIII of the Rules. There are eight provisions in Rule 801(d), twenty-three provisions in Rule 803, five provisions in Rule 804 and one provision in Rule 807 that can be relied upon to admit hearsay evidence for its truth value.

The provisions found in Rule 801(d)[5] are defined as not hearsay despite the fact that they meet the definition of hearsay set forth in Rule 801(c)[6] and thus are an oxymoron: nonhearsay hearsay. The reason for this placement and odd definition is that the drafters of the Federal Rules believed that the

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1. Throughout the Article, when I use the word "Rule," I am referring to a Federal Rule of Evidence.
2. This is the basic rule that exists virtually everywhere.
3. Obviously, states will provide their own exceptions and not make reference to federal statutes, the Federal Rules of Evidence, or the U.S. Supreme Court.
4. FED. R. EVID. 802.
5. *Id.* 801(d) (listing statements that are not hearsay).
6. *Id.* 801(c) (defining hearsay).

justifications for these provisions differed from the justifications supporting true hearsay "exceptions"—i.e., those found in Rules 803,[7] 804,[8] and 807.[9]

The original Advisory Committee on the Federal Rules of Evidence (or "the Advisory Committee") Note explained as to Rule 801(d)(1) that when a testifying witness's out-of-court statement is admitted, there is an opportunity to assess demeanor that is often absent when other hearsay is admitted.[10] As to Rule 801(d)(2), the Advisory Committee relied upon the notion that in an adversary system, parties are responsible for their own statements and those of their agents: "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission."[11] The language in the Note that "[n]o guarantee of trustworthiness is required"[12] for what were originally called "admissions" and are now party opponent's statements[13] suggests that Rule 801(d)(2) is different from the true hearsay "exceptions" because those require a guarantee of trustworthiness.

B. True Hearsay Exceptions

Indeed, the original Advisory Committee believed that the exceptions set forth in Rule 803 were not only supported by guarantees of trustworthiness, but that those guarantees were sufficiently great that it adopted no preference as between live testimony by the declarant and admission of out-or-court statements qualifying under the exceptions:

> The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.[14]

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7. *Id.* 803 (listing exceptions to the rule against hearsay that apply regardless of the declarant's availability).

8. *Id.* 804 (listing hearsay exceptions when the declarant is unavailable).

9. *Id.* 807 (providing a residual exception).

10. The Advisory Committee Note observed that "[i]n respect to demeanor, as Judge Learned Hand observed in *Di Carlo v. United States*, 6 F.2d 364 (2d Cir. 1925), when the jury decides that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court." 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 801.04[1], at 801-303 (10th ed. 2011) [hereinafter EVIDENCE MANUAL].

11. *Id.* at 801-305 to -06 (citations omitted).

12. *Id.* at 801-306.

13. For an argument that changing the term "admission" to "an opposing party's statement" was a bad idea, see Stephen A. Saltzburg, *Restyling Choices and a Mistake*, 53 WM. & MARY L. REV. 1517, 1519 (2012).

14. EVIDENCE MANUAL, *supra* note 10, § 803.04[1], at 803-263.

The Advisory Committee had a less favorable view of the reliability of statements falling within the Rule 804(b) exceptions and thus required a showing of unavailability as defined in Rule 804(a), along with satisfaction of Rule 804(b), to admit hearsay statements:

> Rule 803 [] is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.[15]

There is reason to doubt whether the Advisory Committee's identification of more reliable[16] and less reliable hearsay makes sense.[17] My hypothesis is that most lawyers and judges would say that a dying declaration, which was one of the original hearsay exceptions at common law,[18] is at least as reliable as an excited utterance (especially because most dying declarations also qualify as excited utterances).[19] A similar hypothesis is that many—perhaps most—lawyers and judges would find that declarations against interest, as defined in Rule 804(b)(3), are as reliable as most hearsay that is admissible under Rule 803.[20] But, this

15. *Id.* § 804.04[1], at 804-106.

16. In discussing hearsay exceptions I shall use "reliable" and "reliability" as synonyms for "trustworthy" and "trustworthiness." It will be clear, however, that I doubt whether some of the exceptions are as reliable or trustworthy as the drafters assume.

17. Rule 807, the residual hearsay exception, was originally two exceptions, Rule 803(24) and Rule 804(b)(5). EVIDENCE MANUAL, *supra* note 10, § 807.02[2], at 807-3. Those two exceptions were abrogated in 1997 to create Rule 807. *Id.* Rule 807 creates an exception for a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804," and one of the requirements is that "the statement has equivalent circumstantial guarantees of trustworthiness" as the exceptions found in those Rules. FED. R. EVID. 807. Rule 807 does not distinguish between Rules 803 and 804 in terms of trustworthiness, but it can only be relied upon when a statement "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." *Id.* 807(a)(3). As a practical matter, this means that if a declarant is available to testify, the live testimony will be preferred over the hearsay statement.

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

19. This is because the state of excitement required for an excited utterance usually exists when one is facing impending death and makes a statement concerning the cause of that death. The less common case—one in which the declarant makes a dying declaration after the excited state passes—is illustrated by *State v. Quintana*, 644 P.2d 531 (N.M. 1982), where a shooting victim gave a statement five days after being shot to an attorney hired by the victim's family to investigate civil liability for the shooting. The excited state attributable to the shooting almost surely had passed by the time the statement was made.

20. The former testimony defined by Rule 804(b)(1) arguably is the most reliable of the hearsay exceptions, given that the testimony was given under oath and subject to examination by a party with both motive and opportunity to conduct the examination. There are good reasons to prefer live testimony for a fact finder to assess, and thus the placement of former testimony in Rule 804 is appropriate. There is also a Sixth Amendment Confrontation Clause right to have the government produce an available declarant upon

Article is not intended to argue for reclassification of exceptions between Rules 803 and 804.

I argue instead that the original Advisory Committee was wrong in seeking to explain all exceptions in reliability terms; that there are, and should be, three rationales for the hearsay exceptions that are defined by both Rules 803 and 804; and that they are of approximately equal weight. In short, an exclusive reliance on reliability is a mistake.

The three rationales are reliability, necessity, and adequate foundation. Once these rationales are understood, the argument in favor of exceptions for present sense impressions and excited utterances, and other hearsay exceptions, appears strong.

II. ATTACKING PRESENT SENSE IMPRESSIONS AND EXCITED UTTERANCES

Judge Ann Claire Williams has argued that the hearsay exceptions for present sense impressions[21] and excited utterances[22] are illogical:

> The theory underlying the present sense impression exception "is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." FED. R. EVID. 803 advisory committee's note. Along similar lines, the idea behind the excited utterance exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." *Id.* In other words, the statement must have been a spontaneous reaction to the startling event and not the result of reflective thought. 2 MCCORMICK ON EVIDENCE § 272 (7th ed. 2013).
>
> But that is not to say the spontaneity exceptions in the Federal Rules of Evidence necessarily rest on a sound foundation. We have said before regarding the reasoning behind the present sense impression that "[a]s with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances." *See* Lust v. Sealy, 383 F.3d 580, 588 (7th Cir. 2004) (noting studies showing that less than one second is needed to fabricate a lie) (citing Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 916 (2001)). As for the excited utterance exception, "The entire basis for the exception may . . . be questioned. While psychologists would probably concede that excitement minimizes the reflective self-interest influencing the declarant's statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgment." 2 MCCORMICK ON EVIDENCE § 272 (7th ed. 2013).[23]

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whom it intends to rely in a criminal case. *See* Barber v. Page, 390 U.S. 719, 724–25 (1968). But, the Rule's placement is not based on an assessment of the reliability of former testimony.

21. FED. R. EVID. 803(1).
22. *Id.* 803(2).
23. United States v. Boyce, 742 F.3d 792, 796 (7th Cir. 2014).

III. BUT RELIABILITY ALONE DOES NOT EXPLAIN THE FEDERAL HEARSAY EXCEPTIONS

Judge Williams's argument is persuasive if hearsay exceptions must be grounded in demonstrated reliability. But, as I shall explain below, many of the hearsay exceptions found in Rules 803 and 804 would struggle to pass a reliability test and are more properly grounded in the three rationales I set forth above.

I put aside Rules 803(1) and 803(2) for the moment and focus on the remaining Rules. A quick look at Rules 803 and 804 will demonstrate that reliability cannot explain them all or even most of them.

A. Rule 803

I shall consider the Rule 803 exceptions seriatim, briefly explain why reliability does not support any number of them, and indicate what I believe are the real reasons we have each exception.

803(3). Then-Existing Mental, Emotional, or Physical Condition. I submit that there is no reason to believe that statements of a present physical or mental condition, or statements of an intention to do something in the future, are typically true. People complain about their conditions for any number of reasons—e.g., to avoid work (malingering), to excuse an absence, or just to get sympathy. The true reason we have this exception is *necessity*. There are only two ways to judge someone's emotional or physical condition and his or her plans for the future. One is to assess how they act, and the other is to assess what they say. Both are needed to assess mental or emotional condition and to analyze future intentions.

803(4). Statement Made for Medical Diagnosis or Treatment. People who want a physician to accurately diagnose a problem and to arrive at a treatment plan that is likely to work have a good reason to be honest with their doctors. But people who want to secure controlled substances have reason to lie to get them. People who visit medical personnel to recruit them as expert witnesses for litigation purposes have reason to exaggerate their conditions. The undeniable fact is that people see doctors for many reasons and have varying motives for describing their present and past medical symptoms. There is no way to assess which statements are likely to be reliable.

There are three reasons we have this exception. The most important is *necessity* because in many cases doctors could not correctly diagnose and treat patients and/or explain their diagnosis or treatment without relying on input from their patients. The second reason is *reliability*. We believe that much information provided by patients to doctors is reliable, and this belief finds support in medical testing which often can verify what a patient claims. The third reason is that there will be an *adequate foundation* for a trier of fact to assess the reliability of a patient's statement. The trier will know whether a patient saw a doctor for diagnosis and treatment and whether the patient followed through with treatment, or whether the patient saw a doctor with litigation in mind. Very often, there will be medical

records spanning large periods of time that can be compared to particular medical records that might be disputed.

803(5). *Recorded Recollection*. There is no evidence that people who write down things that they cannot adequately recall when called as witnesses at trial have actually created accurate records. They must testify that memory was fresh when they created the record, but courts have treated the concept of "fresh" with considerable elasticity.[24] Witnesses who write things down might make as many mistakes as witnesses who come to court to testify and have their mistakes exposed on cross-examination. But, witnesses who write things down and claim memory loss frequently immunize mistakes from exposure because a cross-examiner cannot cross-examine a writing. The principal rationale for this exception is that the witness will have to provide *sufficient foundation* to satisfy the rule and answer certain questions: Why did she make a record? Does she frequently make similar records? Was there any particular relationship to a party that affected the record? The foundation also includes the jury's ability to observe the witness as she responds to questions.

803(6). *Records of a Regularly Conducted Activity*. Business records might seem at first blush to be the classic example of *reliability*. After all, businesses that do not keep accurate records might have difficulty remaining profitable. But, the business record exception covers records prepared by the largest entities in the world as well as mom-and-pop small businesses. The degree of accuracy in records might vary depending on the ways a business relies on its records, how they are maintained, who maintains them, and whether they are audited. Moreover, businesses have reason to understate income or overstate expenses for tax purposes and to exaggerate profits to assuage investor concerns. Even though a business record will not be admitted if an opponent is able to demonstrate that the record is untrustworthy, meeting that burden is difficult given that all of the information about the record is in the hands of the business that created it.[25]

It is also important to recognize that Rule 803(6) is not confined to businesses; it covers all regularly conducted activities. This means that records qualify under the exception if created by clubs, citizen organizations, and other entities that are not concerned with profit and loss and that might not suffer much hardship if records are not always accurate and complete.

The most important rationale for the exception is *necessity*. Even a small storeowner might have difficulty remembering every transaction that occurred, and larger businesses have no reliable "memory" other than

24. *Compare* United States v. Smith, 197 F.3d 225, 231 (6th Cir. 1999) (finding statement given to detective fifteen months after event qualifies), *with* Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1582 (6th Cir. 1985) (finding list of products plaintiff was allegedly exposed to cannot qualify when made five years after exposure).

25. The Rule covers records prepared by regularly conducted activities throughout the world. An opponent can challenge the trustworthiness of all records, but the burden of proving untrustworthiness increases when the evidence of how the activity is conducted is located in a distant land and often in a foreign language.

records. A second rationale is *reliability*, as there is merit to the notion that most businesses need reliable records. The third rationale is that there often is a *sufficient foundation* that enables triers of fact to distinguish between more and less reliable records. Although the custodian is not required to lay an elaborate foundation for a business record, the proponent of the record has a strategic reason to do more than the minimum required by Rule 803(6) if a record is important and the proponent wants to impress upon a jury the circumstances in which it was made, kept, and verified.

803(7). Absence of a Record of a Regularly Conducted Activity. The analysis of business-type records set forth above applies equally here.

803(8). Public Records. Does anyone believe that every report prepared by a government worker with a legal duty to make the report is accurate? What about every fact found during a government investigation? My hypothesis is that many, perhaps most, lawyers and judges would be skeptical that government workers are more accurate than private sector workers whose observations are not admissible unless contained in a record that qualifies under Rule 803(6). Rule 803(8) has neither a requirement of routine nor any other criteria grounded in trustworthiness. The principal rationale for the exception is that a *sufficient foundation* usually must be laid to explain how the observation was made or how an investigation was conducted. The foundation also affords an opponent the opportunity to show a lack of trustworthiness.

The one part of the Rule that is premised on *trustworthiness* is 803(8)(A)(i), which covers the office's activities. It is this subsection that covers, among other records, the receipt of tax returns by the Internal Revenue Service and the filing of immigration documents by immigration officials. These records are likely to be created and kept with more care than many other records that are created by varying individuals who might have no expectation that the records would be relied upon as important in litigation.

803(9). Public Records of Vital Statistics. There is no way to measure the accuracy of every record of a birth, death, or marriage that is reported to a public office in accordance with a legal duty. It is likely, however, that a person with a duty to report will not falsify the event. Whether such a person will be accurate on names and dates is more questionable. In any event, the rationales for this exception are *necessity* (governments need to track this information) and *trustworthiness*.

803(10). Absence of a Public Record. This exception is based on *trustworthiness* and tends to relate mostly to Rule 803(8)(A)(i), discussed above.

803(11). Records of Religious Organizations Concerning Personal or Family History. How do the regularly kept records of a religious organization compare in terms of reliability to business records? I doubt that anyone knows, as a religious organization can take many shapes and sizes. The array of records of such things as birth, ancestry, marriage, divorce, death, or similar facts of personal or family history might well depend on oral communications to the organization by members who might

be reporting second or third level hearsay information. The rationale for this exception is *necessity*. Many of these family events will not be recorded elsewhere.

803(12). Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate made by a person who is authorized by a religious organization or by law to perform the act certified is likely to be accurate and is *necessary* to generate a formal record of a marriage or similar ceremony.

803(13). Family Records. A statement of fact about personal or family history contained in a family record such as a Bible or an engraving on an urn or burial marker might reflect wishful thinking about a family member rather than fact. The rationales for this exception are more likely to be *necessity* (only the family has certain information) and *sufficient foundation* (as to how the record was made and how it relates to other family records) as opposed to *trustworthiness*.

803(14). Records of Documents that Affect an Interest in Property. An exception for recorded documents is *necessary* in any property rights system that authorizes the recording of documents to protect property interests.[26] The record generally creates rights and has legal significance, which means it might be admissible as nonhearsay even without an exception.[27]

803(15). Statements in Documents that Affect an Interest in Property. This exception is closely related to 803(14), but covers statements in documents that are filed that relate to but do not establish property rights. The rationale is *trustworthiness*, as statements relating to those that affect property interests are likely to be true. But, the exception recognizes that it is inapplicable if dealings with the property are inconsistent with the statements or the purpose of the document.

803(16). Statements in Ancient Documents. At one time, drafters might have believed that a statement in a document that is at least twenty years old and whose authenticity is established might be *necessary* to prove matters that a community had long forgotten. The drafters would have reasoned that fraud was unlikely because people do not generally plan fraud twenty years in advance and cannot generally know what they would need to succeed in a scheme twenty years in the future. Today, the typical use of email, texting, and other forms of communication that often are stored for long periods of time at little cost to the persons storing them means that twenty years from now, there are likely to be millions or billions of documents that were created hurriedly and with little concern for accuracy and completeness. This exception might be the single best example of an exception fraught with danger of unreliability. It is no wonder that the

26. *See generally* EVIDENCE MANUAL, *supra* note 10, § 803.02 [15], at 803-76.

27. The law is well established that "a statement such as a law or regulation or an order is neither true nor false," and "statements that do not assert, even implicitly, that things are true will not be hearsay." *Id.* § 801.02[1][e], at 801-20. If state law makes a filed document "the law" as to property rights, arguably the document is neither true nor false and not hearsay.

current Advisory Committee is recommending that this exception be abrogated.[28]

803(17). Market Reports and Similar Commercial Publications. This is surely one of the best examples of an exception based on *reliability*. Stock quotations and similar data that are sold by commercial vendors or included in newspapers are generally accurate, and if a mistake is made it usually can be easily identified by comparing it to sources that offer similar data. Moreover, the fact that it is limited to compilations that are generally relied on by the public or by persons in particular occupations is some guarantee that sloppy or error-prone publications will not likely remain in business long.

803(18). Statements in Learned Treatises, Periodicals, or Pamphlets. At first blush, this exception looks as reliable as the compilations covered by 803(17), but a second look reveals that this is not so. The fact that a statement is found in a publication that is regarded as a reliable authority does not mean that the statement is correct. This is easy to see when two reliable treatises offer statements that contradict each other. One or the other might be correct, or they both might be wrong. *Reliability* is a factor, but so is *necessity*, and it is an important factor. Every scientific or other expert relies on the work of others in becoming educated, staying informed, and developing opinions. They must rely on the best information available, even when that information might be debatable.

803(19). Reputation Concerning Personal or Family History. How accurate are reputations generally? Reputation and rumor are difficult to separate. The broader the category of reputation evidence, the more likely it is to include rumor. This exception is extremely broad covering family and community and every matter of personal or family history. The rationale surely is not *trustworthiness*. It is more likely *necessity*, as the exception most likely will be employed when events occurred long ago and/or outside the community in which a person resided many years later and among groups that traditionally keep no formal records.

803(20). Reputation Concerning Boundaries or General History. The same analysis as in 803(19) applies here.

803(21). Reputation Concerning Character. This reputation evidence is different from 803(19) and (20) as it typically involves more recent reputation. People's characters are difficult to determine, however, and it is doubtful that reputations are very accurate. Nevertheless, Rule 404(a) gives a criminal defendant the right to initiate an inquiry into relevant character traits. Thus, there must be a hearsay exception that permits the defendant to do what Rule 404(a) permits. The principal rationale is *sufficient foundation*, because the reputation witness must show familiarity with others who know the defendant in order to demonstrate that there is a reputation. And an opinion witness must show a sufficient foundation for

28. *See* Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 17, 2015, at 13, 55–70.

the opinion. A secondary rationale is *necessity*; there is a need for an exception that corresponds to Rules 405(a) and 608(a).[29]

803(22). Judgment of a Previous Conviction. Judgments following pleas of guilty or guilty verdicts in felony cases are admissible against the defendant who was convicted. Although juries and judges make mistakes and innocent people do plead guilty, the exception rests on the notion that judgments in felony cases are generally *reliable*.

803(23). Judgments Involving Personal, Family, or General History, or a Boundary. These judgments are generally much less reliable as a group than those falling within 803(22). Judgments in civil cases might result from defaults, litigants being unrepresented or not caring very much about the outcome of minor disputes, or sweetheart suits intended to establish something that is really not contested. Moreover, the preponderance of the evidence standard used in civil cases means that a judgment might have reflected a very close call by a judge or jury. Nonetheless, the rationale for the exception is *reliability*, even though there is reason to question that rationale.

B. Rule 804(b)

I turn now to the five exceptions found in Rule 804(b) and consider them seriatim along with the rationales that support them.

804(1). Former Testimony. I have already made the point that former testimony is probably one of the most *reliable* exceptions because it was given under oath subject to examination by a party with an interest and motive to test it.[30] The principal rationale is surely *reliability*, but a secondary and powerful rationale is the *substantial foundation* that is laid for such testimony. The trier of fact often will learn the nature of the prior dispute, which party tested the former testimony, and what the motive was to do so in that dispute. This assists the trier in assessing the testimony's reliability.

804(2). Statement Under the Belief of Imminent Death. The dying declaration rests upon two rationales, one of which is most often repeated. The oft-repeated rationale is that a declarant will not want to meet his "Maker" with a lie on his lips.[31] This is a *reliability* rationale. Whether it is in fact an accurate prediction of how dying people behave, we will never know because there is no way to test the proposition in the mine-run cases. Maybe truly vindictive people want to leave earth by wreaking last-minute vengeance on those they hate. Maybe people dying hallucinate. Maybe the

29. Both at common law and under Rules 405(a) and 608(a), reputation evidence is a permissible way to prove character evidence when character evidence is admissible either as substantive, impeachment, or rehabilitative evidence. A hearsay exception is needed because otherwise reputation evidence would fall within the definition of hearsay in Rule 801(c) and be inadmissible under Rule 802.

30. *See supra* note 20.

31. Reg. v. Osman, (1881) 15 Cox Crim. Cas. 1 (N. Wales Cir.) at 3 ("[N]o person, who is immediately going into the presence of his Maker, will do so with a lie on his lips."), *cited with approval in* Idaho v. Wright, 497 U.S. 805, 820 (1990).

concerns about the negative impact of stress raised with respect to excited utterances are also applicable here. In any event, the second rationale for the exception is that the trier of fact receives *substantial foundation* evidence about the condition of the declarant and the relationship of her condition to the statement that is made. The tier of fact is then in a position to decide how reliable or unreliable it believes the statement to be.

804(3). *Statement Against Interest*. There is no doubt that declarations against interest rest principally upon a *reliability* rationale: namely that individuals generally do not make statements that would hurt them financially (including with respect to their property) or that would subject themselves to criminal prosecution and conviction, unless the statements are true. The exception has a corroboration requirement for statements offered in criminal cases because trustworthiness may not be as readily assumed in those cases, especially when a declarant has a motive to take blame for the acts of another when blame might not actually result in actual harm to the declarant.[32]

Is it clear that declarations against interest are generally reliable? There is little empirical research to answer the question. We know that some people accept responsibility for bad outcomes even though they are not at fault. It is likely that some people believe they are at fault when they are not. And it is surely possible that even in a civil case, a declarant will deliberately take blame to spare another person from being held responsible. Nevertheless, *reliability* is arguably sufficient to support the exception, but it is not the sole rationale. Parties relying on declarations against interest must demonstrate a *sufficient foundation* for such statements, and that foundation enables a trier of fact to make a determination as to their reliability.

804(4). *Statement of Personal or Family History*. This is one of the broadest hearsay exceptions imaginable and the only true exception that does not require a declarant to have personal knowledge. The absence of personal knowledge is a strong signal that reliability cannot be at the core of this exception. The rationale for it clearly is *necessity*.[33] Many people have not seen their parents' birth certificates; yet, they believe they know their birthdays. Even without seeing their parents' birth certificates, most people think they know who their grandparents are. How is that possible? It is because their parents told them who they are and because they might well have lived a long time interacting with the people they identified as grandparents.[34]

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32. *See, e.g.*, United States v. Silverstein, 732 F.2d 1338, 1346–47 (7th Cir. 1984) (finding statement by declarant serving three life sentences that he murdered a prison guard not sufficiently disserving).

33. It is a tragedy that Chief Justice John Marshall did not recognize this in deciding *Queen v. Hepburn*, 11 U.S. 290 (1813), where his opinion rejected a hearsay exception for family history and relegated individuals to slavery who could have been free if the dissenting opinion by Justice Duvall had prevailed. *Id.* at 299 (Duvall, J., dissenting).

34. There is certainly an opportunity for strategic behavior under this Rule. When a billionaire dies, anyone can come forward to claim a legacy and allege that his mother told

804(6). Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.[35] This exception bears a close relationship to Rule 801(d)(2), which is based on the adversarial process and the notion of personal responsibility. Simply put, a party is not permitted to object to the introduction of hearsay by wrongfully causing a declarant to be unavailable. The wrongful conduct deprives an adversary of a witness, and the Rule permits hearsay to substitute for the expected testimony of the witness.[36]

IV. RETURNING TO PRESENT SENSE IMPRESSIONS AND EXCITED UTTERANCES

Rules 803(1) and 803(2) as I would break them up (denoted by bracketed letters) read as follows:

(1) *Present Sense Impression.* A statement [a] describing or [b] explaining an event or condition, made [c] while or [d] immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement [a] relating to a [b] startling event or condition, made [c] while the declarant was under the stress of excitement [d] that it caused.

Both exceptions have four elements that must be established before hearsay is admitted. Most courts have added a fifth, a corroboration requirement, for present sense impressions.[37] The stated rationales for the exceptions are suspect, as Judge Williams has pointed out. The original Advisory Committee explained the two exceptions as follows:

> The underlying theory of Exception (1) [present sense impression] is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. . . .
>
> The theory of Exception (2) [excited utterance] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.[38]

The rationale is basically *reliability*. It is not hard to make the case with respect to present sense impressions that people can lie about the event or condition that they are perceiving, although the corroboration requirement makes this a little more difficult than it otherwise might be. It is no harder

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him that he is the illegitimate son of the billionaire. Fortunately, DNA tests make resolution of the claim much easier than once might have been the case.

35. As noted *supra* note 17, Rule 804(b)(5) was abrogated in 1999, and its substance was moved, along with that of Rule 803(24), to Rule 807.

36. Closely related to this Rule is the last sentence of Rule 804(a), which states that "this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying." FED. R. EVID. 804(a). A party is not entitled to *offer* hearsay on the basis of the unavailability of the declarant if the party wrongfully caused the unavailability. In short, Rule 804 makes a party who wrongfully causes a declarant to be unavailable worse off in two ways: the party cannot offer the declarant's hearsay statements and cannot object to an adversary's offering the statements.

37. *See* EVIDENCE MANUAL, *supra* note 10, § 803.02[2][b], at 803-17 to -19.

38. *Id.* § 803.04[1], at 803-264.

to challenge excited utterances by arguing that excitement can produce stress that reduces reliability and that not all excitement stifles the ability to fabricate.

But I believe that to establish that the exceptions apply, the *substantial foundation* required under both Rules is sufficient to enable a trier of fact to make a judgment as to the trustworthiness of statements that qualify and to give those statements appropriate weight.[39] That is why I have broken down each exception to identify the required elements.

CONCLUSION

The bottom line is that the *substantial foundation* rationale is a key aspect of not only these two exceptions, but of the others that I analyze above. It is high time that we gave up the ghost of the idea that our hearsay exceptions are based exclusively on the reliability of statements falling within the exceptions and recognized that there are three bases of true hearsay exceptions: reliability, necessity, and substantial foundation.

39. Indeed, it is clearly true that some excited utterances are more reliable than trial testimony. Stephen A. Saltzburg, *Excited Utterances and Family Violence*, 15 CRIM. JUST. 39 (2001).