Residual Present Sense Impressions and Excited Utterances in the Social Media Age

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ABSTRACT

The growth of social media, especially the archiving of millions of social media posts from many years ago, (including in the Library of Congress's archive of tweets from 2006 to 2017), presents unique evidentiary challenges that were unanticipated by the current Federal Rules of Evidence ("FRE"). For example, parties and their experts now scour the web for social media posts that may be useful at trial. The use of social media posts raises important questions about when these statements can be used despite the declarant not being available to testify, depriving parties and juries of the benefit of cross-examination regarding the statement. Two hearsay exceptions in the FRE impacted by this radical shift are the present sense impressions and excited utterances.

Fortunately, prominent legal scholar Richard Posner, former Judge of the Seventh Circuit, posed a viable solution adaptable to these developments. In *United States v. Boyce*, Judge Posner's concurrence argued that the residual approach under FRE 807 should replace both the present sense impression and excited utterance exceptions. Under the residual approach, each possible present sense impression or excited utterance is assessed on a case-by-case basis of circumstantial reliability. While *Boyce* did not concern social media evidence, Judge Posner's concurrence is still invaluable to social media statements. Indeed, Judge Posner highlighted the current judicial elasticity in which judges already employ a covert residual approach masked under the exceptions, plus their psychological deficiencies. Thus, the *cumulative impact* of judicial elasticity and psychological deficiencies, now exacerbated by the social media catalyst, favors adopting the residual approach.

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I. INTRODUCTION

The Federal Rules of Evidence ("FRE") present sense impression[1] and excited utterance[2] exceptions to hearsay have faced criticism from their enactment. However, while the call for hearsay evidentiary reform has been consistent, the recent and unprecedented changes from social

1. *See* FED. R. EVID. 803(1).
2. *See* FED. R. EVID. 803(2).

media make such reform urgent. To be sure, some scholars still maintain that both exceptions need only be *modified*.[3] On the other hand, others have advocated for abolition of both exceptions even before social media evidence. The most relevant articulation of the abolitionist view is Judge Posner's 2014 concurrence in *United States v. Boyce*.[4] While *Boyce* did not involve social media evidence,[5] Judge Posner's reasoning about the residual approach under FRE 807 is invaluable to addressing the obstacles posed by social media statements, such as the lack of corroborating witnesses and/or other circumstantial reliability. Judge Posner asserted that he would "like to see" Rule 807 "swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee."[6] Notably, however, he focused upon the present sense impression[7] and excited utterance[8] exceptions, even labeling them as "folk psychology."[9] Indeed, the "folk psychology" label is magnified when noting that social media evidence was unfathomable to the initial Advisory Committee.

Despite Judge Posner's reasoning, several scholars, including the Advisory Committee on Rules of Evidence ("Advisory Committee" or "Committee"), criticized his call for an expanded residual approach. Specifically, on October 21, 2016, the Advisory Committee declined to adopt Judge Posner's proposal, labeling it as an "all-out discretion fest."[10] The Committee further stated:

> One can hope that there is a sweet spot somewhere between outright rejection of a residual exception—which could result either in the loss of a good deal of reliable evidence or an unwelcome expansion and

3. *See e.g.*, Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 373–74 (2012) (advocating for reform of present sense impression exception); Michael J. Hutter, *New York's Excited Utterance Hearsay Exception: Ave Atque and Vale?*, 84 ALB. L. REV. 703, 729 (2021).

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

5. *See id.* at 802.

6. *Id.*

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

8. *See Boyce*, 742 F.3d at 796 ("As for the excited utterance exception, '[t]he entire basis for the exception may . . . be questioned.'" (ellipses in original) (quoting 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 272 (7th ed. 2013))).

9. *Id.* at 801.

10. *See* Memorandum from Daniel L. Capra, Philip Reed Professor of Law, to Advis. Comm. on Evid. Rules at 10 (Oct. 16, 2016), *in* ADVISORY COMMITTEE ON RULES OF EVIDENCE 118 (2016), https://perma.cc/D6XN-ANRC.

> misshaping of the standard exceptions—and an all-out discretion fest as championed by Judge Posner.[11]

Relatedly, during the Fall 2016 meeting, the Advisory Committee highlighted the minutes of the spring meeting, which stated that "[a]t the Hearsay Symposium, the Committee heard *repeatedly* from lawyers that they wanted *predictable hearsay exceptions*—–judicial discretion would lead to inconsistent results and lack of predictability would raise the costs of litigation and would make it difficult to settle cases."[12] Finally, Timothy Lau, a member of the Federal Judicial Center, has authored a 24-page memorandum defending the reliability of the present sense impression and excited utterance exceptions post-*Boyce* and has stated that there is presently no need for further experiments into the reliability of these exceptions.[13] However, even as recently as the Fall of 2016, social media evidence was conspicuously absent in the Advisory Committee's remarks and the Committee never addressed social media obstacles. In fact, the Advisory Committee to date has *never* mentioned the evidentiary nuances and challenges posed by Twitter, Facebook or any other social media platform, despite their frequency and ubiquity.

Given the cumulative impact of social media evidence *plus* the existing legal and psychological deficiencies, this Article submits that the residual approach should replace the present sense impression and excited utterance exceptions. Part II after this Introduction offers a primer on the residual approach as codified in FRE 807 and the Advisory Committee Notes surrounding its most recent 2019 amendment about the circumstantial reliability factors. These factors are adaptable to social media, despite not being discussed in the Advisory Committee Notes to the 2019 amendment. Moreover, Part II also outlines the Seventh Circuit's decision in *Boyce* with an emphasis on Judge Posner's concurrence defending the residual approach and Judge Posner's published clarifications post-*Boyce*. Part III provides an overview of the present sense impression and excited utterance exceptions, specifically discussing the text of FRE 803(1) and FRE 803(2) respectively, as well as the Advisory Committee Notes surrounding their enactment and the criticisms these exceptions have historically received. These criticisms are exacerbated by social media evidence discussed in the next part.

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11. *Id.*

12. *Id.* at 110–11 (emphasis added).

13. *See* Memorandum from Timothy Lau to the Adv. Comm. on Rules of Evid., re: Review of Scientific Literature on the Reliability of Present Sense Impressions and Excited Utterances at 22, 24 (Mar. 5, 2016), https://perma.cc/Z63A-66AY, in FED. JUD. CTR., https://perma.cc/5BEC-27WU (last visited Aug. 5, 2025) (concluding that further research into either exception is "unnecessary").

Part IV then discusses the rise of social media evidence and its implications post-*Boyce* for present sense impressions and excited utterances.[14] Specifically, Part IV draws from social media research of prominent scholars, such as Jeffrey Bellin.[15] This scholarship shows that electronic present sense impressions and excited utterances will likely increase in frequency and also pose reliability risks unanticipated and/or beyond the psychological rationale of the current FRE. Part IV further demonstrates these theoretical and practical reliability risks by examining several actual cases. [16]

Part V makes a case for the residual approach's superiority while simultaneously responding to comments from the Advisory Committee and the most prominent scholarly objections. Such objections primarily include the Advisory Committee's assertion that the residual approach will result in an "all out discretion fest" by judges, that the approach is less economical for efficient litigation and settlements, and that certain *modifications* are more rational rather than the abolition of FRE 803(1)–(2). Yet, Part V reiterates that judges are *already employing* frequent residual-like judicial discretion, albeit covertly, under the guise of bright-line exceptions. The current covert application becomes more problematic with social media statements, thereby further supporting a case-by-case approach. Furthermore, the residual approach's discretionary framework is analogous to the discretionary standard for weighing prejudice under FRE 403 and assessing character evidence under FRE 404(b). As for proposed modifications to FRE 803(1)-(2), Part V further argues that such proposals may initially seem persuasive, but these suggestions are either functionally equivalent to the residual model and/or raise their own obstacles, making the residual approach ideal. Therefore, Part V concludes that the residual approach is the "easiest update" to the present sense impression and excited utterance exceptions while still maximizing case-by-case evidence reliability.

II. A PRIMER ON THE RESIDUAL APPROACH

A. The Current Rule and Advisory Notes

Federal Rule of Evidence 807 provides:

> Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804: (1) the statement is supported by sufficient guarantees of trustworthiness—after

14. *See infra* Part IV.
15. *See infra* Section IV.A.
16. *See infra* Section IV.B–IV.C.

> considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.[17]

The current version of FRE 807 is the product of a 2019 amendment, which contains lengthy Advisory Committee Notes.[18] Since the amendment's rationale is relevant to this Article in general and social media evidence specifically, the Advisory Notes are summarized below.

First, the Advisory Notes recognized the deletion of FRE 807's previous language of "equivalent" trustworthiness.[19] Specifically, "[c]ourts have had difficulty with the requirement that the proffered hearsay carry 'equivalent' circumstantial guarantees of trustworthiness."[20] In other words, the "equivalence" standard has not served "to guide a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison."[21] "Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy."[22] Therefore, "the requirement of an equivalence analysis has been eliminated. Under the amendment, the court should proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness."[23]

Second, "[t]he amendment specifically requires the court to consider *corroborating evidenc*e in the trustworthiness enquiry."[24] While most courts have required the consideration of corroborating evidence, some courts have disagreed.[25] "The rule now provides for a uniform approach and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception."[26] And, "the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence."[27]

The Advisory Notes further clarified that "[t]he rule in its current form applies to hearsay 'not specifically covered' by a Rule 803 or 804

17. FED. R. EVID. 807.
18. *See* FED. R. EVID. 807 advisory committee's notes to 2019 amendment.
19. *Id*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* (emphasis added).
25. *See id.*
26. *Id.*
27. *See* FED. R. EVID. 807 advisory committee's notes to 2019 amendment.

exception.[28] The amendment makes the rule applicable to hearsay 'not admissible under' those exceptions."[29] Hence, "[t]his clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a '*near-miss'* of one of the Rule 803 or 804 exceptions."[30] "If the court employs a 'near-miss' analysis it should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the hearsay misses the admissibility requirements of the standard exception."[31]

Finally, despite FRE 807's broad language, "[t]he amendment *does not alter the case law prohibiting parties from proceeding directly to the residual exception,* without considering the admissibility of the hearsay under Rules 803 and 804."[32] To be clear, "[a] court is not required to make a finding that no other hearsay exception is applicable."[33] However, "the opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception."[34] With that background in mind, a review of the Seventh Circuit's decision in *United States v. Boyce* is needed. *Boyce* pre-dates, and arguably helped prompt, the 2019 amendment.

B. United States v. Boyce

The *Boyce* decision helpfully frames the debate of the residual approach replacing the present sense impression and excited utterance exceptions.[35] Specifically, *Boyce* examines whether the declarant made a statement in response to a question by police and whether the declarant had the opportunity to reflect prior to making the statement. Judge Posner's concurrence expanded that analysis in relation to the residual approach, which then set the stage for the social media discussion later in this Article.[36]

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28. *Id.*
29. *Id.*
30. *Id.* (emphasis added). Such "near-miss" statements are the focal point of this Article in general and the application to social media evidence specifically for present sense impressions and excited utterances.
31. *Id.*
32. *Id.* (emphasis added).
33. *Id.*
34. *Id.*
35. *See generally* Gary Dunn, *The Residual Exception's Renaissance*, 17 GEO. J.L. & PUB. POL'Y 737, 738 (2019). Some of the arguments from this Part are based, in part, on this author's previous work published with express permission.
36. To be clear, *Boyce* is not a social media case, but Judge Posner's concurrence has substantial implications for social media evidence discussed later.

1. Seventh Circuit Decision

On March 27, 2010, defendant Darnell Boyce's girlfriend, Sarah Portis, contacted police officers claiming that Boyce had hit her and was "going crazy for no reason."[37] The 911 operator inquired whether Boyce had any weapons.[38] Portis stated that Boyce had a gun.[39] The 911 operator then told Portis that if she was not telling the truth, she could be taken to jail.[40] Portis reiterated that she was "positive" Boyce had a gun.[41] After the officers arrived, Boyce tried to run away and the officers chased after him.[42]

During trial, the officers testified that they chased Boyce, saw him throw the gun into a neighboring yard, and then found ammunition in Boyce's pocket.[43] Importantly, the district court admitted Portis's statements during the 911 call about Boyce possessing a gun as both present sense impressions under FRE 803(1) and excited utterances under FRE 803(2).[44] The jury convicted Boyce of both being a felon in possession of a firearm and being a felon in possession of ammunition.[45]

On appeal, Boyce argued that the district court improperly admitted the hearsay statements.[46] The Seventh Circuit disagreed and affirmed Boyce's conviction.[47] Specifically, the Seventh Circuit held that the district court did not abuse its discretion in admitting the hearsay statements under the excited utterance exception.[48] Notably, the Seventh Circuit did not "definitively decide" whether the statements were *also* admissible under the present sense impression exception since the excited utterance exception applied.[49]

Despite not definitively ruling on whether the present sense impression exception applied, the Seventh Circuit noted that Portis only mentioned that Boyce possessed a firearm *after* questioning by the 911 operator, which, in turn, occurred *after* she ran to another residence before making the 911 call.[50] Yet, the court also held that a declarant may still utter statements in response to questions without calculated narration.[51]

37. United States v. Boyce, 742 F.3d 792, 793 (7th Cir. 2014).
38. *See id.*
39. *See id.*
40. *See id.*
41. *Id.*
42. *See id.* at 794.
43. *See id.*
44. *See id.*
45. *See id.* at 793, 800.
46. *See id.* at 793.
47. *See Boyce*, 742 F.3d at 793.
48. *See id.*
49. *Id.* at 798.
50. *See id.* at 797–98.
51. *See id.*

Such circumstances are plausible because it was Portis who first mentioned the gun.[52] With that being said, the Seventh Circuit still found that there was a possibility that Portis's statements to the officers were the product of calculated narration, but ultimately did not answer the question.[53]

Regardless of whether the statements were present sense impressions, the Seventh Circuit highlighted that the excited utterance exception "allows for broader scope of subject matter coverage" anyway.[54] The Seventh Circuit relied on two specific events when affirming the district court's application of the excited utterance exception: (1) the domestic battery was a "startling event";[55] and (2) the 911 call occurred while Portis was *under the stress* of the excitement from the domestic battery.[56] The court also noted that one of the officers testified that Portis seemed "emotional" and as if "she had just been in a[] . . . fight" when he arrived at the scene.[57] Ultimately, the Seventh Circuit affirmed Boyce's conviction and held that: "if a domestic battery victim in Portis's circumstances knows her assailant has access to a gun nearby, the potential for more lethal force to be used against her would be a subject likely to be evoked in the description of her assault."[58]

2. Judge Posner's Concurrence

While Judge Posner "disagreed with nothing" in the majority opinion about the admissibility of Portis's statements, he sought to "amplify" concerns about the reliability of present sense impressions and excited utterances.[59] In fact, Judge Posner stated that "there is profound doubt whether either should be an exception to the rule against the admission of hearsay evidence."[60]

First, for present sense impressions, Judge Posner criticized the Advisory Committee Notes' rationale that "if the event described and the statement describing it are near to each other in time, this 'negate[s] the likelihood of deliberate or conscious misrepresentation.'"[61] Notably, Judge Posner cited the same post-FRE-codification psychological studies

52. *See id.*
53. *See id.*
54. *Id.* at 798.
55. *Id.*
56. *See id.*
57. *Boyce*, 742 F.3d at 798.
58. *Id.* at 799.
59. *Id.* at 799–800 (Posner, J., concurring).
60. *Id.* at 800.
61. *Id.* (quoting FED. R. EVID. 803 advisory committee's notes to 1972 Proposed Rules).

that the majority did,[62] which provided that "less than one second is required to fabricate a lie,"[63] and that "most lies in fact are spontaneous."[64] Hence, Judge Posner concluded that the present sense impression exception "has neither a theoretical nor an empirical basis; and it's not even common sense—it's not even good folk psychology."[65] To be clear, the majority opinion acknowledged the concerns of the studies showing that "less than one second is required to fabricate a lie," but it still moved on and applied the traditional exceptions because of their previous widespread acceptance.[66]

Regarding excited utterances, Judge Posner stated that the Advisory Committee Notes provide "even less convincing justification" for that exception.[67] Specifically, Judge Posner noted that the McCormick treatise cited by the majority indicates that "[t]he entire basis for the [excited utterance] exception may be questioned."[68] Moreover, Judge Posner further noted that the rationale for the excited utterances exception is "simply that circumstances *may* produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of

62. *See id.* at 796.

63. *Id.* at 800–01 (quoting McFarland, *supra* note 7, at 916); *see also* Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 362–66 (2012); I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 27–29, https://perma.cc/9X8T-94TK. Judge Posner further provided: "Wigmore made the point emphatically 110 years ago." *Boyce*, 742 F.3d at 801 ("[T]o admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle." (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1757 (1904))).

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

65. *Boyce*, 742 F.3d at 801. Judge Posner also noted the fact that present sense impressions that are allegedly immediate have been interpreted to encompass periods as long as 23 minutes after the events prompting the statement. *See id.* at 800. Notably, the Tenth Circuit recently underscored the immense judicial discretion employed regarding present sense impressions by holding that 911 calls specifically are a "large gray area" involving statements "that could reasonably be regarded as either contemporaneous or non-contemporaneous." *See* United States v. Lovato, 950 F.3d 1337, 1351 (10th Cir. 2020) (Bacharach, J., concurring). For these statements, "district courts have *broad discretion* in determining admissibility." *Id.* (emphasis added).

66. *Id.* at 796. Notably, the Hutter article noted above exposes the misleading nature of the claim that there is "no recent empirical research" supporting the contention that such statements are unreliable and will lead to wrongful convictions. *See* Hutter, *supra* note 3, at 705. This Article submits that the potential unreliability for such statements, coupled with the other deficiencies discussed, sufficiently warrants residual reform.

67. *Boyce*, 742 F.3d at 801.

68. *Id.* at 801–02 (quoting 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 272 (7th ed. 2013)).

conscious fabrication."[69] Judge Posner's concern was that, even assuming the absence of the capacity for reflection, there is no reason to believe that the statement is *automatically* reliable.[70]

Finally, Judge Posner ended his concurrence by offering his own hearsay model,[71] which did not seek a net reduction of hearsay evidence in federal court.[72] Rather, Judge Posner hoped that the residual exception under FRE 807 would "swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee."[73] Judge Posner proposed a three-part test: (1) the statement must be "reliable"; (2) the jury must be able to comprehend the statement's "strength and limitations"; and (3) the statement will "materially enhance the likelihood of a correct outcome."[74]

3. Judge Posner's Comments After *Boyce*

Judge Posner's concurrence sparked criticism from legal scholars defending the traditional exceptions.[75] As just one example, Professor Edward J. Imwinkelried, one of the most cited legal scholars in the country for evidence law,[76] defended the present sense impression exception.[77] After receiving such criticism, Judge Posner wrote an article advocating for a more modest approach.[78] He stated that he is "not yet ready to endorse the abolition of the hearsay rule."[79] Crucially, however, Judge Posner still maintained that both the present sense impression and excited utterance

69. *Id.* at 801 (emphasis added) (quoting FED. E. EVID. 803(2) advisory committee's note).

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

71. *See Boyce*, 742 F.3d at 801.

72. *See id.* at 802 ("I don't want to leave the impression that in questioning the present sense and excited utterance exceptions to the hearsay rule I want to reduce the amount of hearsay evidence admissible in federal trials.").

73. *Id.* As noted above, while Judge Posner's concurrence broadly addressed FRE 801 through FRE 806, this Article *solely* focuses on FRE 803(1) (present sense impressions) and FRE 803(2) (excited utterances).

74. *Id.*

75. While criticisms will be discussed at length later in this Article, the initial reason of noting an example criticism is to show the context in which Judge Posner provided follow-up commentary to his concurrence in *Boyce*.

76. *See* Brian R. Leiter, *Most Cited Law Professors by Specialty, 2000–2007*, BRIAN LEITER'S L. SCH. RANKINGS, https://perma.cc/5MGG-6A96 (last updated Dec. 18, 2007).

77. *See* Edward J. Imwinkelried, *The Case for the Present Sense Impression Hearsay Exception: The Relevance of the Original Version of Federal Rule of Evidence 803 to Judge Posner's Criticism of the Exception*, 54 U. LOUISVILLE L. REV. 455, 466 (2016) ("Several commentators, though, have found the rationale for the present sense impression exception attractive. For example, Edmund Morgan, one of the great Evidence reformers of the last century, favored the exception.").

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

79. *Id.*

exceptions *should* be abolished. First, for present sense impressions, Judge Posner reiterated that "people are entirely capable of spontaneous lies in emotional circumstances" and that "[o]ld and new studies agree that less than one second is required to fabricate a lie."[80]

Second, for excited utterances, Judge Posner reiterated his criticism of the Advisory Committee Notes' rationale that: "circumstances *may* produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of *conscious* fabrication."[81] Judge Posner concluded:

> The two words I've emphasized ("may" and "conscious") 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?[82]

Thus, for purposes of this Article, Judge Posner's concurrence in *Boyce* remains intact.[83]

III. THE RULES, ADVISORY COMMITTEE NOTES, AND HISTORICAL CRITICISMS FOR PRESENT SENSE IMPRESSION AND EXCITED UTTERANCE EXCEPTIONS

The FRE Advisory Committee Notes originally provided four psychological safeguards that help determine increased accuracy for hearsay exceptions: perception, memory, narration, and sincerity.[84] In fact, the Advisory Committee used these criteria when deciding whether to adopt a categorical approach versus a residual one.[85] As discussed below,

80. *Id.* at 1470. Recall that Judge Posner made this identical point in *Boyce* and even referenced the same psychological study, meaning that he did not retreat from his earlier reasoning for this exception in the later article. *See* United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014).

81. Posner, *supra* note 78, at 1470 (emphasis added).

82. *Id.*

83. *Id.* Furthermore, as discussed earlier, Judge Posner's concurrence does not address the issue of social media, which bolsters the validity of his concerns about the present sense impression and excited utterance exceptions. *Boyce*, 742 F.3d at 801–02.

84. FED. R. EVID. art. VIII, Refs & Annos, Introductory Note: The Hearsay Problem (West) (citing Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948)). Note, sincerity "seems merely to be an aspect of the [first] three." *Id.*; *see* Gary Dunn, *The Residual Exception's Renaissance*, 17 GEO. J.L. & PUB. POL'Y 737, 738 (2019). Some of the arguments from this Part are based, in part, on this author's previous work published with express permission.

85. *See* FED. R. EVID. 803 advisory committee's notes ("The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules." (quoting S. REP. NO. 93–1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066)).

these criteria were used when adopting the excited utterances and present sense impressions exceptions.

A. Excited Utterances

FRE 803(2) defines an excited utterance as "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."[86] The Advisory Committee's rationale for this exception is that the circumstances giving rise to the utterance *may* conjure such excitement as to temporarily still the capacity of reflection.[87] Again, the goal is that excitement "produces utterances free of conscious fabrication."[88] The psychological safeguards of perception, memory, narration and sincerity apply to excited utterances as follows: perception disfavors admitting the statements since "excitation decreases accuracy."[89] Yet, memory was not addressed by the Advisory Committee.[90] Instead, sincerity was viewed as the main reason for this exception since the declarant is too excited to lie.[91] This means that "spontaneity" is the key basis of the excited utterance's perceived reliability.[92]

Notably, even the Advisory Committee Notes acknowledged the criticism that FRE 803(2) has historically received, despite the above psychological safeguards. Specifically, the Committee noted that FRE 803(2) has been "criticized on the ground that excitement *impairs accuracy of observation* as well as eliminating conscious fabrication."[93] Moreover, Professor Imwinkelried, noted above, also acknowledged that some viable unreliability arguments against excited utterances exist.[94] Thus, the excited utterance exception has received stable criticism linked back to the Advisory Committee Notes.

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

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

88. *Id.*

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

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

91. *See id.*

92. *Id.*

93. *See id.* ("The theory of Exception [paragraph] (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication." (emphasis added) (citing Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432 (1928))).

94. *See* Imwinkelried, *supra* note 77, at 466.

B. Present Sense Impressions

FRE 803(1) defines a present sense impression as "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."[95] Per the Advisory Committee, the original justification for this exception is "that substantial contemporaneity of event and statement negative the likelihood of deliberate [or] conscious misrepresentation."[96] If the testifying witness is the declarant then the declarant may be cross-examined.[97] Alternatively, if the witness is not the declarant, then the witness "may be examined as to the circumstances as an aid in evaluating the statement."[98] Hence, the stated psychological justifications for present sense impressions address perception, memory, sincerity and narration in the following ways: (1) for perception and memory, the event happened "right then" as the statement was uttered which allegedly bolsters the statement's accuracy;[99] (2) for sincerity, the event causing the statement happened "too quick" for the declarant to lie;[100] (3) narration is not impacted here since this psychological factor is usually only relevant for expert testimony and "shaping the parameters of the learned treatise hearsay exception."[101] Finally, other individuals may independently verify the factual circumstances surrounding such statements.[102]

While the criticism of this exception is not as explicit in the Advisory Committee Notes as excited utterances, the key contradiction is between the rationale of "contemporaneity" negating fabrication and the scholarship showing that "less than one second is required to fabricate a lie."[103] Consistent with such scholarship, John Henry Wigmore has previously cautioned: "To admit hearsay testimony simply because it was uttered at the same time something else was going on is to introduce an arbitrary and unreasoned test and to remove all limits of principle."[104]

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

96. FED. R. EVID. 803(1) advisory committee's notes.

97. *See id.*

98. *Id.*

99. *See* SAKS & SPELLMAN, *supra* note 89, at 193 (describing the accuracy mechanism for present sense impressions).

100. *Id.*

101. *See* Imwinkelried, *supra* note 77, at 459 (recognizing that narration is meant to ensure that a jury is not misled by complicated information deriving from an expert's work).

102. *See* SAKS & SPELLMAN, *supra* note 89, at 193.

103. McFarland, *supra* note 7, at 916 ("Old and new studies agree that less than one second is required to fabricate a lie.").

104. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1757, at 238 (James H. Chadbourn ed., 1976) ("To admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test and to remove all limits of principle."); *see also* Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*,

Finally, with these historical psychological criticisms in mind, it is apropos to review the further nuances and reliability complications that arise in today's social media era.

IV. THE RISE OF SOCIAL MEDIA EVIDENCE AND IMPLICATIONS POST-BOYCE

While Judge Posner persuasively criticized present sense impressions and excited utterances, *Boyce* was not a social media case. However, social media use continues to exponentially increase since *Boyce* and the evidentiary implications are substantial. Perhaps no scholar has noted the hearsay implications of social media better than Professor Jeffrey Bellin. Professor Bellin provides that "[w]hen communication norms change, it follows that evidence doctrine, and particularly the hearsay rules that control the admission of out-of-court statements, must change as well."[105] Undoubtedly soon, key hearsay exceptions will need to be reassessed to adequately account for such advancements.[106] Therefore, Professor Bellin's research is highlighted below to illuminate the future social media landscape in which the residual approach must be discussed.

A. Present Sense Impressions and Social Media Risks

From its enactment, the present sense impression exception has historically been tailored to oral statements rather than electronic communication.[107] Professor Bellin surmised that "absent a previously unassailable assumption that statements describing contemporaneous events could only be communicated orally, [the United States's] evidence codes would probably never have adopted this once-controversial exception."[108] As noted above, concerns about the reliability of the present sense impression exception predate both the rise of social media and Judge

52 HOW. L.J. 319, 327–28 (2009) ("By and large, the courts have found Wigmore's position persuasive. Until the adoption of the Federal Rules of Evidence, only a few jurisdictions recognized the present sense impression exception.").

105. Jeffrey Bellin, Facebook, *Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 332–33 (2012).

106. *See id.*

107. *See id.*

108. *Id.* Note that from a review of the relevant scholarship, Professor Bellin has written the most comprehensive article to date regarding present sense impressions and reliability concerns posed by social media. Hence, this Article addresses his research in-depth. While there has been at least one article written specifically to respond to his work discussed here, *see generally* Susan W. Brenner, *Communications, Technology, and Present Sense Impressions*, 160 U. PA. L. REV. PENNUMBRA 255 (2012), even that work "tend[s] to agree with Professor Bellin's views on the importance of corroboration," *id.* at 262. Moreover, Professor Bellin's work remains widely cited and corroboration is central to the residual approach discussed here.

Posner's concurrence in *Boyce*. Before smartphones or Twitter,[109] an individual who made a statement about a transpiring event (i.e., a present sense impression) would "invariably be speaking to someone nearby" observing the same event.[110] Hence, one of those people observing the event would present the statement at trial and simultaneously *corroborate* its veracity.[111] Conversely, today, "the assumption that a present sense impression will inevitably, or even usually, be corroborated by live witness testimony no longer holds."[112] Given the exponential technological advancements, present sense impressions are not only more *widely available* for use in litigation, but they will frequently "be both *uncorroborated and of dubious reliability*."[113] As noted further below, perhaps the most concrete reason for this is the lack of a percipient corroborating witness.

1. Frequency

Regarding specific social media outlets and *frequency*, Twitter is essentially a "vast electronic present sense impression ('e-PSI') generator," constantly producing admissible out of-court statements.[114] From at least 2012, the service reports a steady increasing average of over 200 million tweets per day.[115] Moreover, if anyone tries to access a tweet from the past, all public tweets are now archived in the Library of Congress.[116] Past tweets may also be accessed via Twitter's public search engine or through third-party Twitter search services.[117]

Similarly, Facebook is an extremely popular social networking site that endlessly broadcasts autobiographical "status updates," which are short summaries of what users are "currently seeing, doing, and feeling."[118] Ultimately, "[b]oth Facebook and Twitter distribute free software applications that enable convenient broadcast (and receipt) of tweets and status updates from handheld devices."[119]

As Professor Bellin further notes, current norms in the present generation encourage people to *frequently* express contemporaneous

109. Note that Twitter has since been renamed "X." *See, e.g.*, Irina Ivanova, *Twitter is Now X. Here's What That Means.*, CBS NEWS (July 31, 2023, 5:18 PM), https://perma.cc/4DDE-UTE3.

110. Bellin, *supra* note 105, at 333.

111. *See id*.

112. *Id.* at 334.

113. *Id.* (emphasis added).

114. *Id.* at 335.

115. *See id.* at 353.

116. *See id.*

117. *See id.* at 354.

118. *Id.* at 335, 353.

119. *Id.* at 353.

observations about *nonstartling* events.[120] People born within the last 20 years have been labeled as the "Look at Me Generation" by social commentators as a group that has "been documented like no group before them, most especially by themselves."[121] Indeed, "[t]his generation employs text messaging, Twitter, and Facebook, as well as other social media tools, to communicate their activities and observations (from the exciting to the banal) to the rest of the world."[122] Additionally, with real-time communication devices, such as androids and iPhones, there is always a social media audience for individuals to express their thoughts to at any hour.[123] In short, "[e]lectronic updates of peoples' observations ('the number seven bus is late'), activities ('I'm watching a movie with Cathy'), and locations ('I'm at a diner in Kalamazoo') increasingly populate cyberspace."[124]

2. Reliability

Professor Bellin also reiterated that objections to the reliability of present sense impressions are not a recent development.[125] Indeed, more contemporary scholars echoed Wigmore's skepticism that contemporaneity ensures reliability.[126] However, without the present rise of social media, there was not the same level of present urgency to address the present sense impression exception.[127] Over time, "there was little reason to believe that present sense impressions played any significant role in American trials, either in terms of their quantity or potency as evidence."[128]

Unlike traditional present sense impressions that occur *orally*, a typical e-PSI[129] is not likely to be accompanied by the "powerful form of

120. *See* Bellin, *supra* note 105, at 354.

121. *Id.* (quoting Jennie Yabroff, *Here's Looking at You, Kids*, NEWSWEEK, Mar. 24, 2008, at 66, 67).

122. *Id.*

123. *See id.* at 355.

124. *Id.*

125. *See id.* at 336 & n.20 (citing Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 875 (1981) to support that John Henry Wigmore had questioned the exception's reliability before Bellin).

126. *See* Bellin, *supra* note 105, at 336–37; *see also* State v. Carpenter, 773 S.W.2d 1, 9 n.3 (Tenn. Crim. App. 1989) ("The present sense impression exception, although embraced by the Federal Rules of Evidence, has been criticized by authorities as having virtually no indicium of reliability."), *overruled on other grounds*; *see also* Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 28–30 (1987) (discussing flaws in the assumptions about cognitive processes that underlie the reliability argument).

127. *See* Bellin, *supra* note 105, at 337.

128. *Id.*

129. *See id.* at 335.

corroboration once inherent in all present sense impressions—*a percipient witness* who can testify about the event described."[130] This lack of corroboration occurs for several reasons. First, it is unlikely that an e-PSI will be communicated to someone who is also physically present at the location where the statement is made.[131] Indeed, the usual purpose for tweeting or texting one's observations to someone else is because they are *not* physically present at the same location.[132] In fact, the specific identities of an audience on social media when a statement is made are often unknown.[133]

Second, litigants will simply *not need to* introduce e-PSIs through the testimony of a percipient witness under the current present sense impression exception. Unlike oral present sense impressions, e-PSIs are stored in electronic records.[134] Alternatively, e-PSIs may be introduced via the testimony of text message recipients, Facebook "friends," or Twitter "followers" "who, like the bare documentary record, cannot speak to the veracity of the statements' contents."[135] Hence, strategic litigants can anticipate when the substance of an e-PSI will likely, or even potentially, be contradicted by a percipient witness, and then introduce the evidence through any of these alternate means to avoid such impeachment at trial.[136] Once again, such concerns were far less fathomable at the time of FRE 803(1)'s codification.

Third, e-PSI declarants may simply *misperceive* the events that they speak about. Undoubtedly, the immediacy requirement of present sense impressions naturally lends itself to this type of error anyway.[137] However, the e-PSIs are potentially even more concerning because they "are not only amenable to presentation at trial without any corroborating witness testimony, but often arise in informal contexts that *foster* ambiguity and miscommunication."[138] Indeed, social media statements often consist of abbreviated words, character limits, and symbols.[139] Even more importantly, social media software innovations designed to facilitate communication "correct perceived spelling mistakes in real time and even

130. *Id.* at 356 (emphasis added).
131. *See id.*
132. *See id.* at 356.
133. *See id.* at 357.
134. *See id.*
135. *Id.*
136. *See id.*
137. *See* Bellin, *supra* note 105, at 364.
138. *Id.* (emphasis added); *see also* State v. Justice, No. W2008-1009-CCA-R3-CD, 2009 WL 1741398, at *5 n.4 (Tenn. Crim. App. June 15, 2009) (explaining that the text messages admitted against the defendant were actually "written in text message shorthand" and then interpreted at trial).
139. *See* Bellin, *supra* note 105, at 364.

attempt to predict the typist's words, sometimes with limited success."[140] In short, sarcasm, irony, and humor may be lost and/or be misinterpreted when jurors review statements out of context and without knowledge of the speaker's mood or idiosyncrasies.[141] Undoubtedly, such "short hand" linguistic concerns were also not on the Advisory Committee's mind when the present sense impression exception was codified.

Therefore, Professor Bellin aptly concludes that "the new breed of present sense impression evidence—typified by text messages, tweets, and Facebook status updates—is distinct from its historical analogue in both quantity and quality."[142] Thus, "[e]lectronic present sense impressions will be more readily available to modern litigators and, most significantly, can be presented at trial—for tactical reasons or out of necessity or sloth—without any corroborating witness testimony."[143]

3. Sincerity

Given the lack of corroboration discussed above, sincerity of present sense impressions is likely to suffer as well.[144] Historically, it was recognized that someone is more likely to utter a false or misleading statement about an alleged event if the audience for the statement does not include any observers of the event described.[145] The absence of other observers in the social media arena removes the prospect of immediate contradiction.[146] Hence, with Facebook, Twitter, and text messaging, sincerity concerns may rapidly increase because "[b]y physically distancing the speaker from her audience and thus minimizing the possibility of contradiction, these technologies enable exaggeration and deceit."[147]

Additionally, e-PSIs allow interested parties to "fabricate admissible evidence in anticipation of litigation."[148] Specifically, declarants can *intentionally* make false statements under their own name, anonymously,

140. *Id.* at 365.
141. *See id.*
142. *Id.* at 357.
143. *Id.* ("[A]s growing use of all cell phones, instant messaging, and electronic monitoring devices expands the number of occasions when contemporaneous statements of observations are narrated to others, the [present sense impression] exception may see expanded application." (alteration in original) (citing 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 272 (7th ed. 2013))).
144. *See id.* at 362.
145. *See id.*
146. *See id.*
147. *Id.*
148. *Id.*

or with "false attributions of authorship."[149] Professor Bellin observes that such potential abuse of the exception has always existed.[150] Yet, while a "declarant could walk the streets loudly voicing false observations or, in more recent times, record such observations on a tape recorder or in a voicemail message," such absurd hypothetical statements have little persuasive value compared to today's mainstream contemporaneous social media updates and text messages.[151] Moreover, the lack of a corroborating witness further magnifies these concerns since there would be no cross-examination regarding the circumstances of these statements to test their veracity.[152] Instead, the jury would be left with the hopeless task of assessing the truth of these statements without independent corroboration.[153] Therefore, sincerity concerns for e-PSIs further bolster the urgency to address deficiencies in the current present sense impression exception and lay further groundwork for reassessing the residual approach.

B. Excited Utterances and Social Media Risks

Professor Bellin briefly compares excited utterances to present sense impressions as a further means of demonstrating the need for change to address e-PSIs. Specifically, he recognizes that the excited utterance exception applies if a speaker makes a statement relating to a "startling" event while "under the stress of [the resulting] excitement."[154] Of course, excited utterances happen frequently. For example, "[i]f a witness (a bystander, participant, or victim) is present, a startling event will invariably trigger excited statements intended for a broad audience: 'Stop, thief!'; 'An assassin shot the Vice President!'"[155] Moreover, since excited utterances often stem from, or are at least correlated with, significant events, they are "also likely to be preserved in the memories of others or documented (for example, by police responding to a crime scene)."[156] "In fact, some scientific studies also suggest that a biological advantage exists

149. Bellin, *supra* note 105, at 362. Note, metadata may become increasingly important here when determining circumstantial reliability of authorship for statements contained in text threads.

150. *See id.* at 362–63.

151. *Id.* at 363.

152. *See id.*

153. *See id.* Indeed, even if the declarant is not *intentionally* falsifying a statement, social media statements often contain *puffery* and/or are exaggerated to draw traffic and "likes" to the page. *See id.*

154. *Id.* at 347 (alteration in original) (quoting FED. R. EVID. 803(2)).

155. *Id.* at 348.

156. *Id.*

for excited utterances: adrenaline generated during a startling event stimulates memory formation."[157]

To be clear, if a litigant is resorting to the present sense impression exception, the statement arises from a more mundane occurrence rather than a startling event or condition.[158] However, even with these distinctions from present sense impressions, excited utterances raise concerns in the social media era as well. Upon a closer look, many of the same deficiencies with the reliability of e-PSIs also occur with excited utterances. For this exception, such closer examination necessarily entails reviewing legal scholarship post-*Boyce*.

Post-*Boyce*, legal scholarship has expanded Judge Posner's critique of the excited utterance exception and linked such criticism to the objections the exception received around its codification. Specifically, Professor Alan G. Williams has provided that "despite the exception's potential attributes, two severe concerns underlie the exception: (1) the fabricating declarant; and, (2) the impaired or inaccurate declarant."[159] Hence, Professor Williams cautions that the exception "may allow into evidence statements that are flat-out lies, or statements that are no more reliable than ones mumbled during a night's sleep."[160]

First, for the *fabricating* declarant, there is no requirement of independent corroboration required to prove that a startling event occurred. The excited utterance itself may be cited as the only proof that a startling event even happened.[161] In other words, unlike other hearsay exceptions, the excited utterance exception enables "complete fabrication of not only the hearsay statement admitted as an excited utterance, *but also of the circumstances* that prove a startling event even occurred."[162]

Second, regarding *inaccuracy*, recall that nearly from the beginning of the excited utterance exception's codification, both psychologists and legal scholars have criticized the presumption of reliability from statements uttered by participants or observers after a startling event.[163]

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157. *Id.*; *see id.* (summarizing scientific research on the effects of stimulation on memory and explaining that "[w]hen encountering a vicious creature in the forest . . . the same adrenaline that helps you run away from it also helps you remember to avoid that path the next time" (citing Adam J. Kolber, *Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening*, 59 VAND. L. REV. 1561, 1571–74 & nn.59–61 (2006))).

158. *See id.* at 348–49.

159. Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 734 (2015).

160. *Id.* at 735.

161. *See id.* at 738 ("[A]lthough rarely is some other type evidence of the existence of the exciting event not available to corroborate its occurrence, 'the only evidence [of the exciting event] may be the content of the statement itself.'" (citing FED. R. EVID. 803 advisory committee's notes to 1972 proposed rules)).

162. *Id.* at 738–39 (emphasis added).

163. *See id.* at 741.

Essentially, for the excited utterance exception to function as Wigmore envisioned, 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."[164] Yet, the declarant may very well be "negatively affected by the stress from which she is still suffering."[165] Indeed, at least one psychological study found that a "startling event" had a negative effect on the accuracy of the declarants in which they accomplished a correct identification only 42% of the time.[166] This is because, while individual reaction to stress varies, researchers have predictably found that increased cortisol levels followed by increased heart rate results "in both a more defensive reaction and inhibited cognitive functionality."[167] Specifically, cortisol levels usually increase anywhere from 20 to 40 minutes after a stressful event and cortisol "impedes memory and recall."[168] Therefore, if courts admit excited utterances made 20 or more minutes after the event occurs, such statements are more likely inaccurate solely from elevated cortisol levels alone.[169] And this is without weighing any other impact by the physical and/or medical condition of the declarant generally.[170]

After reviewing these concerns of lack of a corroborating witness and circumstantial reliability, it is clear that social media excited utterances have similar risks to e-PSIs. Specifically, it is unlikely that an excited utterance from social media will be communicated to someone who is also physically present at the location where the statement is made. Likewise, social media excited utterances are stored in electronic records. Third, declarants of excited utterances on social media may simply misperceive the events that they speak about, especially when considering the impact of cortisol levels and stress that are not present with e-PSIs. Such misperceived statements would then be communicated into the social media avenues thereby creating further obfuscation and greater unreliability. Finally, as with e-PSIs, there is strong reason to think that declarants will be more incentivized to fabricate excited utterances given the increasing use of social media, and because interested parties may want to create evidence in anticipation of litigation.

Hence, at minimum, the circumstantial reliability safeguards required by the residual approach are now even more important to adequately address the inherent risks of both e-PSIs and excited utterances. This is

164. *Id.*
165. *Id.*
166. *See id.* at 742.
167. *Id.*
168. *Id.*
169. *See* Williams, *supra* note 159, at 742 (citing Margaret E. Kemeny, *The Psychobiology of Stress*, 12 CURRENT DIRECTIONS PSYCH. SCI. 124, 126 (2003)).
170. *See id.*

especially true in the increasing lack of corroborating witnesses to such statements.

C. Social Media Application to Cases

Per the above theoretical risks for both e-PSIs and excited utterances from social media, examining actual cases will highlight these difficulties in practice. Even just a few examples suffice to reveal such obstacles. To clarify, some cases below admit social media statements whereas others show the nuanced and problematic obstacles that *would* arise and become significant if social media statements occurred.

1. Present Sense Impression Cases

A helpful FRE 803(1) case study is *Houston Oxygen Co. v. Davis*,[171] which has been described as a "seminal present sense impression case."[172] In *Houston Oxygen*, a Texas appellate court held that a bystander's out-of-court comment that the occupants of a passing car "must [be] drunk" and will end up "somewhere on the road wrecked if they kept that rate of speed up" was admissible hearsay.[173] The court highlighted that the close temporal connection between the statement and the event it described reduced risks of misremembering and insincerity.[174] Moreover, the court also noted that such present sense impressions "will usually be made to another (the witness who reports it) who would have equal opportunities to observe and hence to check a misstatement."[175] Notably, the present sense impression in *Houston Oxygen* was offered at trial via the testimony of both the bystander who originally made the statement and the two people with her.[176] Hence, the three witnesses were able to testify and be cross-examined about the alleged reckless driving that prompted the statement.[177]

Regarding the *Houston Oxygen* decision, Professor Bellin plausibly stated: "The modern day analogue of Houston Oxygen could be a reckless-

171. *See generally* 161 S.W.2d 474 (Tex. 1942).

172. Bellin, *supra* note 105, at 333; *see Houston Oxygen*, 161 S.W.2d at 476; FED. R. EVID. 803(1) advisory committee's notes to 1972 proposed rules (identifying *Houston Oxygen* as an "[i]llustrative" case for the exception).

173. *Houston Oxygen*, 161 S.W.2d at 476.

174. *See id.* ("It is sufficiently spontaneous to save it from the suspicion of being manufactured evidence. There was no time for a calculated statement.").

175. *Id.* at 477.

176. *See id.* at 476.

177. *See id.* As Professor Bellin further notes, "[t]he trial court excluded the statement as hearsay, but the appellate opinion notes that the three percipient witnesses could have testified to its utterance if it had been admitted." *Id.* The opinion provides that one of these witnesses testified that the car was "travelling 'sixty or sixty-five miles' an hour, about four miles from the scene of the accident and that as it went out of sight it was 'bouncing up and down in the back and zig zagging.'" Bellin, *supra* note 105, at 334 n.7.

driving prosecution of pop star Justin Bieber in which the prosecution hinged its case on a pre-crash 'tweet': 'I just raced @justinbieber down Ventura in his Ferrari.'"[178] Under such a scenario, residual reliability factors are likely at play, which are beyond the plain language of FRE 803(1). As already noted, such residual reliability factors may include whether the declarant is available to testify, whether there was a corroborating witness who observed the incident and could verify the details or simply anything else that could bolster the "pre-crash tweet's" reliability, even if not explicitly required under FRE 803(1)'s text. A "pre-crash tweet" was essentially incomprehensible at the time of the Advisory Committee Notes and would not call for any special treatment under FRE 803(1)'s current plain language.

Another illustrative e-PSI case is *State v. Damper*, where a victim used her cellphone to text a friend just prior to the victim's murder. Specifically, the text stated: "Can you come over? Me and Marcus are fighting and I have no gas."[179] The Arizona Court of Appeals upheld the admission of the text and provided: "The text message at issue described an event, an argument between C. [victim] and Damper, perceived by the purported speaker, C, as evidenced by the statement, 'Me and Marcus are fighting.'"[180] The court further held that: "the speaker's use of the present tense, 'are fighting,' suggests she sent the message either during her fight with Damper or shortly thereafter."[181]

Additionally, the Arizona Court of Appeals held that there were no authentication deficiencies either. Specifically, the court rejected the argument that: "the text message could not be authenticated and lacked sufficient foundation because the State did not prove it was C. who sent the message."[182] Importantly, the Arizona appellate court noted that the lower superior court "does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic."[183] This is because "[s]ufficient evidence exist[ed] from which the jury reasonably could have concluded

178. Bellin, *supra* note 105, at 335–36. Relatedly, Professor Bellin notes that: This is a real tweet by celebrity Erik Schrody who tweets under the name "@OGEverlast." *Id.* (citing OGEverlast, I Just Raced @justinbieber, TWITTER (Aug. 30, 2011)); *see also The Evidentiary Significance of "Tweets," Texts and Status Updates (starring Justin Bieber)*, EVIDENCEPROF BLOG (Sept. 12, 2011), https://perma.cc/MM3R-MKZH ("What is particularly interesting about this sequence of events from an evidentiary perspective is the potential admissibility of Everlast's 'tweet' in any subsequent litigation."). This tweet further shows the plausibility of such events occurring more frequently as social media usage increases.

179. State v. Damper, 225 P.3d 1148, 1150 (Ariz. Ct. App. 2010).

180. *Id.* at 1152.

181. *Id.*

182. *Id.*

183. *Id.*

the text message B. received was, as the State argued, sent by C."[184] Indeed, "[a]t trial, B. testified she and C. often communicated with text messages. She explained that she had saved C.'s cell-phone number in her own cell phone, denominated by a nickname, and that when the text message at issue arrived the morning of the shooting, her phone displayed that nickname as the sender of the message."[185] In response, Damper argued that "anyone with access to the apartment he shared with C. could have sent the message."[186] However, "C's cell phone was found on the bed beside her body after the shooting, and Damper points to no evidence indicating that anyone other than C. used the phone that morning."[187] Therefore, both *Houston Oxygen* and *Damper* show how a case may hinge upon the admission of e-PSIs and, therefore, the necessity of circumstantial reliability for such statements. Indeed, the statement in *Damper* could have easily been a Facebook or Twitter statement instead of a text message that resulted in a friend or relative calling the police to assist the victim.

Before moving on from present sense impression cases, a useful thought-experiment is to hypothesize the impact of social media statements in the FRE 803(1) cases cited by Judge Posner in *Boyce*. Recall that Judge Posner cites cases interpreting "immediacy" as encompassing periods as long as "23 minutes,"[188] "16 minutes,"[189] and "10 minutes."[190] As discussed below, courts employed a *covert* residual approach, even *without* social media statements at issue.[191] Hence, the key issue is: how much more nuanced do these cases become if they involved social media statements and judges *still* employed the present sense impression

184. *Id.* at 1153.

185. *Id.*

186. *Id.*

187. *Id.*

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

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

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

191. Recall that the Tenth Circuit recently underscored the immense judicial discretion employed regarding present sense impressions by holding that 911 calls specifically are a "large gray area" involving statements "that could reasonably be regarded as either contemporaneous or non-contemporaneous." United States v. Lovato, 950 F.3d 1337, 1351 (10th Cir. 2020) (Bacharach, J., concurring). For these statements, "district courts have *broad discretion* in determining admissibility." *Id.* (emphasis added).

exception with such elasticity? In other words, when the judges stretched the present sense impression exception in the cases Judge Posner cites, what circumstantial information/factors did they rely upon? Additionally, would such factors even still be *possible* to consider with social media statements? Whatever the answer, the clear indication is that the plain language of FRE 803(1)'s text alone is inadequate to adequately assess the scope of the reliability factors at play. Indeed, from the cases below, the need for residual reliability determination in the social media arena becomes even more apparent.

Specifically, the Seventh Circuit's decision in *United States v. Blakey* provided that "there is no per se rule indicating what time interval is too long under Rule 803(1)."[192] Notably, the Seventh Circuit strongly implied that it conducted a residual analysis by stating that: "the admissibility of statements under hearsay exceptions depends upon *the facts of the particular case*."[193] In other words, the key implication is that if the timespan is arguably too long between the statement uttered and the corresponding event to qualify under FRE 803(1), the statement may still be admissible if the facts show *circumstantial reliability*.[194] In fact, the Seventh Circuit stated that admissibility was based, at least in part, on "substantial *circumstantial evidence* corroborating the statements' accuracy."[195] Therefore, one may logically deduce that if there were no "substantial circumstantial evidence,"[196] the Seventh Circuit likely would have concluded the trial court abused its discretion and that the statement was inadmissible.

Notably, the Seventh Circuit never attempted to argue that 23 minutes equals "immediacy," despite the language of FRE 803(1), likely because then the court's application would openly go beyond the plain meaning of the term. However, the present sense impression exception's fate becomes even worse because now, with e-PSIs, the very circumstantial reliability/corroborating witnesses that cases like *Blakey* rely upon are *less likely to exist*. Indeed, this is evident from Professor Bellin's research discussed above. So, *Blakey* is a prime example of the covert residual approach already at play for present sense impressions. Plus, if social media evidence *were involved*, then there is further reduction of

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

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

194. *See id.*

195. *Blakey*, 607 F.2d at 786; *see id.* ("The trial court was justified in finding that the time interval was not so great as to render Rule 803(1) inapplicable to Dyer's statements. This finding, coupled with *the substantial circumstantial evidence corroborating the statements' accuracy* indicate that the trial court acted properly in admitting these statements." (emphasis added)).

196. *Id.*

circumstantial reliability, and a residual analysis would be appropriate rather than a plain categorical approach of FRE 803(1).

Relatedly, such covert application of the residual model is not isolated to *Blakey* or the Seventh Circuit. The same residual approach was used by both the Eastern District of New York in *United States v. Mejia-Velez*[197] and the Supreme Court of North Carolina in *State v. Odom*.[198] In *Mejia-Velez*, the Eastern District of New York provided that although the second statement was sixteen minutes after the first: "This call was also made without any motivation for fabrication" and the "recitation of the event was consistent with his first call and with the other testimony in the case."[199]

Similarly, in *Odom*, the Supreme Court of North Carolina admitted a statement as a present sense impression even though it was made ten minutes after the event.[200] Specifically, the court noted that "Officer Roberts, a Durham Public Safety Officer, responded to the call and arrived on the scene ten minutes later. Mr. Hartell then described the abduction, the victim's car, and the appearance of the two assailants."[201] Once again, admissibility appears to be based, at least in part, upon the declarant's ability to correctly identify and describe the victim's car and the appearance of the two assailants.[202] Hence, this is another instance of *independent corroboration* of the circumstances surrounding the present sense impression. Therefore, *Blakey*, *Mejia-Velez*, and *Odom*, each show a covert application of the residual approach.

As already alluded, the *cumulative impact* of cases like *Blakey*, *Mejia-Velez*, and *Odom* combined with Professor Bellin's social media concerns and cases like *Houston Oxygen* and *Damper* is telling. On the one hand, *Blakey*, *Mejia-Velez*, and *Odom* admitted statements that are likely reliable, despite not meeting the plain language of FRE 803(1)'s immediacy requirement. Notably, this is because of the circumstantial

197. *See* United States v. Mejia-Velez, 855 F. Supp. 607, 614 (E.D.N.Y. 1994).

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

199. *Mejia-Velez*, 855 F. Supp. at 614; *see id.*:

> The second call placed by Gajewski was admittedly 16 minutes after the completion of his first call. This call, however, was also made without any motivation for fabrication on Gajewski's part. Indeed, his recitation of the event was consistent with his first call and with the other testimony in the case.

Id. (emphasis added); *see also* United States v. Parker, 936 F.2d 950, 954 (7th Cir. 1991) (concluding that the admission of statements under Rule 803(1) was "buttressed by the [statements'] intrinsic reliability."). While the court in *Mejia-Velez* did note the statement's "intrinsic reliability," the court also emphasized the declarant's "motivation" and consistency with "other testimony," meaning it relied upon on extrinsic evidence to the statement as well. *Mejia-Velez*, 855 F. Supp. at 614. Note that "motivation" is not a requirement for admissibility under FRE 803(1). *See* FED. R. EVID. 803.

200. *See Odom*, 341 S.E.2d at 336.

201. *Id.*

202. *See id.*

reliability, such as other *corroborating testimony* in the case or other circumstantial details correctly identified by the declarant. On the other hand, recall that Professor Bellin notes that social media statements, like e-PSIs, will be both more "frequent" than traditional present sense impressions and will likely be *less reliable*.[203] Once again, this two-prong deficiency of ongoing judicial elasticity *coupled with* forthcoming increased reliability concerns from social media provides further ammunition for abolishing the current rigid exception. Finally, this cumulative impact is even more crucial when recalling the psychological research that "less than one second is required to fabricate a lie."[204] Hence, the need for a residual case-by-case assessment continues to be shown.

2. Excited Utterance Cases

One older posterchild case that illustrates how social media complications could arise with excited utterances is *People v. Simpson*, where the complainant claimed that Simpson threatened her with a box-cutter, pushed her into an alley, robbed her, and then sexually assaulted her.[205] The complainant further asserted that Simpson then attempted to force the complainant up to her apartment with the potential goal of stealing more from her and sexually assaulting her again.[206] However, two of the complainant's friends happened to pass by and helped her escape from Simpson.[207] The complainant and her friends then proceeded to chase Simpson for a period of time.[208] Five minutes after the incident occurred, and while her friends were still chasing Simpson, the complainant called the police from her apartment and reported (on a recorded 911 call) that

203. Bellin, *supra* note 105, at 356–57.

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

205. *See* 656 N.Y.S.2d 765, 766 (N.Y. App. Div. 1997).

206. *See id.* at 766.

207. *See id.* at 766–67.

208. *See id.*

her attacker had a gun and a knife, even though Simpson never had a gun.[209] Notably, during Simpson's trial, the complainant testified that she *intentionally* lied about the defendant possessing a gun and justified the lie by stating: "I knew that if I said there was a gun, that the cops would come quicker."[210] Despite Simpson's objection, the trial court admitted the complainant's hearsay statements on the 911 recording as excited utterances.[211]

Simpson was convicted and he appealed.[212] The appellate court affirmed the conviction and the trial court's admission of the complainant's recorded statements on the basis that the excited nature of the statements after such a horrifying event "overcomes the significance of her admitted lie to the police about the gun."[213] Importantly, the appellate court specifically underscored that "the complainant's presence on the witness stand provided an additional justification for admission . . . since the defendant had the opportunity to verify and test the trustworthiness of her statements by cross-examination."[214] Yet, fast-forward into the present social media era and suppose that the statement was instead uttered via a Facebook post, tweet or text message. And further suppose that the declarant did not appear for cross-examination, but the statement was accurately preserved in electronic records. While the exact circumstances cannot fully be ascertained in such a hypothetical, the takeaway is that such social media evidence facilitates statements that are the *product of reflection*. And if such statements are still admitted as "excited utterances," the admissibility will, again, likely be based upon factors beyond the plain text of FRE 803(2), which bleeds back into a residual analysis. In short, as with present sense impressions, the factors proving circumstantial reliability (i.e. a corroborating witness) are likely nonexistent for electronic excited utterances as well, which further supports abolishing the exception as outdated and protecting against fabrication.

More recently, in *State v. Magers*, the Washington Supreme Court affirmed admission of an excited utterance even though the declarant lied to police in a portion of the statement.[215] Specifically, the Washington Supreme Court provided that "[w]e agree with the Court of Appeals that the fact that [the declarant] told the police a falsehood when she denied [the defendant's] presence in her house does not mean that the remainder

209. *See id.* at 767.
210. *Id.*
211. *See id.*
212. *Id.*
213. *Id.*
214. *Id.* at 767–68 (citing People v. Buie, 658 N.E.2d 192, 198–99 (N.Y. 1995).
215. *See* 189 P.3d 126, 134 (Wash. 2008) (en banc).

of her statements were not spontaneous and truthful."[216] Again, however, the point remains that the defendant was capable of fabricating *at least part of* an excited utterance, even without considering additional risks from social media evidence.

Next, an example of an actual excited utterance text message case is *State v. Ford* decided in 2010.[217] In *Ford*, a Nebraska court admitted the following rape victim's text message to her roommate on the grounds that it was an excited utterance.[218] Specifically, the statement provided: "I just got raped .. By Jake .. I don't know what to do . . . ."[219] As further corroboration, the victim testified that "a police officer took both a photograph of the contents of the text message from the screen of her cellular telephone and a photograph showing the date and time of its transmission."[220] The defendant objected on hearsay grounds, but was overruled. This is notwithstanding that the victim testified that they estimated that "the text message was sent about *10 minutes* after her encounter with [defendant],"[221] meaning that the victim likely had *the opportunity to reflect* before making the statement. Hence, the *cumulative impact* of judicial elasticity and social media unreliability intersects again.

Even more broadly than text message cases like *Ford*, another way in which courts have covertly performed a residual analysis under FRE 803(2)'s "under stress" requirement is when a child utters an out-of-court statement about sexual abuse.[222] The "first opportunity" test has been adopted allowing FRE 803(2)'s requirement of being "under stress" to cover statements by a child who does not report the startling events for as long as *hours or days*.[223] Hence, "the lapse of time is not measured from the event itself but rather from the time of the 'first real opportunity' to report the events to a care-taker."[224] Notably, the Fourth Circuit, in *Morgan v. Foretich*, applied the "first opportunity" test in a "liberal way" in which "the child waited *several hours* after being reunited with the mother to speak with her."[225] Moreover, *Morgan* "also invoked the discretionary trustworthiness factor by relying on the circumstantial

216. *Id.*
217. *See* 778 N.W.2d 473, 482 (Neb. 2010).
218. *See id.*
219. *Id.* (alterations in original).
220. *Id.*
221. *Id.* at 456 (emphasis added).
222. Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 492–95 (1992); *see also* Morgan v. Foretic, 846 F.2d 941, 945–47 (4th Cir. 1988) (adopting the "first real opportunity" test of spontaneity on grounds that children's lack of understanding of abusive events, and the fear and guilt they experience, cause them to delay reporting).
223. *Id.*
224. *Id.*
225. Swift, *supra* note 222, at 494; *see Morgan*, 846 F.2d at 947 (emphasis added).

guarantees of the trustworthiness" of the child's statements that "had nothing to do with whether the statements were excited utterances."[226] The "circumstantial guarantees" include the child's method of "speaking—touching herself and use of vocabulary and her physical condition."[227]

From just the above cases/applications alone, Professor Williams accurately notes that: "even though circumstances appear to demonstrate the declarant still remains under the stress of an exciting event—who would ever dispute that, five minutes after someone is robbed and raped at knife-point and is about to be robbed and perhaps raped again, she is still under the stress of the incident—the declarant *clearly had the mental and reflective acumen to fabricate a lie* designed to accomplish the arrest of her assailant."[228] Indeed, many argue that admission of statements such as those made by the complainant in *Simpson* is "exactly what is wrong with the excited utterance exception."[229] More generally, Professor Williams also asserted that "one can easily envision a scenario where a wily declarant could employ the excited utterance as a means to perpetrate a fraud on the court in an effort to manipulate an unjust outcome or escape prosecution."[230] And once again, this hypothesis is made without even factoring in the increased reliability risks from social media statements.

Finally, to illustrate the reliability concerns with one more scenario, consider the following hypothetical derived from Professor Williams, but tailored to social media for this Article.[231] "A man who legally owns a handgun [is] convicted of felony assault for allegedly threatening his ex-girlfriend with his firearm under the following facts"[232]: an allegedly frantic declarant sends a text message and/or posts on social media that her ex-boyfriend is holding a gun on her and is threatening to shoot her unless she takes him back. A friend receives the victim's text message and/or views the statement on social media and then calls the police for the alleged victim.

"The police arrive at the declarant's apartment and she provides a description of her ex-boyfriend, who is arrested a few blocks away as he

226. Swift, *supra* note 222, at 495.

227. *Id.* Note, the "first opportunity" test has been applied in other circuits to young victims as well. *See, e.g.*, United States v. Dee, 319 F. App'x 578, 581 (9th Cir. 2009) (holding that victim's statement qualified as excited utterance, and thus was admissible as exception to hearsay rule, in prosecution for aggravated sexual abuse, where victim experienced ongoing state of danger and severe stress as he fled and hid from his pursuing assailant, and in light of young age of victim, circumstances of assault and subsequent escape, fact that defendant was pursuing victim as he attempted to escape, and fact that victim made statement at *first real opportunity* to report incident).

228. Williams, *supra* note 159, at 736 (emphasis added).

229. *Id.*

230. *Id.*

231. *See id.* at 739.

232. *Id.*

walks down the sidewalk; police [then] find a loaded handgun in his possession; [but] at trial, the declarant refuses to testify."[233] The only evidence presented by the prosecutor is the declarant's social media statement/text message (admitted as an excited utterance) and "testimony from the police regarding the declarant's condition upon arriving at the scene, her description of the ex-boyfriend, and details of the ex-boyfriend's arrest."[234] While the prosecutor asserts that they are not required by the excited utterance exception to produce any corroboration of the exciting event other than the declarant's statement, they argue to the court that possession of the handgun by the defendant when the police arrested him is *sufficient corroboration* of the exciting event and establishes the truth of the declarant's statement.[235] Indeed, there is more than a plausible chance that the defendant will be convicted, "especially if the prosecutor explains to the jury that domestic violence victims often refuse to testify against their abusers."[236]

Alarmingly, however, "the declarant could have fabricated the *entire incident*, her knowledge and description of the defendant's handgun coming solely from the period in which they were still together when she presumably could have seen it, held it, or even fired it herself."[237] And now, such fabricating declarants no longer need 911 calls to fabricate these narratives, but instead can also utter them via social media with ease. Professor Williams concludes this hypothetical by stating that it appears that "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."[238] Moreover, there is also the risk that the declarant may utter a false statement on social media *by mistake* when being startled as well, even if less dire than intentional fabrication. Either way, the two-prong deficiency of (1) courts conducting a covert residual approach analysis and (2) the increased reliability risks that arise with social media excited utterances support abolition of the exception.

V. THE SUPERIORITY OF THE RESIDUAL APPROACH AND ANSWERS TO OBJECTIONS

After highlighting the inadequacies of FRE 803(1)–(2), the issue remains of addressing the most common objections the residual approach has received. Hence, this Part reviews some pertinent case law post-*Boyce*

233. *Id.*
234. *Id.*
235. *See id.*
236. *Id.*
237. *Id.* at 740.
238. Williams, *supra* note 159, at 740.

showing favorable treatment to the residual exception's rationale, plus commentary from various legal scholars lodging objections. In short, this Part concludes that the residual approach is a superior replacement to the traditional present sense impression and excited utterance exceptions, despite any objections raised.

A. Favorable Judicial Commentary Post-Boyce

The New York Court of Appeals heard two cases post-*Boyce* related to Judge Posner's concurrence and the issue of whether an out-of-court statement had been improperly admitted as an excited utterance: *People v. Cummings*[239] and *People v. Almonte*.[240]

First, in *Cummings*, the Court of Appeals held the trial court erred in admitting an out-of-court statement as an excited utterance, which resulted in a reversal of the defendant's conviction.[241] Second, in *Almonte*, the Court of Appeals, assuming that it was error to admit the out-of-court statement as an excited utterance, held the error was harmless.[242] While no argument was made by the defendant in *Cummings* that the excited utterance exception should be abolished, the defendant in *Almonte* did make that argument, but the court held the argument was not preserved for appellate review since it was not raised before the trial court.[243]

Judge Rivera raised Judge Posner's criticism of the excited utterance exception *sua sponte* in her concurring opinion in *Cummings*,[244] despite the court's reversal of the defendant's conviction because of the error in admitting the out-of-court statement as an excited utterance. Additionally, Judge Rivera raised these concerns in her dissenting opinion in *Almonte*,[245] even though the argument was not preserved for oral argument.[246] While no judge joined her concurring opinion in *Cummings*, Judge Rowan Wilson joined her dissenting opinion in *Almonte* in a separate dissenting opinion.[247] Each case is reviewed in more depth below.

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239. *See* People v. Cummings, 99 N.E.3d 877, 879 (N.Y. 2018).

240. *See* People v. Almonte, 130 N.E.3d 873, 875 (N.Y. 2019).

241. *See Cummings*, 99 N.E.3d at 883.

242. *See Almonte*, 130 N.E.3d at 875 (citing People v. Kello, 746 N.E.2d 166, 168 (N.Y. 2001); People v. Crimmins, 326 N.E.2d 787, 793–94 (N.Y. 1975)).

243. *See* Hutter, *supra* note 3, at 705 (citing Brief for Appellant-Defendant at 30, People v. Almonte, 130 N.E.3d 873 (N.Y. 2019) (No. 0923/12) and *Almonte*, 130 N.E.3d at 875).

244. *See Cummings*, 99 N.E.3d at 884–86 (Rivera, J., concurring) (quoting United States v. Boyce, 742 F3d 792, 801–02 (7th Cir 2014) (Posner, J., concurring)).

245. *See Almonte*, 130 N.E.3d at 885–86 (Rivera, J., dissenting) (citing *Cummings*, 99 N.E.3d at 884–85 (Rivera, J., concurring) and *Boyce*, 742 F3d at 801–02 (Posner, J., concurring)).

246. *See* Hutter, *supra* note 3, at 729.

247. *See id.* (citing *Almonte*, 130 N.E.3d at 886 (Wilson, J., dissenting)).

In *Cummings*, Judge Rivera explicitly called for the abolition of the excited utterance exception.[248] Specifically, Judge Rivera echoed Judge Posner's concerns by stating: "Legal scholars and jurists have questioned the continued vitality of this exception, in light of advances in psychology and neuroscience that demonstrate an individual's inability to accurately recall facts when experiencing trauma, and, in turn, to create falsehoods *immediately*."[249] Judge Rivera then proceeded to quote Judge Posner's concurrence in *Boyce*: "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."[250]

Notably, Judge Rivera then cited two recent law review articles, which summarize psychological research that supports abolishing the excited utterance exception. First, Judge Rivera cites Professor Steven Baicker-McKee who reiterated: "Psychological studies suggest that stressful events trigger the 'fight-or-flight' response, and that deceptive statements are not only possible, they can be a *natural component* . . . A traumatic event dramatically increases cognitive load, leading to perception deficits and distortions." [251] Thus, "excited witness perceptions tend to be unreliable for many reasons."[252] Second, Judge Rivera cited Professor Melissa Hamilton who provided: "Evidence law's entrenchment in a precedential schematic relying upon longstanding tradition as proving any rule's validity is unfortunate in light of advances in scientific knowledge concerning human cognitions, physiological functioning, psychological experiences, and purposeful actions."[253] Therefore, Judge Rivera concluded that: "[i]t appears that only *tenuous support exists* for the proposition that a declarant's event-concurrent statements should evade traditional evidentiary requirements, and thus for this judicially-created 'excited utterance' exception."[254] Indeed, as both Judge Rivera and Judge Posner articulated, "[c]ertainly, 'judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas' is no reason to guard this exception so tightly especially in the face of criticism stemming from an informed understanding of human cognitive behavior."[255]

248. *See Cummings*, 99 N.E.3d at 885 (Rivera, J., concurring).

249. *Id.* at 886 (emphasis added).

250. *Id.* (quoting United States v. Boyce, 742 F.3d 797, 801–02 (7th Cir. 2014)).

251. *Cummings*, 99 N.E.3d at 885 (citing Steven Baicker–McKee, *The Excited Utterance Paradox*, 41 SEATTLE U.L. REV. 111, 114 (2017)).

252. *Id.*

253. *Id.* at 885–86.

254. *Id.* at 886 (emphasis added).

255. *Id.* (quoting *Boyce*, 742 F.3d at 802 (Posner, J. concurring)). Again, as noted earlier, the defendant in *Cummings* did not actually challenge the *premise* of the excited

Similarly, in *Almonte*, Judge Rivera continued her critique of the excited utterance exception.[256] Besides citing *Boyce* and other sources mentioned above, she also notes other sources, cited by the defendant, which further support abolishing the exception.[257] Interestingly, Judge Rivera faulted the defendant for not "developing a record below on the state of the science."[258] Ultimately, the clear implication is that Judge Rivera encouraged defendants to either submit the research questioning the premise behind the exception or for the court to hold a *Frye*-type hearing to assess if the exception's justification is generally accepted by the relevant scientific community.[259] Thus, Judge Posner's rationale for abolishing the excited utterance exception, and similar concerns to the present sense impression exception, has received judicial support post-*Boyce*, which bolsters the residual approach's credibility.[260]

B. Answering Objections

1. Advisory Committee Response to Judge Posner

Notwithstanding Judge Posner's favorable treatment from Judge Rivera, the Advisory Committee previously rejected Judge Posner's model on October 21, 2016, and labeled it as an "all-out discretion fest."[261] Recall that the Committee fully provided:

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utterance exception on appeal, but Judge Rivera nonetheless voiced these concerns for future cases applying the exception.

256. *See* People v. Almonte, 130 N.E.3d 873, 885–86 (N.Y. 2019) (Rivera, J., dissenting).

257. Specifically, the defendant cited Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 719–720 (2015) and Aviva Orenstein, *"My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159, 178 (1997). *See Almonte*, 33 N.Y.3d at 885–86.

258. Hutter, supra note 3, at 731 (citing *Almonte*, 130 N.E.3d at 886); *see Almonte*, 130 N.E.3d at 886 ("This would have permitted the trial court to render a decision on whether, apart from the legal scholars' criticism of the exception, there is support for the proposition he asserts here, and also would have allowed the People to respond.").

259. *See id.*

260. To be clear, Professor Hutter seems correct that: "no appeals court or appellate judge in the United States, other than Judge Rivera, has called for the abolition of the excited utterance exception since *Boyce* was decided in 2014." *Id.* However, Professor Hutter's criticism misses the point because Judge Rivera is essentially reiterating the criticisms that the exception has received as far back as the Advisory Committee Notes. The fact that these criticisms have been consistently made for so long, plus the recent psychological studies and subsequent judicial support for abolition post-*Boyce*, all bolsters the case for a residual approach.

261. *See* Memorandum, *supra* note 10, at 10; Gary Dunn, *The Residual Exception's Renaissance*, 17 GEO. J.L. & PUB. POL'Y 737, 738 (2019). Some of the arguments from this Part are based, in part, on this author's previous work published with express permission.

> One can hope that there is a sweet spot somewhere between outright rejection of a residual exception—which could result either in the loss of a good deal of reliable evidence or an unwelcome expansion and misshaping of the standard exceptions—and an all-out discretion fest as championed by Judge Posner.[262]

Moreover, in its fall 2016 meeting, the Advisory Committee highlighted the minutes of the spring meeting, which indicated that "[a]t the Hearsay Symposium, the Committee heard *repeatedly* from lawyers that they wanted *predictable hearsay exceptions*—–judicial discretion would lead to inconsistent results and lack of predictability would raise the costs of litigation and would make it difficult to settle cases."[263]

Further recall that after *Boyce*, Judge Posner wrote an article and appeared to be more restrained, stating that he is "not yet ready to endorse the abolition of the hearsay rule."[264] However, Judge Posner's clarification that the entire hearsay rule should not yet be eliminated still leaves the core of his *Boyce* concurrence intact for purposes here. Specifically, Judge Posner still asserted in the same article that the present sense impression and excited utterance exceptions should be abolished.[265]

The "discretion fest" claim will be addressed in more depth below as it is nearly always the foundational premise of residual approach objections. In short, the panic about increased discretion is largely illusory given the covert elasticity that judges have *already applied* to the present sense impression and excited utterance exceptions discussed above. Additionally, any increased discretion that does occur is actually *preferable* in certain cases to address current social media reliability concerns. However, before specifically discussing the judicial discretion issue, concessions from the Federal Judicial Center are noteworthy as well.

2. Federal Judicial Center Critiques

The Federal Judicial Center has authored a 24-page memorandum defending the reliability of the present sense impression and excited utterance exceptions post-*Boyce*.[266] Specifically, the Federal Judicial Center "does not recommend conducting experiments about the accuracy of observation underlying [excited utterance] hearsay evidence."[267] The Federal Judicial Center provided two reasons for this conclusion. First, the

262. *Id.*
263. *Id.* at 110–11 (emphasis added).
264. Posner, *supra* note 78, at 1467.
265. *See id.* at 1470.
266. *See* Memorandum, *supra* note 13, at 24.
267. *Id.* at 23–24.

literature "posits that emotionally arousing stimuli can draw attention and perceptual resources."[268] Second:

> If an event or condition so happens to be startling to the declarant, then any contemporaneous statement the declarant makes "under the stress of excitement" and "relating to [the] . . . event or condition" will be an [excited utterance]. There is no possibility of revisiting the startling event or condition to obtain the contemporaneous statement that the declarant would have made absent the stress of excitement.[269]

Tellingly, however, the Federal Judicial Center still concedes that there are psychological deficiencies with the excited utterance exception. Specifically, the Center admits that: "[e]motion, as broadly defined, can impair some cognitive processes important for accurate observation. This can be particularly relevant in emotional situations where [excited utterance] hearsay evidence is created."[270] Furthermore, the Federal Judicial Center's memorandum is even more troublesome because it never contends with the examples cited above where courts have performed a masked residual analysis while citing the excited utterance exception. Nor has the Federal Judicial Center ever grappled with the first opportunity test and its reliability risks either. By not discussing the current covert residual analysis taking place under the excited utterance label, coupled with the Federal Judicial Center's recommendation not to conduct experiments about psychological reliability,[271] the memorandum does not alter the logic for abolishing the exception. Finally, the memorandum also does not address any of the new reliability risks posed by social media either.

Like the excited utterance exception, the Federal Judicial Center also concludes that "experimental studies on the accuracy of observation underlying [present sense impression] hearsay evidence seem unnecessary."[272] The justification is that "[r]esearch literature shows that

268. *Id.* at 23.

269. *Id.* at 24. The Federal Judicial Center provided, "accordingly, even if the difference in the accuracy of observation under 'stress of excitement' and under a state of dispassion could somehow be experimentally quantified, it may yield no useful conclusion about whether EU as a whole should be admissible hearsay evidence." *Id.* at 24.

270. *Id.* at 23. The memorandum elaborates in its section II.C.2 on the ways in which emotion can impair the cognitive processes important for observations and cites several studies in support of this proposition. *Id.* at 13–14; *see also* Angela S. Attwood et al., *Acute Anxiety Impairs Accuracy in Identifying Photographed Faces*, 24 PSYCHOL. SCI. 1591, 1593 (2013); S.L. Mattys et al., *Effects of Acute Anxiety Induction on Speech Perception: Are Anxious Listeners Distracted Listeners?*, 24 PSYCHOL. SCI. 1606, 1608 (2013).

271. This is especially concerning when providing guidance to the Advisory Committee about hearsay reform after considering that the Federal Judicial Center also indicated that "[t]here currently is no complete understanding of how emotion affects mental processes, and emotion is itself a broad term that encapsulates many emotional states." Memorandum, *supra* note 13, at 13.

272. *Id.* at 22.

attention generally improves the accuracy of observation."[273] However, this recommendation does not address the separate question of whether residual analysis occurs under the *label* of the present sense impression exception. Indeed, the Center *never* addresses that enormous time gaps, such as 23 minutes, have still been interpreted as "immediate" under FRE 803(1) or the further challenges posed by social media evidence.[274] Thus, the cumulative impact of the Center's recommendation to not pursue further experiments into the reliability of present sense impressions, the Center's failure to address the elasticity in which judges employ the exception, and the fact that "no research to date appears to have tested the situational factors necessary for a declarant to successfully falsify [present sense impressions],"[275] further magnifies FRE 803(1)'s reliability deficiencies. And again, such concerns are compounded when observing social media obstacles, as raised by Professor Bellin.[276]

Interestingly, Professor Hutter surmises that "[i]n essence, the Federal Judicial Center supported the trustworthiness of the exception post-*Boyce*."[277] Moreover, another commentary relying upon Professor Hutter also cautions that "when the relevant statistical evidence is unsettled and inconsistent, the best approach is to play it safe, so to speak."[278] The commentary further asserts that "[a]lthough Posner's 2014 concurring opinion in *Boyce* has sparked conversation among scholars and prompted the publication of numerous articles, at this point there is no need to continue 'sounding the alarm' and that the excited utterance and present sense impression exceptions should be 'left to rest.'"[279] However, the Center's concessions above tell a different story. If such inaction remains, then *covert* ongoing residual analysis *also* remains as Judge Posner shows, *despite* the Center's psychological concessions in the memorandum. Thus, the memorandum still lends further credence to adopting the residual approach.

3. "Discretion Fest" or Exaggerated Hyperbole

By far, the chief scholarly objection to replacing the present sense impression and excited utterance exceptions with the residual approach is the alleged judicial "discretion fest" that will ensue.[280] Professor

273. *Id.*
274. *Blakey*, 607 F.2d at 785–86.
275. Memorandum, *supra* note 13, at 5.
276. *See* Bellin, supra note 105, at 333.
277. Hutter, *supra* note 3, at 728.
278. Mara D. Afzali, *Letting Sleeping Dogmas Lie: A Response to Judge Posner's Call to Reform the Res Gestae Exceptions to the Rule Against Hearsay*, 80 ALB. L. REV. 595, 615 (2017).
279. *Id.*
280. Memorandum, *supra* note 10, at 10.

Imwinkelried has broken down such critiques as stating that: (1) judges will be compelled to apply the residual approach for these exceptions on a case-by-case basis, causing substantial uncertainty;[281] and (2) very few states will adopt the residual approach due to judicial uncertainty of admissibility.[282] In response, this Section first argues that the bulk of this feared increased discretion is illusory since the residual approach is already employed covertly and, second, that such discretionary analysis can function adequately, analogous to the discretionary standard for measuring prejudice under FRE 403 and assessing character evidence under 404(b).

Indeed, as repeatedly discussed throughout this Article, in several cases present sense impressions and excited utterances serve as mere labels for the residual approach. Again, recall the striking example that 23 minutes satisfies the "immediacy test" under FRE 803(1), coupled with Professor Bellin's persuasive concerns about the rampant frequency and reliability concerns with social media statements.[283] Hence, the residual approach allows the *same* discretion to continue in such cases, but without judicial stealth. Moreover, even if *no state* adopted the residual approach, federal judges would at least be bound to increased transparency from the residual approach.

Equally unpersuasive is the general argument that a residual approach should not be adopted for the present sense impression and excited utterance exceptions because such an approach would require a case-by-case analysis by the presiding judge. Indeed, such concerns directly contradict how courts routinely weigh evidentiary prejudicial value against probative value under FRE 403 and the admission of character evidence under FRE 404(b). Under FRE 403, federal judges may exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[284] Notably, FRE 403 fails to define *any* of these terms when weighing "substantial evidence," which necessarily results in case-by-case judicial discretion applying the rule.[285]

Similarly, FRE 404(b) provides that character evidence of a previous crime is not admissible to prove "that on a particular occasion the person acted in accordance with the character," but that such evidence *may* be admitted to establish "motive or opportunity."[286] However, like FRE 403,

281. *See* Imwinkelried, *supra* note 77, at 468 ("The practical problem is that Rule 807's language grants the trial judge an enormous amount of discretion.").

282. *See id.*

283. *Blakey*, 607 F.2d at 86; Bellin, *supra* note 105, at 356–57.

284. FED. R. EVID. 403.

285. *See id.*

286. FED. R. EVID. 404(b).

judges must again decide on a case-by-case basis whether the evidence at issue meets the standard. Thus, it is a non sequitur to conclude that the residual approach should not replace FRE 803(1)–(2) solely because there may be increased judicial discretion in *some* cases. If the mere potential for judicial discretion mandates rejecting an approach, then abolition of FRE 403 and 404(b) follows as a corollary, which no critic of the residual approach alleges. This is unsurprising because both FRE 403 and 404(b) are foundational in the Rules of Evidence and their abolition would drastically alter civil and criminal litigation.

Per the above reasoning, other commentaries with related objections fall like a "house of cards." For example, Professor Ronald J. Allen argues that Judge Posner's residual approach proposal is flawed since there is "no data that indicates that trial judges can do a better job of picking and choosing what hearsay is reliable than the rules presently do, and in any event the rules give them the power to adjust things *at the margins*."[287] However, such criticism again misstates the issue. The issue here is not about judges having discretion to adjust statements *at the margins*. Rather, the issue is judges *pretending* to apply "brightline" or "virtually brightline" exceptions, when doing the exact opposite, such as holding that 23 minutes equals "immediacy" and weighing circumstantial considerations such as whether there is a corroborating witness. If anything, judges are equipped to do a "better job" under the residual approach of *openly* assessing admissibility without attempting to force a statement into a certain exception.[288] And there is no better time to require such openness than during the rise of social media evidence for e-PSIs and excited utterances.

4. Economic Considerations and Settlement Discussions

After reviewing the applicable literature, arguably the most in-depth economic analysis of Judge Posner's concurrence and the residual approach is Professor Liesa L. Richter.[289] Building from the discretion concerns above, Professor Richter asserts that "[a] likely casualty of adopting a generic reliability approach to hearsay would be litigation efficiency and valuation."[290] In other words, the residual approach articulated in *Boyce* would allegedly "result in an increased expenditure of judicial and litigant resources to ascertain the admissibility of key hearsay

287. Ronald J. Allen, *The Hearsay Rule as a Rule of Admission Revisited*, 84 FORDHAM L. REV. 1395, 1401 (2016) (emphasis added).

288. *Id.*

289. *See* Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1882 (2016).

290. *Id.*

evidence and the corresponding value of a case."[291] Hence, the argument cautions that "[a]t a time when mounting costs are diminishing the viability of the trial process as a vehicle for dispute resolution, evidentiary reforms that promise to increase transaction costs should be cause for concern."[292]

Professor Richter further submits that "[i]n litigation, some of the principal assets and liabilities come in the form of evidence admissible at trial to prove one's position."[293] Her overarching concern is that "Judge Posner's discretionary approach to hearsay evidence would require litigation investors to 'buy' into a litigation strategy by filing or defending a lawsuit, although they would learn the true worth of the investment only after the purchase."[294] And for criminal cases, "such a regime may result in fewer plea bargains with defendants and prosecutors overestimating the strength of a case." Moreover, "[o]n the civil side, early settlements may be eschewed in favor of summary judgment practice designed to ascertain the admissibility of trial evidence."[295]

Admittedly, these criticisms may seem persuasive at first glance. Yet, the superficial persuasiveness disappears when the underlying presuppositions are examined more closely. Indeed, Professor Richter does not adequately address the lengthy time periods noted by Judge Posner where the term "immediacy" has been stretched enormously for present sense impression exceptions. Nor has she addressed the first opportunity test in sexual assault cases or the elasticity applied to excited utterances made as the product of reflection. Instead, Professor Richter stands by the conclusory statement that: "[s]till, the highly specific hearsay exceptions and the many federal cases interpreting them make advance judgments about the admissibility of hearsay evidence *far more predictable* than the open-ended discretionary approach espoused in Judge Posner's Boyce concurrence."[296] Again, while initially comforting, the superficial security *is* precisely the deficiency at issue. In other words, the illusory predictability only exists until a judge decides to *discretionarily* expand the exception in a case, such as with the 23 minutes[297] or other examples cited in *Boyce*, or other circumstantial reliability to admit a social media e-PSI.[298]

291. *Id.*
292. *Id.*
293. *Id.* at 1883.
294. *Id.*
295. *Id.*
296. *Id.* at 1884 (emphasis added).
297. *See Blakey*, 607 F.2d at 785–86.
298. *See, e.g.*, Bellin, *supra* note 105, at 356–57.

Notably, Professor Richter also never mentions social media evidence.[299] Nor does she address any of the "circumstantial guarantees" Judge Posner discussed in *Boyce*. If anything, by replacing the present sense impression and excited utterance exceptions with the residual model, parties may continue to rely upon these same circumstantial reliability factors *already employed*, but with greater transparency including from an *economic perspective*.[300] Indeed, this logic applies for both civil discovery and settlements, and plea bargaining in criminal cases. This is because under the residual approach, when parties are anticipating what evidence may or may not be admitted, they would no longer have to hypothesize how far the present sense impression or excited utterance exceptions will be stretched in each case. Instead, the parties are on full notice of FRE 807's discretionary factors and the parties can skip the analytical step of evidentiary elasticity under FRE 803(1)-(2). In short, Professor Richter's economic lens criticism suffers from the same deficiency and hyperbolic concern as the Advisory Committee's "discretion fest" characterization.

5. Modification v. Abolition

A proposed alternative to the residual approach is to *modify* FRE 803(1)–(2) rather than abolition of the exceptions. While initially appealing, such proposals are either functionally similar to the residual approach, do not cure current legal and psychological deficiencies at play, or raise worse obstacles of their own. Reviewing a proposal for each exception suffices to show why.

First, Professor Williams proposes that FRE 803(2) be abolished and replaced with the following hearsay exception as Rule 804(b)(7): "**Statement Immediately Subsequent to Startling Event or Condition.** A statement made immediately subsequent to a startling event or condition that is supported by *corroborating circumstances that clearly indicate its trustworthiness*."[301] Glaringly, this is the same "corroboration" language and safeguard that underlies FRE 807's existence in the first place.[302] To be clear, Professor Williams' proposal would also "require the declarant

299. To be clear, Judge Posner did not mention social media evidence in his concurrence because *Boyce* did not involve social media statements. However, as noted above, any comprehensive critique of the residual approach and defense of the present sense impression and excited utterance exceptions must address how to navigate social media given their increased frequency and reliability concerns.

300. *See* Richter, *supra* note 289, at 1880 ("Still, this reference to the availability of Boyce's girlfriend appears to be a strong, if rather obliquely made, suggestion that hearsay exceptions such as the present sense impression and excited utterance *should not apply when the declarant can give live testimony at trial*." (emphasis added)). This is another example of ensuring reliability from a live witness when possible.

301. Williams, *supra* note 159, at 758 (emphasis added).

302. *See* FED. R. EVID. 807.

be unavailable for in-court, cross-examinable testimony before the trier of fact to determine credibility and weight. Under this new rule, only in those cases where the declarant is unavailable would a former 'excited utterance' be admissible."[303]

While Professor Williams' requirement of *only* admitting statements where the declarant is unavailable seems rational, that denies admissibility to *any* hearsay statement that is otherwise reliable even if the declarant *were* available. Moreover, this does not ultimately matter anyway because the "former excited utterances" may be admitted under FRE 807 as a *circumstantially reliable* statement, even if no longer technically an "excited utterance" under the exception.[304] In other words, all roads lead back to the residual approach, even if not initially obvious.[305] Indeed, Professor Williams concedes this point and advocates for a "hybrid" of FRE 807 reliability factors *and* statement against interest factors under FRE 804(b)(3) for such statements.[306] Yet, even under such a hybrid approach, the judicial determination is still discretionary for the would-be/former excited utterances. Thus, while Professor Williams' model may sound persuasive, the same logical impetus exists for the residual approach. Professor Williams' approach is functionally a distinction without a difference when the implications are fully gleaned.[307]

Second, an illustrative proposed modification for present sense impressions is from Professor Bellin.[308] Specifically, Professor Bellin proposes that "present sense impressions should not be admitted at trial *unless they are presented through a recipient* of the statement (*or its maker*) who was present when the out-of-court statement was uttered."[309] This approach is potentially similar to Professor Williams' with excited

303. Williams, *supra* note 159, at 758–59.

304. *See* FED. R. EVID. 807.

305. *See id.*

306. Williams, *supra* note 159, at 758. Specifically, the factors under FED. R. EVID. 804(b)(3)(A) are:

> [A] reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.

FED. R. EVID. 804(b)(3)(A). There are other requirements under FRE 804(b)(3)(B) for certain criminal cases as well, but the key point is that the judicial admissibility determination is still discretionary.

307. As a relevant aside, this Article is sympathetic to concerns raised by scholars such as Professor Hutter who express fear of "shutting out the cries of victims." Hutter, *supra* note 3, at 733 (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, § 8:68 at 585–86 (4th ed. 2013)). However, the central premise behind adopting the residual approach (or even Professor Williams' model) is to shut out *unreliable* cries, while admitting *reliable* cries of alleged victims.

308. *See* Bellin, *supra* note 105, at 375.

309. *Id.* (emphasis added).

utterances because Professor Bellin also suggests the possibility of moving the present sense impression exception to FRE 804.[310] "[L]ike the other exceptions contained in that rule, [admissibility would be] conditioned on a demonstration of the declarant's unavailability."[311]

Relatedly, Professor Bellin further argues that: "[t]his solution to the challenges posed by changing times fits neatly into the modern hearsay framework and restricts the discretion of courts to indiscriminately pick and choose among otherwise admissible present sense impressions."[312] This proposal also has some persuasive appeal but, still, nevertheless fails to cure the deficiencies raised by Judge Posner. For example, for the present sense impression that was uttered 23 minutes after the event at issue,[313] the statement would still be admissible under Professor Bellin's modification if the declarant or recipient was available to testify.[314] In other words, 23 minutes would still equal "immediacy" under Professor Bellin's proposals or similar modifications.

Additionally, Professor Bellin's witness corroboration approach does not ultimately remedy the concern of reducing the amount that judges "indiscriminately pick and choose" present sense impression statements.[315] This is because for present sense impressions where the declarant or recipient is not available, but the statement is *otherwise reliable* (i.e. another corroborating witness), then FRE 807's residual approach is still at play.

Notably, Professor Bellin's concession is telling, which admits that, out of all the current hearsay exceptions, the present sense impression exception "is both most immediately undermined by recent technological changes" and maybe the most "easily updated to respond to these changes."[316] Professor Bellin's commentary is correct regarding "most easily undermined." However, when Professor Bellin's social media insights are combined with the legal and psychological deficiencies from Judge Posner in *Boyce*, that *cumulative impact* bolsters the rationality of adopting the residual approach. In fact, the residual approach is the true

310. *See id.* at 373.

311. *Id.*

312. *See id.*

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

314. Bellin, *supra* note 105, at 375. Note that Professor Bellin's article pre-dates *Boyce* so the elasticity in which judges have applied the present sense impression exception was not addressed. Instead, Professor Bellin's article is solely focused on social media. Relatedly, Judge Posner does cite Professor Bellin's article in his concurrence. *See* United States v. Boyce, 742 F3d 792, 801 (7th Cir 2014).

315. Bellin, *supra* note 105, at 375.

316. *Id.*

"easiest update" to this exception while still maximizing case-by-case reliability.

VI. CONCLUSION

From the outset, FRE 102 states that the FRE should "promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[317] This Article has shown that the residual approach furthers such "development" for several reasons regarding the present sense impression and excited utterance exceptions. First, Judge Posner's concurrence in *Boyce* underscores the psychological deficiencies behind these exceptions and the gross elasticity in which judges have applied the exceptions, thereby already employing a covert residual analysis. Second, the rampant increase of social media evidence, specifically e-PSIs and excited utterances, further catalyzes the need for evidentiary reform as noted in Professor's Bellin's observations of increased frequency and reliability concerns.

Though the residual approach has received objections within legal scholarship, such objections have either been adequately addressed or simply do not impact the residual approach's utility upon closer examination. Specifically, the criticism of a "discretion fest" fails as a matter of logic after considering that other prominent rules of the FRE necessarily require the *same* discretion and still function adequately. Indeed, FRE 403 and 404(b) function properly, despite that FRE 403 requires case-by-case discretion for assessing "substantial prejudice" and FRE 404(b) requires judicial discretion when evaluating character evidence. Moreover, the "economic lens" objection and other variants of the judicial discretion objection fall like a "house of cards" since the economic lens critique also ignores the covert residual approach already at play. Likewise, the economic lens objection also turns a blind eye to the nuances and further obstacles posed by social media statements. Finally, any alternative proposals to modify FRE 803(1)–(2) without abolition are either functionally equivalent to the residual approach or otherwise ill-suited to address the current deficiencies that the exceptions contain. Therefore, this Article concludes that the time has come for the residual approach to replace the present sense impression and excited utterance exceptions.

317. FED. R. EVID. 102.