RELIABILITY OF EXCITED UTTERANCE HEARSAY EVIDENCE

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This article was awarded the best paper award in the 6th International Conference of Evidence Law and Forensic Science, held at Baltimore, Maryland, in August of 2017.

INTRODUCTION

Rule 802 of the Federal Rules of Evidence, which prohibits the admission of hearsay statements into evidence,[1] reflects the Anglo-American tradition of favoring cross-examination for discerning truth in litigation.[2] But because hearsay can be valuable and sometimes necessary evidence, the Rules provides avenues for some hearsay to be admitted. Rule 803, premised "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[,]" excepts 23 categories of hearsay from the general prohibition against admissibility.[3]

One of these is the present sense impression ("PSI"), defined in Rule 803(1) (the "PSI hearsay exception") as "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."[4] Another is the excited utterance ("EU"), defined in Rule 803(2) (the "EU hearsay exception") as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."[5]

The rationale for these two hearsay exceptions can be found in the notes to Rule 803 provided by the Advisory Committee on the Federal Rules of Evidence (the "Advisory Committee"). With regard to the PSI hearsay exception, the notes state that "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation."[6] With regard to the EU hearsay exception, the notes explain that

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

[2] 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 244 (7th ed. 2013).

[3] FED. R. EVID. 803 advisory committee's notes to 1972 proposed rules.

[4] FED. R. EVID. 803(1).

[5] FED. R. EVID. 803(2).

[6] FED. R. EVID. 803(1) advisory committee's notes to 1972 proposed rules.

"circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[7] In short, these hearsay exceptions are based on assumptions that PSI and EU hearsay statements are more likely to be truthful because they are made under circumstances that make lying difficult.

Not everyone thinks these assumptions are well-founded. In 2014, in *United States v. Boyce*, Judge Richard Posner wrote a concurring opinion in which he charged that the PSI and EU hearsay exceptions "don't even have support in folk psychology."[8] With specific regard to the EU hearsay exception, he stated that it "rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas."[9] In 2016, he followed up on his concurring opinion in *Boyce* with an article which characterizes Rules 803(1) and (2) as "fossil[s]."[10]

The subject of this article is the EU hearsay exception. However, as noted by the Advisory Committee, there is "considerable . . . overlap" between the scope of PSI and EU hearsay.[11] Indeed, the PSI and EU hearsay exceptions are often invoked together to admit the same piece of hearsay evidence.[12] This is because PSI hearsay evidence about a "startling event or condition" made "under the stress of excitement" meets the definition of EU and can be admissible under the EU hearsay exception as well. It is therefore important at the outset to clarify how this article will approach the dividing line between PSI and EU.

An earlier study (the "PSI study") reviewing the literature on deception and perception has shown that PSI hearsay evidence may be reliable.[13] In order to avoid the complication of the impact of emotion on perception, that study specifically focused on PSI

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[7] FED. R. EVID. 803(2) advisory committee's notes to 1972 proposed rules.

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

[9] *Id.* at 802.

[10] Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1471 (2016).

[11] FED. R. EVID. 803(1)-(2) advisory committee's notes to 1972 proposed rules.

[12] *See, e.g.*, *Boyce*, 742 F.3d at 796 ("The district court admitted [the subject hearsay] on the basis that it was a present sense impression under Federal Rule of Evidence 803(1) and an excited utterance under Federal Rule of Evidence 803(2).").

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

that is based on dispassionate observation of the subject event or condition ("pure PSI") and avoided that which also qualifies as EU ("mixed PSI"). This companion study builds upon the PSI study to examine the reliability of EU hearsay evidence, including the mixed PSI.[14] Unless otherwise specified, all subsequent references to EU include mixed PSI within their scope.

I. ASCERTAINING THE RELIABILITY OF HEARSAY STATEMENTS

In order to assess the reliability of a type of hearsay statement, it is necessary to establish what reliability itself entails. This is fundamentally difficult; as the Supreme Court noted, "[r]eliability is an amorphous, if not entirely subjective, concept."[15] Nonetheless, as explained in the PSI study,[16] the courts have discussed hearsay reliability in the context of "the possibility of fabrication, coaching, or confabulation"[17] and in terms of the "accuracy of observation."[18] Hearsay reliability can be assessed along these two metrics.

This article therefore reviews research on the susceptibility of EU hearsay evidence to fabrication, coaching, or confabulation, as well as the probable accuracy of underlying observations. A search of the literature yields no research that directly and empirically tests the assumptions underlying the EU hearsay exception.[19] This review is therefore based on research directed at questions outside of the hearsay realm which nonetheless speak to the exception.

II. REAL-LIFE EXAMPLES OF EXCITED UTTERANCE HEARSAY EVIDENCE

While a complete analysis of the origins of EU hearsay evidence is beyond the scope of this article, it is nonetheless

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[14] To better appreciate this article, the reader may find it helpful to read the PSI study. *See* Lau, *supra* note 13.

[15] Crawford v. Washington, 541 U.S. 36, 63 (2004).

[16] Lau, *supra* note 13.

[17] Idaho v. Wright, 497 U.S. 805, 820 (1990).

[18] FED. R. EVID. 803(2) advisory committee's notes to 1972 proposed rules.

[19] *See, e.g.*, John E.B. Myers, Ingrid Cordon, Simona Ghetti & Gail S. Goodman, *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 L. & CONTEMP. PROBS. 3, 5 (2002) ("[T]o our knowledge, psychological research has never directly tested the hypothesis that stress inhibits the ability to lie.").

helpful to consider some real-life examples of EU hearsay evidence that have been admitted in the federal courts.

There were at least five precedential, federal appellate opinions in 2014 affirming the admissibility of EU hearsay evidence. *Boyce*, the case in which Judge Posner wrote his concurring opinion, arose from the following incident:

> [The declarant] called 911 . . . asking that police come to her residence because her child's father, [the defendant], had just hit her and was "going crazy for no reason." The 911 operator asked, "Any weapons involved?" to which [the declarant] responded, "Yes." The operator asked what kind, and [the declarant] said, "A gun." The operator said, "He has a gun?", then "Hello?", and [the declarant] responded, "I, I think so. 'Cause he just, he just." After the operator said, "Come on," [the declarant] responded, "Yes!" twice. The operator again inquired, "Did you see one?" and [the declarant] replied, "Yes!" The operator then cautioned [the declarant] that if she wasn't telling the truth, she could be taken to jail. [The declarant] responded, "I'm positive." After giving a description of what [the defendant] was wearing, the operator asked where he was at the moment. [The declarant] responded that she "just ran upstairs to [her] neighbor's house" and didn't know whether [the defendant] had left her house yet.[20]

The defendant was charged with being a felon in possession of a firearm and being a felon in possession of ammunition, and the recording of the 911 call was relied upon by the prosecution to show that the defendant had a gun.[21] The Seventh Circuit affirmed the admission of the call under the EU hearsay exception:

> Here, the startling event of a domestic battery occurred. [The declarant] called 911 and reported that [the defendant] had just hit her and was "going crazy for no reason" and that he had a gun. Next, [the declarant] made her 911 call while under the stress of the excitement caused by the domestic battery. She made the call right

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[20] United States v. Boyce, 742 F.3d 792, 793 (7th Cir. 2014).

[21] *Id.* at 794.

> after the battery, telling the operator that she had "just" run upstairs to her neighbor's house. [The testimony of the officer responding to the 911 call] that [the declarant] appeared emotional, as though she had just been in an argument or fight, further supports the district court's conclusion that [the declarant] made the call while under the stress or excitement of the startling event.
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> . . . .
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> Under the facts of this case, we find no abuse of discretion in the district court's decision to admit [the declarant's] statements during the 911 call as excited utterances under Rule 803(2).[22]

Malin v. Hospira, Inc., another Seventh Circuit case, involved the following hearsay evidence, which was used to establish retaliation claims under Title VII of the Civil Rights Act of 1964 and the Family and Medical Leave Act:

> [The plaintiff] told her direct supervisor, [the declarant], that she was going to complain to Human Resources about sexual harassment by her indirect supervisor []. While [the plaintiff] was still in his office, [the direct supervisor] called his and [the indirect supervisor]'s boss . . . and told him about [the plaintiff]'s plan. [The plaintiff] heard [the boss] shouting through the phone. When [the direct supervisor] hung up the phone, he told [the plaintiff] that [the boss] had told him to do everything in his power to stop [the plaintiff] from going to Human Resources. [The plaintiff] told [the direct supervisor] that she was going ahead, and she made a formal sexual harassment complaint to Human Resources based on [the indirect supervisor]'s behavior.[23]

The Court concluded that the direct supervisor's statement about what his boss said over the phone was admissible under both the PSI and EU hearsay exceptions:

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[22] *Id.* at 798-99.

[23] Malin v. Hospira, Inc., 762 F.3d 552, 554 (7th Cir. 2014).

> [The plaintiff] . . . needs a hearsay exception to admit [the direct supervisor]'s statement into evidence. She has two. [The direct supervisor] described [the boss]'s screamed admonition to [the plaintiff] immediately after it occurred, so we agree with the district court that the comment qualifies as a present sense impression under Federal Rule of Evidence 803(1). Further, according to [the plaintiff], [the direct supervisor] was visibly startled by [the boss]'s comment and told her about it immediately, "while under the stress of excitement that it caused." The comment is thus also admissible as an excited utterance under Rule 803(2).[24]

The subject hearsay evidence of *United States v. Zuniga*, again, a Seventh Circuit case, arose from the following incident:

> [The defendant] was at a bar playing pool with friends when . . . an ex-girlfriend . . . entered the bar and slapped him across his face. [The defendant] immediately took [the ex-girlfriend] out the back door of the bar to an area enclosed by a fence. [The declarant], curious to see what was going on, walked to the rear of the bar, opened the back door, looked into the back fenced-in area, and saw [the defendant] holding a gun to [the ex-girlfriend]'s face. Less than a minute later, [the declarant] closed the door, walked back to his friend . . . and whispered to her that [the defendant] had a gun and told her to call the police.[25]

The defendant was convicted of being a felon in possession of a firearm.[26] The Seventh Circuit affirmed the admission of the statement of the declarant to his friend as excepted EU hearsay evidence. It reasoned, in part, that "in almost every imaginable scenario, seeing a person pointing a gun at the head of another is a startling situation."[27]

Woods v. Sinclair, an appeal in the Ninth Circuit over the denial of a habeas corpus petition, arose from an extremely grim and violent incident.[28] The petitioner was invited by three women,

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[24] *Id.* at 555 (citation omitted).

[25] United States v. Zuniga, 767 F.3d 712, 714–15 (7th Cir. 2014).

[26] *Id.* at 714.

[27] *Id.* at 716.

[28] Woods v. Sinclair, 764 F.3d 1109, 1124 (9th Cir. 2014).

one of whom he had previously dated, to join them while they were drinking and socializing. After spending some hours with the women, the petitioner physically attacked them all and even raped one, the declarant. Two of the women, including the declarant, did not survive. However, before she died, the declarant was able to talk to the first responders, and these hearsay statements of hers were admitted into evidence:

> [A deputy of the county sheriff's department], who responded to the scene of the crime, testified at trial that he asked [the declarant] whether she knew who attacked her and that she responded it was "a guy named [the petitioner's name]." . . . [A] paramedic who accompanied [the declarant] to the hospital, testified at trial that: (1) when she asked [the declarant] what had happened to her, [the declarant] told her that she had been hit with a baseball bat; (2) when she asked [the declarant] who hit her, [the declarant] responded that it was a man named [the petitioner's name]; and (3) when asked whether she was sexually assaulted, [the declarant] said yes.[29]

The petitioner challenged the admission of the evidence on Confrontation Clause grounds. The Ninth Circuit concluded that the Washington Supreme Court was not objectively unreasonable in concluding that the statements of the declarant to the deputy and to the paramedic qualified as EU hearsay evidence,[30] and therefore fell within a "firmly rooted" excepted hearsay whose admission does not offend the Clause.[31]

United States v. Graves, the fifth and final case identified in the review, involved the following hearsay statement:

> [The defendant] and his fiancée, [the declarant], were involved in an all-day argument. At some point . . . [the defendant] left their shared residence. He returned . . ., kicked in the front door, and confronted [the declarant] in the back bedroom of the home. During this confrontation, [the defendant] held a loaded shotgun. After 10 to 15

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[29] *Id.*

[30] The EU hearsay exception as embodied in Washington State Rule of Evidence 803(a)(2) is not meaningfully different from the federal counterpart.

[31] *Woods*, 764 F.3d at 1124.

> minutes of arguing, [the defendant] left the residence. As he departed, he fired the shotgun five times.
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> A neighbor called 911 to report the gun shots. . . . It took Officer [] approximately 20 minutes to travel to the residence after being dispatched. When he arrived, he knocked on the front door, and [the declarant] answered. Officer [] observed that [the declarant] was shaking and appeared to have been crying. Officer [] told [the declarant] that there had been a report of shots being fired and asked, "What's going on here?" [The declarant] responded by recalling the details of the fight she had with [the defendant], including the fact that [the defendant] had pointed the shotgun at [her] and threatened to shoot her in the head.[32]

The defendant was convicted of assault with a dangerous weapon and domestic assault by a habitual offender, and the Eighth Circuit affirmed the district court's use of the EU hearsay exception to admit the evidence.[33]

The cases cited above are merely used in this article as examples of EU hearsay evidence; they do not represent a comprehensive or thorough survey. Still, it is noteworthy, for future investigations of EU and PSI hearsay, to compare and contrast these examples of EU and mixed PSI hearsay evidence against the four examples of pure PSI hearsay evidence cited within the PSI study.[34]

As observed in the PSI study, pure PSI hearsay evidence often appears to arise from interactions with and amongst law enforcement agents. Similarly, three of the five examples of EU and mixed PSI hearsay evidence cited above, *Boyce*, *Woods*, and *Graves*, grew out of interactions with police or first responders. While the subject EU of *Zuniga* was not a statement made directly to law enforcement, it was made to the witness in order for the

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[32] United States v. Graves, 756 F.3d 602, 603-604 (8th Cir. 2014).

[33] *Id.* at 603.

[34] The PSI study identified four cases in a search of precedential, federal appellate opinions, between 2011 and 2015, where PSI is either ruled admissible or mentioned as admissible under the PSI hearsay exception. Lau, *supra* note 13. They include: United States v. Boyce, 742 F.3d 792 (7th Cir. 2014); United States v. Orm Hieng, 679 F.3d 1131 (9th Cir. 2012); United States v. Polidore, 690 F.3d 705 (5th Cir. 2012); United States v. Solorio, 669 F.3d 943 (9th Cir. 2012); and United States v. Ibisevic, 675 F.3d 342 (4th Cir. 2012).

witness to obtain police help. Only one example, *Malin*, involved hearsay generated from an interaction between civilians in a civil action.

What distinguishes the examples of pure PSI hearsay evidence from these present examples is how personal the subject events and conditions were to the respective declarants. Two of the four cases referred to in the PSI study actually involved communications between agents in the course of law enforcement operations, as opposed to statements made by civilians to law enforcement. *United States v. Solorio* concerned hearsay statements made by agents during an undercover "buy bust" operation for drugs, who were "broadcast[ing] their observations [about the ongoing drug bust] over a radio, one from a [surveillance] van . . . and one from an airplane overhead[,]" to the other participating agents.[35] The subject pure PSI of *United States v. Orm Hieng* consisted of statements about the number of marijuana plants in each row of a field made to a recording detective by officers who were in the process of destroying the plants.[36] These law enforcement officers certainly must be considered participants in the subject event or condition, but they nonetheless had a somewhat detached role.

In contrast, with the exception of *Zuniga*, the events surrounding the above examples of mixed PSI and EU hearsay evidence had a markedly more direct relation to the declarants. *Boyce*, *Woods*, and *Graves* involved statements made by victims in the context of domestic violence. The direct supervisor in *Malin* was conveying what was shouted at him. These events or conditions had a far more intimate and personal connection to the declarants of the hearsay statements than did the drug busts of either *Solorio* or *Orm Hieng* to the officers who made the pure PSI statements.

This difference makes sense in that declarants who have a personal role in the subject event or condition will more likely find the event or condition "startling." As a result, their hearsay statements are more likely to qualify as EU, even if the statements fall within the definition of PSI.

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[35] *Solorio*, 669 F.3d at 947.

[36] *Orm Hieng*, 679 F.3d at 1142.

It is also of interest to note that all four cases referred to in the PSI study involved contraband. Like *Solorio* and *Orm Hieng*, *United States v. Polidore* was also a drug case.[37] *United States v. Ibisevic* was about the failure to declare currency to Customs and Border Protection.[38] In contrast, of the five mixed PSI and EU examples above, four, *Boyce*, *Woods*, and *Graves*, and *Zuniga*, arose from incidents of domestic violence.

In retrospect, it is very easy to explain this division on the ground that contraband cases are less likely to be "startling" than domestic violence cases. Nonetheless, it certainly was not expected by this author, prior to conducting this current study, to find such a neat division in type between pure PSI cases and mixed PSI and EU cases.[39]

III. "STARTLING EVENT OR CONDITION" FROM A SCIENTIFIC POINT OF VIEW

Prior to a discussion about the research findings, it is important to note the divergence in the usages of "startling," "excitement," and "stress" in the context of the EU hearsay exception and in the scientific literature.

The "startle reflex," as science now understands it, is a defensive reaction to an intense and abrupt sensory stimulus such as a sudden, loud noise.[40] The reflex includes an involuntary muscular contraction, such as the blinking of the eyes or the ducking of the head, presumably to facilitate flight or to protect the body from danger.[41] It also occurs at a speed too fast to be simulated, and, unlike surprise, cannot be entirely inhibited by

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[37] *Polidore*, 690 F.3d at 705.

[38] *Ibisevic*, 675 F.3d at 347.

[39] These very real differences between examples of pure PSI and examples of mixed PSI and EU confirm the need to separate the two discussions.

[40] M. Koch, *The Neurobiology of Startle*, 59 PROGRESS IN NEUROBIOLOGY 107, 108 (1999); Javier Rivera et al., *Startle and Surprise on the Flight Deck: Similarities, Differences, and Prevalence*, PROC. HUM. FACTORS & ERGONOMICS SOC'Y 1047 (2014), http://skybrary.aero/bookshelf/books/3748.pdf [https://perma.cc/JSG3-P9L2]; Sergio Agnoli, Laura Franchin & Marco Dondi, *Three Methodologies for Measuring the Acoustic Startle Response in Early Infancy*, 53 DEV. PSYCHOBIOLOGY 323, 323 (2011).

[41] Christian Grillon & Johanna Baas, *A Review of the Modulation of the Startle Reflex by Affective States and its Application in Psychiatry*, 114 CLINICAL NEUROPHYSIOLOGY 1557, 1557 (2003); Rivera et al., *supra* note 40, at 1047.

anticipation.[42] The startle reflex may be accompanied by an emotional response, such as surprise, along with a disruption to cognitive processing and motor responses, but it can also be completed within a fraction of a second without awareness that the reflex ever took place.[43]

The EU hearsay exception defines an EU as, "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." In associating "startling" with "stress of excitement," the exception seems to reflect an understanding, held by some scholars prior to and through the 1980's, that startle is itself an emotional response, such as an extreme form of surprise.[44] The exception does not appear to require that the "startling event or condition" be one that triggers a reflexive response, such as the startle reflex; instead, it seems to contemplate "event or condition" to be one that leads to a strong emotional response, or, in the words of the exception, "stress of excitement."[45]

Courts also have interpreted a "startling event or condition" as an event eliciting emotion rather than the startle reflex. For example, in *Zuniga*, the Seventh Circuit noted that, "in almost every imaginable scenario, seeing a person pointing a gun at the head of another is a startling situation."[46] The sight of a gun pointed at the head of another person may cause intense emotion, but it is unlikely to trigger such reflexive muscular movement as flinching. Furthermore, the Supreme Court, in dicta, suggested that a "startling event or condition . . . has a[n] . . . effect of focusing an individual's attention."[47] The Advisory Committee's notes similarly indicated that a "startling event or condition" is more "likely to evoke comment."[48] That a "startling event or condition" "focus[es] . . . attention" and "evoke[s] comment"

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[42] Paul Ekman, Wallace V. Friesen & Ronald C. Simons, *Is the Startle Reaction an Emotion?*, 49 J. PERSONALITY & SOC. PSYCHOL. 1416, 1424 (1985).

[43] Rivera et al., *supra* note 40, at 1047–48; Jenefer Robinson, *Startle*, 92 J. PHIL. 53, 55 (1995).

[44] *See* Ekman, Friesen & Simons, *supra* note 42, at 1424–25.

[45] The language of the EU hearsay exception also appears to contemplate a response from the "startling event or condition" that is longer in duration than the startle reflex.

[46] United States v. Zuniga, 767 F.3d 712, 716 (7th Cir. 2014).

[47] Michigan v. Bryant, 562 U.S. 344, 361-62 (2011).

[48] FED. R. EVID. 803(2) advisory committee's notes to 1972 proposed rules.

suggests a judicial conception of "startling event or condition" not so much as one that actually causes a startle reflex but as one that brings about a strong emotional response, such as surprise, anxiety, fear, and anger.[49]

This article therefore interprets "startling event or condition" as an event or condition that elicits an emotional response. The EU hearsay exception does not discriminate between different emotions, such as surprise and fear, and the discussion here generalizes across the emotions to draw common conclusions.[50]

IV. SUSCEPTIBILITY OF EU HEARSAY EVIDENCE TO FABRICATION, COACHING, AND CONFABULATION

Fabrication, coaching, and confabulation are all potential sources of falsity but they are not the same thing. Fabrication and coaching involve intentional deception. A declarant making a fabricated or coached statement intends the statement to be false. In contrast, confabulations are false memories; confabulators sincerely believe in the veracity of their memories despite their falsity.[51] The susceptibility of EU hearsay evidence to such intentional and unintentional deception is separately discussed.

A. Fabrication and Coaching

The intentional falsification of an EU or mixed PSI, like that of a pure PSI,[52] can be analyzed in three stages. First, the "startling event or condition" that is the subject of the EU must be amenable to being lied about. Second, the declarant must make the decision to lie. Third, lies inserted into the EU must be of

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[49] Laurent Itti & Pierre Baldi, *Bayesian Surprise Attracts Human Attention*, 49 VISION RES. 1295, 1305 (2009); Gemot Horstmann, *Evidence for Attentional Capture by a Surprising Color Singleton in Visual Search*, 13 PSYCHOL. SCI. 499, 504 (2002); Jenny Yiend & Andrew Mathews, *Anxiety and Attention to Threatening Pictures*, 54A Q.J. EXPERIMENTAL PSYCHOL. 665, 679 (2001); Anne M. Finucane, *The Effect of Fear and Anger on Selective Attention*, 11 EMOTION 970, 973 (2011).

[50] It should be noted that this is a gross simplification. For example, different emotions have different effects on attention. *See, e.g.*, Finucane, *supra* note 49, at 972 (selective attention costs differ between the fear condition and the anger condition).

[51] Jerrod Brown et al., *Confabulation: Connections between Brain Damage, Memory, and Testimony*, 3 J.L. ENFORCEMENT 1, 2-3 (2013).

[52] Lau, *supra* note 13.

sufficient quality for the hearsay to be moved into evidence. This section addresses the feasibility of each of these three steps.

1. Opportunity to Falsify a EU

For a falsified piece of EU hearsay evidence to exist, there must first be an available opportunity. The EU hearsay exception defines an EU as "[a] statement relating to a startling event or condition." An EU cannot be made in a vacuum; there must be some "startling event or condition" that the declarant can use to falsify hearsay evidence.

No research to date appears to have tested the situational factors necessary for a declarant to successfully falsify EU hearsay evidence. However, it is possible to infer a number of necessary conditions.

First, it must be noted that EU is not generally presented in court by the declarant himself or herself. Rather, the EU enters into evidence through the witness to the EU. Accordingly, a lying declarant needs to be sure that there is in fact a witness to the EU and that the witness is not in a position to refute the description about the subject event or condition.

Second, the available physical evidence of the startling event or condition must allow for a plausible lie to be incorporated into the EU. It is true that the witness is not always ready to contradict a lie injected into the EU. For example, the subject EU of *Boyce* was a 911 call; the 911 operator was not there at the scene to challenge the declarant's statement about the defendant's gun. But EU, by its very nature, draws attention. If the lie does not accord with what is subsequently discovered on site, then the EU will not likely make its way to court as hearsay evidence. In *Boyce*, the 911 operator dispatched law enforcement officers to the scene.[53] Had the officers found the defendant with a guitar instead of a gun, there likely would have been no arrest and no case for the EU to be used as evidence.

Third, it is possible that, even if an event or condition permits the generation and construction of plausible lies, there may be no lie that could be useful to the EU declarant. In other words, the range of plausible lies permitted by the event or

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[53] United States v. Boyce, 742 F.3d 792, 793 (7th Cir. 2014).

condition must be capacious enough to accommodate a lie that could benefit the declarant. In *Malin*, for example, if the plaintiff had only heard the boss shouting on the phone to the direct supervisor without obtaining some clue about what the boss had said, she would likely have had no choice but to accept whatever the direct supervisor told her about the call. Yet, it was not clear there was much the direct supervisor could have said that would benefit himself; if anything, it was likely most advisable for him to tell the truth in order to avoid being further embroiled in the brewing dispute.

It is difficult to estimate the frequency of these factors in EU scenarios because the judicial decisions applying the EU hearsay exception generally lack the necessary details for such a study. Accordingly, it may be possible to infer the existence of some situational barriers against the injection of lies about a particular event or condition into EU hearsay evidence, but it may not be feasible to determine the degree of protection the barriers provide against the introduction of falsified hearsay into evidence.

2. Deciding to Falsify a EU

Even if the conditions allow the declarant to inject lies into an EU, the declarant must still make the decision to lie. The literature suggests that humans have a default response when presented with an opportunity to lie. This response hinges on the presence of a motivation to lie.[54] Generally, when there is a motivation to lie, the default response is to lie, and when there is no motivation to lie, the default response is to tell the truth.[55]

The suppression of the default response—to lie when there is no motivation to lie or to be honest when there is a motivation to lie—requires cognitive effort.[56] During this deliberative process,

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

[55] *Id.* at 421; Evelyne Debey, Jan De Houwer & Bruno Verschuere, *Lying Relies on the Truth*, 132 COGNITION 324, 331 (2014); Bruno Verschuere et al., *The Ease of Lying*, 20 CONSCIOUSNESS & COGNITION 908, 909 (2011); Sean A. Spence et al., *Behavioral and Functional Anatomical Correlates of Deception in Humans*, 12 NEUROREPORT 2849, 2852 (2001); Evelyne Debey et al., *From Junior to Senior Pinocchio: A Cross-Sectional Lifespan Investigation of Deception*, 160 ACTA PSYCHOLOGICA 58, 65 (2015).

[56] Debey, De Houwer & Verschuere, *supra* note 55, at 331; Shaul Shalvi, Ori Eldar & Yoella Bereby-Meyer, *Honesty Requires Time (and Lack of Justifications)*, 23

the mind may weigh such factors as moral judgment and the justification for lying.[57] The process requires time and demands attentional focus.[58] It is more impaired under situations of high cognitive load, such as conditions that promote attentional lapses or depletion of self-control,[59] or under fatigue, such as conditions of sleep deprivation or later times of day.[60]

These findings support some of these assumptions in the notes to Rule 803 about the decision to lie in EU scenarios.[61] The logic flow of the EU hearsay exception essentially runs as follows: (1) the default behavior is a tendency to truth; (2) "conscious fabrication" requires "reflection"; (3) the "reflection" required for "conscious fabrication" is difficult or unlikely under the "condition of excitement"; and (4) the resulting EU therefore reflects default, truthful behavior.

The Advisory Committee's intuition of the existence of a default response appears to be supported by the literature. Similarly, research supports the Committee's belief that "capacity of reflection"—or cognitive effort, in modern scientific language—is necessary to overcome this default behavior. Research also

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PSYCHOL. SCI. 1264, 1268 (2012); Ahmed A. Karim et al., *The Truth About Lying: Inhibition of the Anterior Prefrontal Cortex Improves Deceptive Behavior*, 20 CEREBRAL CORTEX 205, 209–10 (2010); Evelyne Debey, Bruno Verschuere & Geert Crombez, *Lying and Executive Control: An Experimental Investigation Using Ego Depletion and Goal Neglect*, 140 ACTA PSYCHOLOGICA 133, 140 (2012); Shawn E. Christ et al., *The Contributions of Prefrontal Cortex and Executive Control to Deception: Evidence from Activation Likelihood Estimate Meta-Analyses*, 19 CEREBRAL CORTEX 1557, 1558 (2009).

[57] Shalvi, Eldar & Bereby-Meyer, *supra* note 56, at 1266; *see, e.g.* Nobuhito Abe et al., *The Neural Basis of Dishonest Decisions that Serve to Harm or Help the Target*, 90 BRAIN & COGNITION 41 (2014).

[58] Jeffrey J. Walczyk et al., *Cognitive Mechanisms Underlying Lying to Questions: Response Time as a Cue to Deception*, 17 APPLIED COGNITIVE PSYCHOL. 755, 771 (2003) [hereinafter Walczyk et al., *Cognitive Mechanisms*]; Shalvi, Eldar & Bereby-Meyer, *supra* note 56, at 1268; Debey, Verschuere & Crombez, *supra* note 56, at 138–40.

[59] Debey, Verschuere & Crombez, *supra* note 56, at 138, 140; Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 191, 199 (2011).

[60] Christopher M. Barnes et al., *Lack of Sleep and Unethical Conduct*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 169, 177-78 (2011); Maryam Kouchaki & Isaac H. Smith, *The Morning Morality Effect: The Influence of Time of Day on Unethical Behavior*, 25(1) PSYCHOL. SCI. 95, 100-101 (2014).

[61] FED. R. EVID. 803 advisory committee's notes to 1972 proposed rules.

supports the idea that exertion of cognitive effort is more difficult under time and mental pressure.

However, the assumption that the default response obtained through an EU would more likely be truthful is less supported. Research suggests that the default response—whether to tell the truth or to lie—may hinge on the existence of a motivation to lie. When the declarant has no motivation to lie, the resulting EU likely reflects a default reaction of truth-telling. Likewise, when the advantage of lying is latent or not immediately obvious, the EU also may stem from a default behavior of truth-telling. But where there is a benefit to lie readily perceptible to the declarant, he or she may be primed to lie. In this case, overcoming the default response to lie, so as to tell the truth, might actually require "deliberat[ion] or conscious [decision]."

Whether a particular piece of EU hearsay evidence may contain lies is therefore context-sensitive and depends on both the circumstances during which the statement was made and the motivations the declarant may have had at the time. To the extent that the hearsay exceptions are formulated based on generalities, a proper evaluation of the exceptions would require balancing those statements made by neutral declarants or made in such circumstances where the benefit of lying is difficult to detect against those statements made in circumstances where lying is obviously advantageous.

No research appears to have directly addressed how frequently motivations to lie exist within the circumstances under which typical EU hearsay statements are made and how obvious such motivations would be to typical declarants. And it is possible that no experiment could ever be performed to arrive at such an answer because of the difficulty in experimentally replicating the mental stress and danger involved in real-life EU situations within the ethical boundaries of research on human subjects.

As seen in *Boyce*, *Graves*, *Zuniga*, and *Woods*, statements in the context of domestic violence form an important category of the EU hearsay evidence presented in court. Understanding whether real-world declarants may decide to inject lies into an EU may therefore require asking questions such as whether a person, fresh from an incident of domestic violence, could so easily and quickly discern the advantages of speaking dishonestly to law

enforcement that he or she would be primed to lie. The fact that victims, as in *Boyce* and *Graves*, do recant or refuse to testify after initially cooperating with law enforcement suggest that EU declarants do need some time and reflection to discover the motive to lie.[62]

But it would be both unethical and resource-intensive to experimentally subject humans to the levels of stress and physical danger needed to realistically simulate these settings. Experiments of lying that involve lower, and thus more ethical, levels of induced stress will still be useful to the discussion, but the analysis of any result from such experiments must take into consideration that the methodologies may not be representative of real-world conditions.

In one experimental method used to study deception, participants are asked to report on the outcome of a die thrown under a cup and are incentivized to lie with the offer of a payment that scales with the reported outcome of the roll.[63] Such an experiment can be modified by tying the reward to a more complicated formula,[64] and may then be used to test the relationship between the difficulty of discerning the motivation to lie and the resulting choice to lie.

However, conclusions drawn from such an experiment cannot easily be extrapolated to situations involving the urgency and the potentially complex and highly personal motives to lie involved in the creation of actual EU hearsay evidence. Even if the experiment proposed above were to yield a chart tying the mathematical complexity of the reward formula to the incidence of lying, it would be difficult to associate real-life motivations, such

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[62] In *United States v. Boyce*, "[the declarant] did not testify at trial." 742 F.3d 792, 794 (7th Cir. 2014). In *United States v. Graves*, "[the declarant] . . . recanted her statements at trial." 756 F.3d 602, 606 (8th Cir. 2014). She attributed her EU to "hormonal issues pertaining to her pregnancy." *Id.*

[63] *See, e.g.*, Shalvi, Eldar & Bereby-Meyer, *supra* note 56, at 1265-66.

[64] In the typical die-under-the-cup experiment, the reward is directly proportional to the reported outcome of the roll. For example, a reported die throw of 2 yields a reward of $2 and a reported throw of 6 yields a reward of $6. However, the reward can be changed to follow a quadratic formula, such as $= -^2 + 6$, where x is the reported outcome. In the example, the yield is maximized at $9 by a reported throw of 3. A reported throw of 6, in contrast, yields $0. The mathematical formula of the yield can be endlessly complicated to increase the difficulty of discerning the reported outcome associated with the optimum reward.

as the fear of a victim of domestic violence about losing the economic support of the family breadwinner,[65] with a particular degree of mathematical complexity sufficient to make the chart useful for predicting the behavior of EU declarants.

3. Injecting Lies into a EU

The construction of a lie is a mental step distinct from the decision to lie and requires additional time and cognitive resources.[66] In lying, one must also perceive the truth of the situation and then mentally suppress the response to tell the truth in order to consciously lie.[67] And for an EU with a lie to be submitted into evidence, the lie must be of some quality because the duty of candor to the tribunal forbids attorneys from offering evidence they know to be false.[68]

The difficulty of formulating a lie increases when there is a greater need to think through a lie; that is, a more complex lie or a more complex situation requires greater cognitive effort.[69] For example, research finds that lying is more cognitively taxing and takes longer when multiple lies are plausible or when the lies are made in response to open-ended questions rather than yes/no

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[65] Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 4-5 (2002).

[66] Jeffrey J. Walczyk et al., *Lying Person-to-Person about Life Events: A Cognitive Framework for Lie Detection*, 58 PERSONNEL PSYCHOL. 141, 145 (2005) [hereinafter Walczyk et al., *Lying Person-to-Person*]; Emma J. Williams et al., *Telling Lies: The Irrepressible Truth?*, 8 PLOS ONE 1, 12 (2013).

[67] Walczyk et al., *Cognitive Mechanisms*, *supra* note 58, at 765; Debey, De Houwer & Verschuere, *supra* note 55, at 331-32; Christ et al., *supra* note 56, at 1558; Debey et al., *supra* note 55, at 65-66.

[68] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.3 (Discussion Draft 1980). At the least, attorneys will avoid submitting such evidence when they believe the fact finder may catch the lies within. It should be noted that another scholar has proposed that a lie in hearsay evidence ought to be capable of "withstand[ing] effective subsequent rebuttal by the other facts in the case." Edward J. Imwinkelried, *The Case for the Present Sense Impression Hearsay Exception: The Relevance of the Original Version of Federal Rule of Evidence 803 to Judge Posner's Criticism of the Exception*, 54 U. LOUISVILLE L. REV. 455, 477 (2016). This is more stringent than the requirement for quality proposed in this article and would be more difficult for a lying declarant to meet.

[69] Jeffrey J. Walczyk et al., *A Social-cognitive Framework for Understanding Serious Lies: Activation-decision-construction-action Theory*, 34 NEW IDEAS IN PSYCHOL. 22, 33 (2014).

questions.[70] When a lie must fit within a narrative to advance an agenda, the liar needs to expend cognitive effort to keep the story straight.[71] Maintaining a plausible and consistent narrative should be more difficult under situations that increase cognitive load, such as when a narrative must be told in reverse chronological order.[72] To that end, lying by omitting information should be cognitively easier because, unlike more active forms of lying, it does not require assessing the truth, inhibiting an urge to tell the truth, and then creating a lie that counters the truth.[73] Research suggests that lying by omission may be the most prevalent form of deception.[74]

Lying in response to an expected opportunity may also be easier because retrieval of rehearsed lies from memory takes less cognitive effort than the generation of spontaneous lies.[75] But even when a lie has been prepared in advance, lying may still be more difficult than telling the truth because truthful knowledge may be encoded in a larger portion of the brain.[76]

Furthermore, a successful liar must appear honest and credible, which motivates them to regulate their own behavior as well as to monitor the behavior of surrounding people.[77] This

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[70] Williams et al., *supra* note 66, at 12-13; Walczyk et al., *Lying Person-to-Person*, *supra* note 66, at 160.

[71] G. Ganis et al., *Neural Correlates of Different Types of Deception: An fMRI Investigation*, 13 CEREBRAL CORTEX 830, 831, 835 (2003).

[72] *See* Aldert Vrij et al., *Increasing Cognitive Load to Facilitate Lie Detection: The Benefit of Recalling an Event in Reverse Order*, 32 LAW HUM. BEHAV. 253, 254-62 (2008) [hereinafter Vrij et al., *Increasing Cognitive Load*] (increasing cognitive load by requesting a narrative in reverse order increased cues and thus detection of deception by police officers).

[73] Timothy R. Levine et al., *Self-Construal, Self and Other Benefit, and the Generation of Deceptive Messages*, 31 J. INTERCULTURAL COMM. RES. 29, 32-34 (2002).

[74] *Id.* at 32-34, 43.

[75] Lara Warmelink et al., *The Effect of Question Expectedness and Experience on Lying about Intentions*, 141 ACTA PSYCHOLOGICA 178, 182 (2012); Aldert Vrij et al., *Non-Visual Saccadic Eye Movement Rate as a Cue to Deceit*, 4 J. APPLIED RES. MEMORY & COGNITION 15, 18 (2015) [hereinafter Vrij et al., *Saccadic Eye Movement Rate*]; Ganis et al., *supra* note 71, at 832, 835.

[76] Ganis et al., *supra* note 71, at 834-35. *But see* Vrij et al., *Saccadic Eye Movement Rate*, *supra* note 75, at 13-14, 18 (saccadic eye movements, correlated with the search of long term memory, found to be higher in the telling of planned lies than in truth-telling, although the difference was not considered significant).

[77] Vrij et al., *Increasing Cognitive Load*, *supra* note 72, at 259; Kamila E. Sip et al., *When Pinocchio's Nose Does Not Grow: Belief Regarding Lie-detectability Modulates*

behavioral monitoring may constitute an additional cognitive burden.[78]

Thus, the Advisory Committee's rationale that "conscious fabrication" requires "reflection" finds some support in research which demonstrates that the construction and convincing delivery of lies require cognitive resources and effort. And the research findings further suggest that the construction of lies may be more difficult under the conditions in which the typical EU is made.[79]

At the outset, the existence of EU hearsay is itself a guarantee that the declarant did not resort to the easiest lie: silence. Unless a declarant is prompted or required to describe an event or situation, he or she does not actually have to provide an EU. And mixed PSI and EU hearsay evidence seems to with some frequency arise from circumstances where the declarant need not have said anything. Of the five examples cited within this article, only two involve situations where some statement was arguably compelled by the circumstances. In *Woods*, the declarant was responding to questions from a paramedic, called by a third party, about how the declarant was injured.[80] In *Graves*, the declarant was explaining the cause of gun shots to an officer who was called by a third party in response to the shots.[81] However, the three other cases concern statements volunteered by the declarant, where not speaking was an available option.

The research literature does not speak to how frequently liars who intend to lie about an event or situation do so by silence. But given the prevalence of omission among the various means of deception,[82] there may actually be no EU at all in a significant portion of the instances when would-be declarants encounter an appropriate event or condition for lying.

Production of Deception, 7 FRONTIERS IN HUM. NEUROSCIENCE 1, 9 (2013); Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74, 103 (2003).

[78] Vrij et al., *Increasing Cognitive Load*, *supra* note 72, at 259; Sip et al., *supra* note 77, at 9.

[79] A literature review by scholars in 2002, which does not have the benefit of subsequent research cited within this article, has come to substantially similar conclusions. Myers et al., *supra* note 19, at 6-8.

[80] Woods v. Sinclair, 764 F.3d 1109, 1117-24 (9th Cir. 2014).

[81] United States v. Graves, 756 F.3d 602, 603-04 (8th Cir. 2014).

[82] Levine et al., *supra* note 73, at 40.

And even if the declarant chooses to or is compelled to generate some spoken lie, such lies are easier when they involve responses to closed-ended yes/no questions or when the possible lies are limited. But it is unlikely that the circumstances surrounding the making of EU hearsay evidence will often constrict the universe of potential lies in such a way. For example, of the five cases cited above, only *Boyce* arguably involved close-ended lies. All of the others involved narrative, open-ended statements.

Thus, to falsify EU hearsay evidence that would be introduced into court, a declarant must construct a lie of some sophistication. He or she must process the facts as he or she observes them and adjust the lie accordingly, all the while keeping the falsification coherent within the desired narrative. And to the extent that liars perform poorly in situations where their prepared lies are narrated in reverse,[83] it is probable that liars who are forced to adjust to events as they unfold would perform poorly as well, in that both situations demand extra cognitive resources to keep the narrative straight. The need for the declarant to convince the witness would further increase the cognitive burden.

It is helpful to consider these impediments to lying in view of the facts of *Graves*. An officer was called by a third party to investigate gun shots fired by the declarant's fiancé. The declarant, if she had decided to shield her fiancé, would have had to come up with a story that accounted for the gun shots but which exonerated him. And this story would have had to fit with the facts; she could not have invented a tale about an armed robber if there were no sign of any robbery. And for her lie to succeed, she would still have needed to persuade the officer. This likely would not have been a trivial exercise in the wake of the trauma of an attack.

Lies may be made easier with preparation and rehearsal. But EU hearsay evidence seems unlikely to involve expected situations, given that the element of a startling event or condition is built into the definition of an EU. EU hearsay evidence therefore may be less likely to involve rehearsed lies.

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[83] Vrij et al., *Increasing Cognitive Load*, *supra* note 72, at 259-60, 262.

In sum, it should generally be more difficult to lie under the circumstances in which EU hearsay evidence is generated. And this heightened difficulty in lying may mean a reduction in the incidence of lying. Humans are generally cognitive misers; that is, they tend toward the simplest cognitive mechanisms.[84] It is quite plausible that, under cognitively demanding conditions, potential declarants will take the path of least resistance and either not lie or stay silent.

4. Critique of the EU Hearsay Exception

The research findings summarized above do not yield unequivocal conclusions about the resistance of EU hearsay evidence to the negative effects of fabrication and coaching. It would not be correct to assume that EU hearsay evidence is immune to being tainted by lies. Still, there is good reason to think that it is difficult to lie in EU scenarios and that the reliability of EU hearsay evidence may benefit from the barriers to lying.

Judge Posner's discussion of lying is primarily targeted against the PSI hearsay exception, which has been addressed in the PSI study. He seems to have conceded that EU hearsay statements may be resistant to lying; his criticism of the EU hearsay exception primarily is based on the accuracy of observation.[85] That criticism will be addressed in the subsequent discussion about the accuracy of observation underlying EU hearsay evidence.

However, some scholars do champion an attack against the EU hearsay exception on the ground that EU can be falsified. The recent article written by Williams will be here taken as representative.[86]

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[84] *See, e.g.*, Maggie E. Toplak, Richard F. West & Keith E. Stanovich, *Assessing Miserly Information Processing: An Expansion of the Cognitive Reflection Test*, 20 THINKING & REASONING 147, 148 (2014).

[85] United States v. Boyce, 742 F.3d 792, 801-02 (7th Cir. 2014) (Posner, J., concurring).

[86] Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 KAN. L. REV. 717 (2015). *See also* Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 Seattle Univ. L. Rev. 111 (2017) (providing a similar, albeit more scientifically grounded, argument against the EU hearsay exception).

There are two ways in which Williams argues that EU may be prone to lies. First, he states that:

> Many parents know the experience of dashing into the kitchen after hearing the crash of broken plates only to ask the question "What happened?" and hear one's four-year-old exclaim in response, "It wasn't me; it was my brother!" Some may argue that it is simply a natural human reaction to blame another for an exciting event rather than accept fault for the event oneself; such a fabricated assignment of blame often may take the form of an excited utterance.[87]

This argument is faulty because it ignores two realities of EU hearsay evidence.[88] EU hearsay evidence appears to rarely involve situations where the declarant is under suspicion for wrongdoing and is in need of deflecting blame. This is evident from the five examples cited in this article, none of which involves the defendant invoking the hearsay exception to admit exculpatory evidence. Indeed, the experience with domestic violence teaches quite the opposite. The reason why the EU hearsay exception is needed in domestic violence cases is that victims of domestic violence sometimes want to undo the blame they assigned in their EU.

Furthermore, Williams ignores the fact that it is the witness, not the declarant, who brings what the declarant says to court. Many parents may have heard their children's attempt to blame their siblings for broken objects. However, many parents also do not believe these statements, particularly when there is nothing to make the statements plausible to them, such as the proximity of the siblings to the dishes. And without this belief, these parents generally do not bring the statements of their children to court. That lies can be found in the form of EU does not mean that EU hearsay evidence is unreliable.

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[87] *Id.* at 738.

[88] It is important to recognize that the EU hearsay exception depends on the reliability of the type of EU that is used as EU hearsay evidence, which is only a small, limited subset of all EU. The reliability of EU that is not used as evidence in court or that is not introduced into evidence under the EU hearsay exception is not germane to the discussion as to whether the hearsay exception should be maintained or abolished.

Second, Williams articulates the worry that, because the EU hearsay exception does not have a corroboration requirement, evidence that take the form of EU can be admitted even when the startling event or condition does not actually exist. In his words, "the excited utterance exception—especially considering its lack of a requirement of corroboration of the exciting event—could be manipulated via fabrication by some, or many, would-be declarants."[89]

The argument presented by Williams is somewhat curious. Where there actually was no "startling event or condition," the hearsay statement is by definition not an EU even though it may be presented in the form of an EU. It is for the courts to resolve the gatekeeping "preliminary questions of fact" to determine whether a proffered piece of evidence actually qualifies as EU hearsay evidence.[90]

His concern then is not with the susceptibility of actual EU to falsification, but, rather, the likelihood that judges will be fooled. But this objection holds true across all forms of evidence; every single type of evidence can be faked and, with enough effort and help, falsity can be made indistinguishable from the truth. The rules of evidence cannot be made based on whether evidence can be entirely faked. At some point, judges must be entrusted to decide admissibility based on their best judgment, even though, at times, they may be fooled.

Even then, there is no reason to think that EU hearsay evidence is particularly vulnerable to forgery, compared to paper documents, such as, "[m]arket quotations, lists, directories, or other compilations."[91] To entirely fabricate a startling event or condition, it is necessary that the startling event or condition be plausible. The same principle applies for paper documents such as market quotations. What may actually make EU hearsay evidence less vulnerable to forgery is the fact that it has an additional plausibility check. An EU must be plausible to the witness to become EU hearsay evidence, that is, something the witness will testify about in court. A piece of paper, being a non-living object, is not able to perform a plausibility check on its own contents.

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[89] *Id.* at 740.

[90] FED. R. EVID. 803(2) advisory committee's notes to 1972 proposed rules.

[91] FED. R. EVID. 803(17).

The weakness of Williams' critique is highlighted by the fact that he singles out felon-in-possession cases as being particularly vulnerable to intentionally fabricated EU:

> Felon-in-possession cases are especially vulnerable to fabricated excited utterances: all the declarant need do is telephone the police and exclaim that the defendant brandished a gun. Regardless whether the defendant ever did brandish a firearm and with no corroboration of the event other than the excited utterance, as long as the defendant is later found in possession of a firearm the arrest and conviction of the defendant is likely assured.[92]

It is true that a declarant can fake an EU about a nonexistent "brandish[ing] [of] a gun" to have a felon arrested for possession of the gun. However, there is no need for either excitement or utterance, much less the two combined, to get someone arrested for possession.

Furthermore, even in the hypothetical fact pattern presented by Williams, the felon whose arrest was triggered by a falsified EU "is . . . found in possession of a firearm." It is very difficult to see any injustice in the conviction of a felon who is caught with a weapon where the law prohibits him from having that very weapon. What Williams may actually quibble with is the fairness of felon-in-possession laws—which this article takes no position on—but the proper solution to that problem is the abolition of felon-in-possession laws, not the EU hearsay exception.

B. Confabulation

A detailed scientific review about confabulation has been presented in the PSI study, which will not be repeated here.[93] But in short, confabulations are false memories which often result from brain damage or mental disease; while healthy persons also may confabulate, they generally do so during memory tests or under lengthy and pressured questioning.

Overall, confabulations do not appear to present much of a threat to the reliability of EU hearsay evidence. First, it is not

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92 Williams, *supra* note 86, at 740 n.101 (citation omitted).

93 Lau, *supra* note 13.

likely that attorneys will frequently introduce statements made by declarants known to suffer from brain damage as EU hearsay evidence. It also seems unlikely, absent strong corroborating evidence, that jurors would credit such evidence.

And while EU hearsay evidence consists, with some frequency, of statements made by declarants to law enforcement, as in *Boyce*, *Woods*, and *Graves*,[94] such statements do not often appear to be made under the type of pressured questioning typically involved in the formation of confabulations. Furthermore, in order for a piece of hearsay evidence to be corrupted by such confabulations, it would be necessary for law enforcement to develop and force a narrative about the subject event or condition onto the declarant and for the declarant to accept the narrative and generate false memories to support the narrative. The entire process requires a time duration that is unlikely to fit within the window permitted by the EU hearsay exception.

Courts are also aware of the potential role of interrogative questioning in corrupting EU hearsay evidence. As the Eight Circuit stated in *Graves*, "detailed, interrogation-style questioning . . . might negate the use of the excited utterance exception."[95] It was in part because "[the declarant] offered her statements to [the officer] in response to his general inquiry into what had happened" that the court upheld the admissibility of the evidence.[96] The vigilance of the courts against the admission of EU generated in interrogations will help combat the possibility that EU hearsay evidence could be contaminated by confabulations.

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[94] United States v. Boyce 742 F.3d 792, 793, 796 (7th Cir. 2014); Woods v. Sinclair, 764 F.3d 1109, 1124 (9th Cir. 2014); United States v. Graves, 756 F.3d 602, 604-66 (8th Cir. 2014).

[95] *Graves*, 756 F.3d at 606; *See also* United States v. Pursley, 577 F.3d 1204, 1222 (10th Cir. 2009) (admitting statements under the EU hearsay exception with the consideration that subject statements were "were spontaneous—not conscious, reflective responses to suggestive questioning") (citation omitted).

[96] *Graves*, 756 F.3d at 606.

V. ACCURACY OF OBSERVATION UNDERLYING EU HEARSAY EVIDENCE

The fact that a declarant honestly makes an EU is no guarantee that the resulting hearsay is reliable. An honest declarant still must accurately observe the event or condition to generate reliable evidence. This section addresses the problem of accurate observations in EU hearsay evidence and some of the pertinent criticisms of the EU hearsay exception.

A. The Effect of Emotion on Perception

Before considering the effect of emotion on perception, it is important to outline the baseline of perception in the absence of emotion. As discussed in detail in the PSI study, research suggests that attention generally facilitates accurate perception.[97]

Accordingly, it is not surprising that the rules of evidence would value PSI hearsay. A PSI, that is, "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it"—generally should be supported by the force of attention. Pure PSI may therefore benefit from the enhanced perception due to the attention paid to the subject event or condition.

The reliability of the accuracy of observation underlying EU and mixed PSI is a bit more problematic. Emotion is itself a broad term that encapsulates many emotional states, and there currently is no complete understanding of how emotion affects mental processes. Broadly speaking, emotion may impair some cognitive processes while facilitating others.[98] It may therefore degrade some types of perception and cognitive processing that would be important for accurate observation. For example, anxiety has been found to reduce the ability to accurately recognize faces and to discriminate between sounds.[99] Emotion may also enhance

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[97] Lau, *supra* note 13.

[98] Hadas Okon-Singer et al., *The Neurobiology of Emotion-cognition Interactions: Fundamental Questions and Strategies for Future Research*, 9 FRONTIERS IN HUM. NEUROSCIENCE 1, 3 (2015); MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 194 (2016); Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 88, 121-22 (2011).

[99] Angela S. Attwood et al., *Acute Anxiety Impairs Accuracy in Identifying Photographed Faces*, 24 PSYCHOL. SCI. 1591, 1593 (2013); S. L. Mattys et al., *Effects of*

schematic processing of observations and result in schema-driven interpretations.[100] Furthermore, the intensity of arousal is another factor; high levels of stress have been shown to negatively impact eyewitness identification and recall of crime-related details.[101] For the purposes of this article, it can be taken that emotion generally negatively impacts the accuracy of observation; indeed, the Advisory Committee itself has accepted criticism of the EU hearsay exception "on the ground that excitement impairs accuracy of observation."[102]

However, the exception requires that an EU be a "statement relating to a startling event or condition."[103] It is therefore worthwhile to consider the effect of emotion not on the general accuracy of observation but on the accuracy of observation relating to the subject event or condition.

Generally, emotion narrows attention to central details of emotional events.[104] One such mechanism of such narrowing is the weapon focus effect, where the presence of an emotionally arousing stimulus, such as a gun, narrows the range of attentional focus to that stimulus.[105] The attentional effects of the stimulus exist not only when the stimulus arouses emotions of negative valence, such as fear, but also emotions of positive valence.[106] This

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Acute Anxiety Induction on Speech Perception: Are Anxious Listeners Distracted Listeners?, 24 PSYCHOL. SCI. 1606, 1608 (2013).

[100] Deborah Davis & Elizabeth F. Loftus, *Expectancies, Emotion, and Memory Reports for Visual Events*, *in* THE VISUAL WORLD IN MEMORY 178, 192-94 (ed. James R. Brockmole, 2009). The authors suggest possibilities of such schema-driven interpretive errors later within the same text. *Id.* at 196 ("[F]ear might distort memory for the facial expression of a centrally attended robber toward greater anger or hostility, or for the general appearance of a Black perpetrator toward stereo-typically "Black" features.").

[101] Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 6 LAW & HUM. BEHAV. 687, 699 (2004).

[102] FED. R. EVID. 803(2) advisory committee's notes.

[103] FED. R. EVID. 803(2).

[104] Linda J. Levine & Robin S. Edelstein, *Emotion and Memory Narrowing: A Review and Goal-Relevance Approach*, 23 COGNITION & EMOTION 833, 837 (2009).

[105] Robin L. Kaplan, Ilse Van Damme & Linda J. Levine, *Motivation Matters: Differing Effects of Pre-goal and Post-goal Emotions on Attention and Memory*, 3 FRONTIERS IN PSYCHOL. 1, 1 (2012); Finucane, *supra* note 49, at 973; Deffenbacher et al., *supra* note 101, at 691.

[106] Florin Dolcos & Ekaterina Denkova, *Current Emotion Research in Cognitive Neuroscience: Linking Enhancing and Impairing Effects of Emotion on Cognition*, 6 EMOTION REV. 362, 363-64 (2014).

enhanced attention may result in more accurate observation of the stimulus, even if it detracts from observation of the peripheral or background details of the scene, such as the face and clothing of the bearer of the gun.[107]

The narrowing effect of emotion applies not only to the perception of an active event but also to the memories about the event.[108] Emotionally arousing stimuli or events are more likely to be encoded into memory, and memories of emotional events may be more vivid and enduring than memories about more neutral stimuli or events.[109] At the same time, memories about peripheral details may be weaker, and may result, for example, in a decreased ability to remember the appearance of a person encountered under stress and to subsequently identify this person.[110] These memories about peripheral details may be at greater risk of unintentional manipulation and suggestion.[111]

In short, a statement about an emotionally arousing stimulus may benefit from extra attention paid to and enhanced memory of the stimulus.[112] As mentioned above, for a statement to qualify as

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[107] *Id.* at 363; Kaplan, Van Damme & Levine, *supra* note 105, at 1; Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 420-22 (1992); Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of the 'Weapon Focus' Literature*, 19 PSYCHOL., CRIME & L. 35, 56-58 (2013).

[108] Kaplan, Van Damme & Levine, *supra* note 105, at 1; Levine & Edelstein, *supra* note 104, at 835-36.

[109] Dolcos & Denkova, *supra* note 106, at 363-64; Robin L. Kaplan et al., *Emotion and False Memory*, 8 EMOTION REV. 8, 9-10 (2016); Elizabeth A. Kensinger & Suzanne Corkin, *Memory Enhancement for Emotional Words: Are Emotional Words More Vividly Remembered than Neutral Words?*, 31 MEMORY & COGNITION 1169, 1177 (2003); Adam K. Anderson et al., *Emotional Memories Are Not All Created Equal: Evidence for Selective Memory Enhancement*, 13 LEARNING & MEMORY 711, 714-15 (2006).

[110] Tim Valentine & Jan Mesout, *Eyewitness Identification Under Stress in the London Dungeon*, 23 APPLIED COGNITIVE PSYCHOL. 151, 159 (2008).

[111] Kaplan et al., *supra* note 105, at 11-12; *see also* Michael E. Lamb, Kathleen J. Sternberg & Phillip W. Esplin, *Conducting Investigative Interviews of Alleged Sexual Abuse Victims*, 22 CHILD ABUSE & NEGLECT 813, 820 (1998) (discussing the susceptibility of the accounts of very young children to suggestion).

[112] This is the general case, but there are other possible factors at play. *See, e.g.*, Levine & Edelstein, *supra* note 104, at 863-65 (explaining the importance of relevance to goals in the narrowing of memory); Davis & Loftus, *supra* note 100, at 191, 196 (hypothesizing that attention may be diverted by the multiple pulls of attention in real-life situations and that the schematic processing of central details enhanced by emotion may result in memories of central details that suffer from schema-consistent errors).

an EU, there must be a nexus between its content and the emotionally arousing event or condition. This requirement may help counteract, even if it does not entirely eliminate, some of the negative effects of emotion on the accuracy of observation.

At any rate, the reliability of any hearsay evidence is ultimately measured against courtroom testimony.[113] If EU hearsay about a startling event or condition were to be compared with courtroom testimony about the same startling event or condition, then the underlying accuracy of observation would not be a factor. Both the testimony and the EU hearsay are backed by the same observation. If the EU hearsay is unreliable because the underlying observation is clouded by the stress of excitement, then the live testimony is unreliable for the very same reason. The intervening time between the startling event or condition and the live testimony cannot result in an improvement in the accuracy of observation about the startling event or condition.[114]

But the literature does give some reason to think that the EU would be superior to live testimony. The content of the EU often makes clear what exactly it was that the declarant paid attention to and therefore may have better perceived. In *Boyce*, for example, the EU about the presence of a gun suggests that the gun may have been the subject of the declarant's attention. But in a trial testimony based on memories, it may not always be easy, even with skillful examination and cross-examination, to separate out the possibly enhanced memories pertaining to the central details from the more potentially vulnerable memories concerning the peripheral details.

Still, the memories of central details are themselves subject to corruption over time. Memories are also not static; for example, memories of facial details may shift over time toward stereotypes about the ethnicity of the person whose face was observed.[115] Psychologists have also documented a number of ways that memories can be influenced by interactions after the event, such

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[113] Imwinkelried, *supra* note 68.

[114] Reflection may lead to better interpretations of the facts that were observed during the event. However, it cannot enlarge the amount of observations drawn by the declarant at the time of the startling event or condition.

[115] Davis & Loftus, *supra* note 100, at 198 (citation omitted).

as discussions with co-witnesses or dealings with police.[116] To the extent an EU captures the memories of observations closer to the subject event or condition, such that the corrupting influences have less time to take hold, it should be considered more reliable than trial testimony.

Ultimately, these new findings about the effects of emotion on cognitive processes do not appear to be so different from what the Advisory Committee knew or considered when it promulgated the EU hearsay exception as to create new concerns about the exception.[117]

B. Critique of the EU Hearsay Exception

Judge Posner challenges the EU hearsay exception on the ground that the underlying observations may not be accurate:

> The Advisory Committee Notes provide an even less convincing justification for . . . the "excited utterance" rule [as compared to the PSI hearsay exception]. The proffered justification is "simply that circumstances *may* produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of *conscious* fabrication." The two words I've italicized drain the attempted justification of any content. And even if a person is so excited by something that he loses the capacity for reflection (which doubtless does happen), how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable? "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation." Robert M. Hutchins & Donald Slesinger, "Some Observations on the Law of Evidence: Spontaneous Exclamations," 28 *Colum. L.Rev.* 432, 437 (1928). (This is more evidence that these exceptions to the hearsay rule don't even have support in folk psychology.)

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[116] *Id.* at 199-207.

[117] The negative impact of anxiety and preoccupation on eyewitness ability was recognized as early as 1978. Judith M. Siegel & Elizabeth F. Loftus, *Impact of Anxiety and Life Stress Upon Eyewitness Testimony*, 12 BULL. PSYCHONOMIC SOC'Y 479, 480 (1978).

> As pointed out in . . . the McCormick treatise, "The entire basis for the [excited utterance] exception may . . . be questioned. While psychologists would probably concede that excitement minimizes the possibility of 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, p. 366 (7th ed.2013).
>
> The Advisory Committee Notes go on to say that while the excited utterance exception has been criticized, "it finds support in cases without number." I find that less than reassuring. Like the exception for present sense impressions, the exception for excited utterances rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas.[118]

This argument is succinctly captured by Williams, cited earlier:

> In essence . . . a declarant need be so upset by an event that she cannot lie about it but not so upset that she is inaccurate in her description of the event. Imagine the infrequency of scenarios wherein this balancing is actually accomplished.[119]

At the outset, all can agree that the accuracy of observation underlying EU hearsay evidence may not be perfect. However, the criticisms seen above are based on extreme simplifications. It is indeed quite possible that a declarant can be upset enough that lying is difficult yet not so much that the accuracy of observation is so low that the resulting EU is unreliable.

The critics of the EU hearsay exception appear to agree that lying requires some sort of cognitive function, which, as discussed earlier, is scientifically correct. Where they go wrong, however, is in their heavy underestimation of the ease of lying and their belief, which lacks scientific support, that lying requires no more cognitive function than does observation.

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[118] United States v. Boyce, 742 F.3d 792, 801-02 (7th Cir. 2014) (Posner, J., concurring).

[119] Williams, *supra* note 86, at 741.

To begin with, the task of lying at the least requires accurate observation. It is not possible to make convincing or even plausible lies about an ongoing situation without observing what is actually going on. A lie that has no connection with reality certainly can be packaged into an EU, but that EU will not be brought into court as hearsay evidence to prove facts.

However, lying actually requires more accurate observation than truth-telling. The truth-teller need not observe what others may or may not know that can undermine his or her EU. A liar trying to falsify an EU does not have that luxury.

The facts of *Malin* are instructive. When a boss yelled at the direct supervisor, the plaintiff was in the supervisor's office and could hear that the boss was shouting over the phone. If the direct supervisor had wanted to lie to cover up for the boss, he already would have had the difficult task of explaining the shouting, a fact he could be fairly certain that the plaintiff knew. However, the plausibility of his explanation about what the boss shouted at him would have hinged on what the plaintiff had overheard, which could have been nothing, everything, or something in between. The direct supervisor would have had to guess based on the plaintiff's expressions. He might also have had to confront the possibility that there was no plausible lie he could make to protect his boss.

In contrast, for the direct supervisor to tell the truth, he only would have needed to accurately reflect what he had heard on the phone when the boss was yelling at him. He would not have needed to have observed or guessed what the plaintiff might or might not have heard. Without even considering the other mental steps required in lying, this example illustrates the incorrectness of equating the mental task of accurate observation with that of lying.

Furthermore, the critics of the EU hearsay exception ignore what EU hearsay evidence is used for. As seen in *Boyce*, *Woods*, and *Graves*, the EU hearsay exception is often used to admit reports by victims of domestic violence.[120] These hearsay statements are generally used to establish the identity of the

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[120] *See Boyce*, 742 F.3d at 793-94; Woods v. Sinclair, 764 F.3d 1109, 1117, 1119 (9th Cir. 2014); United States v. Graves, 756 F.3d 602, 603-04 (8th Cir. 2014).

perpetrator and the manner and mode of the attack. They do not appear to require taxing observations that call into question the accuracy of underlying observation.

With regard to identity, it is true that victims of assault do not always know or recognize who their assailants are. But in the context of domestic violence, the assailants are intimately familiar to the victims. It is difficult to imagine how these victims would have any trouble accurately recognizing the spouses or partners who assault them.[121]

EU hearsay evidence about the details of domestic violence also does not appear to demand difficult observations. The declarants are simply describing how they were attacked and with what they were attacked. It would be ludicrous to assert that a person who was hit with a baseball bat or had a gun pointed at her, however badly mentally shocked, is not fit to observe in general terms what happened to her. It would be one thing to question the accuracy of observation underlying a piece of EU hearsay evidence if the evidence were used to prove the brand of the baseball bat or the caliber of the gun used in the attack. However, in none of the examples cited in this article was EU hearsay evidence used to establish such minute details; it is hard to imagine that these cases are far from the norm.

The accuracy of observation underlying EU may not be perfect. That does not mean that EU hearsay evidence is unreliable.

VI. RELIABILITY OF VERSUS NEED FOR EU HEARSAY EVIDENCE

As seen in the above discussion, there is some support for the idea that EU statements may be reliable. But the broader question of whether the EU hearsay exception should be maintained must be decided, however difficult it may be, by weighing the reliability of EU hearsay evidence against the need for such evidence.

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[121] A similar argument has been advanced in support of Rule 804(b)(2), the Dying Declaration hearsay exception. Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1457 (2010) ("Problems with accuracy are less likely in dying declarations made by intimate partners.").

Hearsay statements in the context of domestic violence form an important category of the EU hearsay evidence presented in court. As in *Boyce*, *Woods*, and *Graves*,[122] the hearsay evidence is used in such cases because declarants recant, will not testify, or cannot testify.[123] Motivations that drive declarants, particularly those who are victims, to refuse to support their EU with subsequent testimony may include the fear of losing a family breadwinner or worry for the safety of themselves or their children.[124]

To that end, it must be recognized that a clean abolition of the EU hearsay exception, that is, one that simply abolishes the EU hearsay exception without making some provision for domestic violence cases, may not be acceptable to the public. When the Advisory Committee proposed the abolition of Rule 803(16) ("the Ancient Documents hearsay exception") in 2015, seven senators wrote in opposition. Their reasoning is quite pertinent here:

> [T]he proposal is especially troublesome because, in latent-injury, toxic-tort, products-liability, and other cases alleging corporate misconduct, abrogating Rule 803(16) could make it more difficult for plaintiffs—including the Federal Government—to prove their claims. Furthermore, the Committee's proposed elimination of the ancient documents exception undermines Congress's legislative authority to create causes of action and claims that aggrieved parties can pursue.[125]

Given the connection between the EU hearsay exception and domestic violence cases, a clean elimination of the exception, like the proposed abolition of the Ancient Documents hearsay exception, would almost certainly be seen as "undermin[ing] . . . legislative authority to create causes of action and claims that

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[122] In *Boyce*, "[the declarant] did not testify at trial." *Boyce*, 742 F.3d at 794. In *Woods*, the declarant did not survive the assault. *Woods*, 764 F.3d at 1117. In *Graves*, "[the declarant] . . . recanted her statements at trial." *Graves*, 756 F.3d at 606.

[123] Beloof & Shapiro, *supra* note 65, at 3-4.

[124] *Id.* at 4-5.

[125] Letter from Senators Edward J. Markey, Sheldon Whitehouse, Jeff Merkley, Barbara Boxer, Richard J. Durbin, Patrick Leahy, and Al Franken to Committee on Rules of Practice and Procedure (Feb. 26, 2016) [hereinafter Letter from Senators], https://www.regulations.gov/document?D=USC-RULES-EV-2015-0003-0193 [https://perma.cc/QVJ6-BSV9].

aggrieved parties can pursue."[126] Furthermore, the cause of combatting domestic violence probably command far stronger public support than that of "latent-injury, toxic-tort, products-liability, and other cases alleging corporate misconduct."[127] It is difficult to see how the clean abolition of the EU hearsay exception could happen under the expected public disapproval.

Even absent these considerations, it is bad policy simply to eliminate the exception. The effect of the abolition of any hearsay exception is to increase the importance of in-court testimony. In the context of domestic violence, it would mean an increase in the incentive for perpetrators of domestic violence to exert pressure on declarants not to testify or to change their narrative. This may subject vulnerable persons, especially women who are physically weak or economically dependent, to a greater degree of danger and harm.

This is no hypothetical concern. For example, in *Boyce*, Judge Posner himself explained why the declarant was not called to testify:

> Neither party called her—the government, doubtless because [the declarant] recanted her story that [the defendant] had had a gun after he wrote her several letters from prison asking her to lie for him and giving her detailed instructions on what story she should make up; [the defendant], because her testimony would have been likely to reinforce the evidence of the letters that he had attempted to suborn perjury, and also because his sexual relationship with [the declarant] began when she was only 15. [The defendant]'s counsel said "the concern is that if [the declarant] were to testify, she does look somewhat young and so the jury could infer . . . that this relationship could have started when she was underage.[128]

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[126] *Id.* It should be noted that this language is a reference to 28 U.S.C. § 2072(b), which states that the Federal Rules of Evidence "shall not abridge, enlarge or modify any substantive right." The letter essentially takes the position that *changes* to the rules as they exist "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1990).

[127] Letter from Senators, *supra* note 125.

[128] United States v. Boyce, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J., concurring) (citation omitted).

It is easy to imagine what more perpetrators of domestic violence might do if the clean abolition of the EU hearsay exception increased the benefits to them of keeping victims off the stand. The practical effects make a clean abolition of the EU hearsay exception unconscionable. Whatever theoretical advantage there may be to scrapping the EU hearsay exception cannot wipe away the negative effects it might have on victims of domestic violence.

Ultimately, just as the Advisory Committee had to amend its proposal to abolish the Ancient Documents hearsay exception with a grandfather clause to admit the truly ancient, Ancient Documents, any attempt to abolish the EU hearsay exception could only be accomplished with some carve-out for hearsay statements made in the context of domestic violence. The same forces and needs that resulted in the Violence Against Women Act of 1994 and created Rule 412, the Rape Shield Law, would guarantee this result.

There are existing proposals for a domestic violence hearsay exception,[129] and it is not the aim of this article to analyze their relative merits. Rather, the question at hand, with regard to the EU hearsay exception, is whether a domestic violence hearsay exception, whatever form it might take, would be any better than the existing EU hearsay exception.

At the outset, any discussion about a domestic violence hearsay exception as a replacement for the EU hearsay exception must recognize that, under current understanding of the Constitution, it may be impossible to craft a domestic violence hearsay exception that will admit all hearsay evidence arising from domestic violence cases now admissible under the EU hearsay exception.

As the Supreme Court has held, "the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding."[130] Outside of this, the Confrontation Clause bars the admissibility of hearsay statements that are testimonial.[131] The EU hearsay exception has an ancient pedigree; it was first known

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[129] *See, e.g.*, Beloof & Shapiro, *supra* note 65, at 1-2.

[130] Ohio v. Clark, 135 S. Ct. 2173, 2180 (2015).

[131] *Id.*

to be invoked, in a more primitive form, in 1694,[132] a century before the founding of the United States. Admission of EU hearsay statements, at least those that "would have been admissible in a criminal case at the time of the founding," are not barred by the Confrontation Clause.[133] The same could not be said, of course, about the statements admissible under a newly minted domestic violence hearsay exception.

Accordingly, the Confrontation Clause may bar the admission of some hearsay evidence that falls within a hypothetical domestic violence hearsay exception, even if the new hearsay exception is crafted to be coextensive in scope with the current EU hearsay exception with regard to statements made in the context of domestic violence. A domestic violence hearsay exception therefore may not be able to do the same work in admitting evidence in domestic violence cases as the EU hearsay exception. The sacrifice in the territory of admissibility creates a policy concern.

But even without consideration of the interactions of the hearsay exceptions with the Confrontation Clause, there are still some fundamental difficulties with replacing the EU hearsay exception with a domestic violence hearsay exception.

There are two ways to justify a domestic violence hearsay exception. The first is to completely abandon any theory of evidence and simply acknowledge a preference to favor prosecution of domestic violence cases. It seems difficult to see how critics of the EU hearsay exception who argue that the exception lacks theoretical justification would ever accept such an approach, but it will be entertained in this article for the sake of discussion.

Defining a hearsay exception based on a particular type of tort or crime seems hazardous. For a piece of hearsay evidence to be admitted under a domestic violence hearsay exception, the circumstances in which the hearsay evidence arose would need to satisfy the elements of domestic violence, however defined within

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[132] Thompson v. Trevanion, Skin. 402, 90 Eng. Rep. 1057 (K.B. 1693).

[133] *Clark*, 135 S. Ct. at 2180. *See also* Woods v. Sinclair, 764 F.3d 1109, 1123-24 (9th Cir. 2014) ("The Supreme Court subsequently recognized that 'spontaneous declarations'—the same types of statements referred to as 'excited utterances' under Washington's hearsay laws—constitute a 'firmly rooted' hearsay exception.") (citation omitted).

the exception. The admissibility of the hearsay evidence would then hinge upon some determination on the merits of the case. It would encourage collateral litigation and might be an unacceptable shift of adjudicative power from juries to judges, if judges were given the authority to decide whether potentially case-determinative evidence may be admitted based on their assessment of the credibility of the cases.

Furthermore, while almost all people would agree that domestic violence is a scourge that society should eradicate, using the hearsay exceptions to accomplish policy objectives risks a politicization of the rules of evidence. The hearsay exceptions have been neutrally worded and, thus far, have not explicitly been used as policy tools for accomplishing political goals. Even if the reduction in the number of hearsay statements that would be admitted by substituting the EU hearsay exception with the domestic violence hearsay exception could benefit the cause of justice, such gain would be minuscule compared to the loss if the rules of evidence were to become yet another battlefield of political partisanship.

The second way to justify a domestic violence hearsay exception is to explain it on the ground that the circumstances surrounding domestic violence give rise to reliable hearsay. However, it is not clear that any such justification would significantly differ from the existing justification for the EU hearsay exception. What in domestic violence would result in reliable hearsay, if not that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication"?[134]

And if it were possible to create such a general justification, there is no reason to limit the exception only to admit evidence arising from domestic violence cases rather than from all types of cases, so long as the circumstances resemble those of domestic violence. And if such a justification resembles that of the justification for the EU hearsay exception, then the new hearsay exception would not be meaningfully different in scope and effect

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[134] FED. R. EVID. 803(2) advisory committee's notes.

from the existing EU hearsay exception.[135] Any improvement from the creation of this new hearsay exception would be marginal.

Ultimately, as explained in this article, there actually are reasons to think that EU hearsay evidence may be reliable. Even if these reasons are found not to be sufficient or convincing, would the search for an alternative to the EU hearsay exception actually going to result in anything that is markedly better? Or would it simply end up with a slightly reworded version of the EU hearsay exception?

CONCLUSION

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

With regard to intentional lying, the Advisory Committee's explanation of the EU hearsay exception, that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication," could certainly benefit from a tweak. However, the reasoning is also largely supported by the research finding that shows that lying requires deliberation, which is made more difficult under stress.

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

Both the Advisory Committee and the critics of the EU hearsay exception agreed that "excitement impairs accuracy of observation." The science also generally points toward that direction. However, for the usual purposes of EU hearsay statements, such as to identify perpetrators of and to establish the weapon used in domestic violence cases, the need for accurate

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[135] As Professor Daniel Capra points out, "once you [remove the EU hearsay exception but] keep throwing excitedness in as a factor for the court [to decide the admissibility of hearsay statements], in about twenty years then you're back to the categorical excited utterance exception." Daniel Capra, *Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323, 1353 (2016).

observation does not seem so high that the decrease in accuracy due to excitement is much of a concern.

On balance then, there is reason to think that EU may be sufficiently reliable to warrant the existing hearsay exception. The critics of the exception who nonetheless seek to abolish it will have to confront the practical reality that the exception is used to admit statements from victims of domestic violence who, because of their vulnerability, cannot or will not testify about what happened to them. It is impossible and irresponsible for hearsay reform not to somehow account for domestic violence situations in any suggestion to replace or scrap the EU hearsay exception. To that end, it may be difficult to craft some alternative to the EU hearsay exception which materially advances the state of evidence law and which, at the same time, is acceptable to the public.