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TEREE E. FOSTER*

INTRODUCTION

Promulgation of the Proposed Illinois Rules of Evidence placed Illinois at a critical juncture. If adopted, the Proposed Rules would have accomplished the noteworthy reform of liberating this legal area from the ponderous and often quixotic domain of the common law. As promulgated, the Proposed Rules deleted the exception to the hearsay rule which was first articulated by Thayer, urged by Morgan, and is codified in the Federal Rules of Evidence under the designation present sense impression. Only a minority of jurisdictions have enacted evidence codes substantially similar to the Federal Rules. Of those jurisdictions enacting such codes, only a few exclude the hearsay exception for present sense impressions. The

1. Rule 803 of the Federal Rules of Evidence provides:
   The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
   (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
   Statements encompassed within this exception are referred to variously throughout this article as spontaneous, or contemporaneous, statements, declarations, or utterances, as well as present sense impressions.


Florida incorporates Federal Rule 803 in its codification of hearsay exceptions, but adds the phrase "except when such statement is made under circumstances that indicate its lack of trustworthiness" following the word "thereafter." Fla. Stat. Ann. § 90.803(1)(Supp. 1976).

Minnesota has deleted the present sense impression exception from its codification of Rule 803. Minn. Court Rules—Minn. R. Evid. 803 (Supp. 1977). However, in Rule 801(d)(1)(D), Minnesota defines statements of present sense impression, where the statement describes or
Commentary accompanying the Proposed Rules does not delineate the premises supporting the decision to omit evidence of present sense impressions from the enumerated exceptions to the hearsay rule. This class of spontaneous statements has, however, traditionally encountered judicial skepticism, fueled by the criticism that the exception furnished inadequate safeguards against the recognized hazards of hearsay, particularly deliberate fabrication or falsification of evidence.

Outright rejection, on hearsay grounds, of contemporaneous statements which describe the perception of the declarant may deprive the trier of fact of valuable information; yet the expressed fears regarding the reliability of this category of statements are not wholly unwarranted, in view of the formulation of the present sense impression exception incorporated in the Federal Rules. This article will briefly outline the development of the hearsay exception for present sense impressions, analyze the rationale for the exception, and probe its potential for supplying relevant, reliable information of some utility to the trier of fact. The article concludes that, as incorporated in the Federal Rules of Evidence, the exception may admit evidence of questionable trustworthiness and urges adoption of a modified version which will allow only evidence possessing the requisite guarantees of dependability.

THE CASE FOR THE EXCEPTION

Development and Rationale

The hearsay rule prohibits consideration by the finder of fact of

3. See 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1757, at 238 (Chadbourn rev. 1976) [hereinafter cited as WIGMORE (Chadbourn rev.)]: "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, and this has been the result."
evidence untempered by application of the safeguards for testimonial accuracy indigenous to Anglo-American jurisprudential systems: oath, personal presence of the declarant, and cross-examination contemporaneous with the adducement of testimonial evidence. Without these safeguards, evidence is susceptible to ordinary human failings. The declarant may harbor some motive to falsify, or at least slant, his statement so that it embodies a less than neutral observation of existing facts. Language may be used imprecisely, thereby giving to the listener an unclear or unintended impression. The subject matter of the statement may have been inadequately or inaccurately perceived by the declarant. The declarant's initial perception may have been lost or modified through the cognitive processes of memory. Oath, personal presence and, particularly, cross-examination are the means by which defects in the declarant's sincerity, use of language, perception and memory are probed and exposed.

Elimination of hearsay evidence from the trial process would be ill-considered; much relevant evidence of some utility to resolution of the dispute at issue would be lost, increasing the probability of erroneous determinations. Moreover, the outcome in litigation would often be dependent upon the location of the burden of proof. Thus, exceptions to the rule excluding hearsay have been carved for categories of statements which, as a class, neutralize one or more of the risks associated with unprobed testimony. Principles of necessity and circumstantial probability of trustworthiness operate at times to render insistence upon conformance to the requirements of oath, personal presence and cross-examination superfluous.

The present sense exception to the hearsay rule traces its conceptual origins to the thoroughly discredited res gestae notion. Upon


5. 4 J. Weinstein & M. Berger, Weinstein's Evidence § 800[01], at 11 (1978) [hereinafter cited as Weinstein].

6. 5 Wigmore (Chadbourn rev.) supra note 3, §§ 1420-23.

7. Commentators, without exception, have maligned this well-worn and most controversial of hearsay exceptions, deemed the harbinger of reliable utterances. Since res gestae involves "the facts talking through the party, [not] the party talking about the facts," the
truth of the out-of-court declaration is not dependent upon the veracity of the declarant. State v. Long, 186 S.C. 439, 445, 195 S.E. 624, 626 (1938). Thayer attributed its origin to “Garrow and Lord Kenyon,—two famously ignorant men.” Thayer, Bedingfield’s Case—Declarations as a Part of the Res Gestae, 15 Am. L. Rev. 1, 10 n.1 (1881) [hereinafter cited as Bedingfield’s Case]. Morgan marvelled at the “capacity of a Latin phrase to serve as a substitute for reasoning. . . .” Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 229 (1922) [hereinafter cited as A Suggested Classification]. Judge Learned Hand declared “if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms.” United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944). Sir Frederick Pollock referred to the phrase as “the damnable pretended doctrine of res gestae,” and expressed the wistful desire that an authoritative figure would successfully “prick that bubble of verbiage.” II Homes-Pollock Letters 284 (M. Howe ed. 1951). Wigmore was characteristically blunt, denoting res gestae as not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated as a vicious element in our legal phraseology. No rule of evidence can be created or applied by the mere muttering of a shibboleth.

6 Wigmore (Chadbourn rev.), supra note 3, § 1767, at 255. See also People v. Poland, 22 Ill. 2d 175, 178-79, 174 N.E.2d 804, 806 (1961) (“the term ‘res gestae’ not only fails to contribute to an understanding of the problem but may actually inhibit any reasonable analysis.”)

examination of *res gestae* cases, Thayer distinguished a category of spontaneous statements, uttered at or near the time of the observation which the statement reports, from the *res gestae* morass. Thayer distilled three conditions for admissibility of these declarations which, if satisfied, would provide the assurances of reliability required for hearsay exceptions: (1) a spontaneous declaration describing an event observed by the declarant; (2) made at the time of the declarant's observation; (3) which is also observed, and thereby verified, by the witness who reports the statement to the trier of fact. Thayer stressed the temporal congruence of statement and occurrence being related as the essence of the exception.9 Morgan concurred in this analysis, stating the justification for permitting unperturbed utterances as an exception to the hearsay rule as follows:

What substitutes for the oath and cross-examination can be found to give it reliability? A statement by a person as to external events then and there being perceived by his senses is worthy of credence for two reasons. First, it is . . . nothing more than an assertion of his presently existing sense impressions. As such it has the quality of spontaneity . . . . Second, since the statement is contemporaneous with the event, it is made at the place of the event. Consequently the event is open to perception by the senses of the person to whom the declaration is made and by whom it is usually reported on the witness stand. The witness is subject to cross-examination concerning that event as well as the fact and content of the utterance, so that the extra-judicial statement does not depend solely upon the credit of the declarant.9

The Federal Rules of Evidence accomplished a salutary advance in legal analysis by statutorily omitting all reference to *res gestae* and substituting precise hearsay exceptions. FED. R. EVID. 801(d)(2) and 803(1)-(4). Unfortunately, this attempt to restore conceptual lucidity may prove unavailing in the face of judicial refusal to undertake reasoned analysis. In United States v. Gutierrez, 576 F.2d 269 (10th Cir. 1978), defendant appealed his conviction for conspiracy to distribute heroin, challenging the adequacy of proof adduced by the government to establish his relationship to various "pushers" and "sellers," so that statements made by the latter to undercover agents would be admissible as co-conspirators' statements, FED. R. EVID. 801(d)(2)(E). Defendant, accompanied by two co-conspirators, met one Vigil at a tavern to discuss Vigil's contacts in Mexico and to check his credentials as a heroin buyer. The three co-conspirators conferred, then one stated that "his partners had given him permission to go ahead with the proposed heroin transaction with Vigil." Id. at 273. The court experienced little analytic difficulty, holding the statement part of a single transaction, and therefore, citing Federal Rules 803(1) & (2) "part of the *res gestae.*" Id.


9. *A Suggested Classification*, supra note 7, at 236 (citations omitted). See also Morgan,
As articulated by Thayer and Morgan, this exception provides assurances against the hearsay problems of sincerity and memory. The statement is the "spontaneous product" of an occurrence which operates upon the "visual, auditory, or other preceptive senses of the speaker," rather than the product of deliberation. Its concurrence in time with the perception it describes negates the risk of memory difficulties, and the presence of an auditor who also observes the event described enhances the guarantees of reliability, substantiating both the sincerity and memory of the declarant.

Commentators, with the notable exception of Wigmore, have generally embraced the present sense impression exception, al-

6 Wigmore (Chadbourn rev.) supra note 3, § 1747, at 196. Since frenzy which stifles reflective capacity, thereby insuring the sincerity of the declarant, is the touchstone for reliability under Wigmore's formulation of the exception, the utterance need not coincide in time with the initial perception by the declarant of the startling occurrence; the utterance must occur only while the reasoning capacity of the declarant is held in abeyance under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock.


13. See, e.g., E. Cleary et al., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 298 (2d ed. 1972) [hereinafter cited as McCORMICK (2d ed.)]; 4 Weinstein, supra note 5, § 803(1) [01], at 70-79; Falknor, The Hearsay Rule and Its Exceptions, 2 U.C.L.A. L. REV. 43, 60-62 (1954); Quick, Hearsay. Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 WAYNE L. REV. 204 (1960); Slough, Spontaneous Statements and State of
though few common law courts explicitly recognized it as distinct from res gestae.14 The present sense impression exception incorporated in the Federal Rules of Evidence adopts the spontaneity and


Hutchins and Slesinger were enthusiastic about the efficacy of the exception:

Professor Morgan's insistence on the admissibility of declarations closely connected in time with such a stimulus seems entirely justified. With emotion absent, speed present, and the person who heard the declaration on hand to be cross-examined, we appear to have an ideal exception to the hearsay rule.

Spontaneous Exclamations, supra note 12, at 439.


Both the American Law Institute Model Code of Evidence, Rule 512 (1942), and the Uniform Rules of Evidence (1974) embody specific present sense impression exceptions, and several jurisdictions have adopted the Uniform Rules: California, CALIF. EVID. CODE § 1240 (West 1965); Kansas, KAN. STAT. ANN. § 60-460(4)(a) (1964); New Jersey, N.J. R. EVID. 63(4)(a); Utah, UTAH R. EVID. 63(4)(a).


In addition to the fact that many courts superimposed Wigmore's condition of physical shock upon the spontaneous utterances exception, present sense impressions have not been recognized as an explicit hearsay exception for several reasons. First, it is a fact of life that unremarkable incidents which evoked no frenzy in observers and participants are also less likely to evoke contemporaneous comment.

Second, courts mired in the res gestae jargon, has caused courts to exclude as without the res gestae, unperturbed observations uttered prior to occurrence of the incident on trial. See notes 42 through 44 infra and accompanying text.
contemporaneity conditions articulated by Thayer and Morgan, but omits the verification proviso, although the Advisory Committee’s Note cites the requirement with approval.\textsuperscript{15} The question then becomes, whether Rule 803(1), as drafted, provides sufficient circumstantial reliability guarantees so that its effectiveness in sifting truth from error is insured. The first step in answering this question involves an analysis of the conditions for admissibility set forth in Rule 803(1), with recommendations for construction of the requirements which will effectuate the rationale of Thayer and Morgan.

\textit{Application of the Exception}\textsuperscript{16}

(a) Subject Matter of the Statement

The present sense impression exception admits statements that articulate a sensual perception, whether the impression is obtained through use of visual, olfactory, tactile, taste, or auditory powers.\textsuperscript{17} The difficult question involves distinguishing utterances expressing an impression acquired through the exercise of sensory faculties upon physical data from statements depicting memories or beliefs lodged in the declarant’s mind. The distinction is important, since the latter class of statements constitute inadmissible hearsay.\textsuperscript{18} For example, \textit{McCaskill v. State}\textsuperscript{19} was a murder prosecution of a physician for the death of a young girl, allegedly as the consequence of an abortion performed by the defendant. The defendant conceded that he had treated the victim, but maintained that she had already had an abortion when she consulted the defendant at his clinic. The victim’s mother testified that she contacted her daughter by telephone at the defendant’s clinic, and was advised by the victim, “I am up here to the doctor getting something done about [the preg-
The court affirmed admission of the statement on res gestae grounds although it does not express a physical perception, but is a mere recounting of the declarant's belief. Although this statement might be deemed admissible on other grounds, it is not a sensual impression and should be excluded under Rule 803(1).

Even more difficult are declarations wherein physical impressions are inextricably bound up in evaluative judgments which involve elements of past memory or belief. For example, assume that the declarant enters a pasture, views a flock of sheep and states to his companion, "These sheep belong to the defendant." Is the statement trustworthy enough as proof of the flock's ownership so that the safeguards of oath, presence and cross-examination are unnecessary? The declarant mingles a description of what he sees with an assessment premised upon remembered knowledge, the identifying characteristics which prompted characterization of the flock as the property of the defendant. It is submitted that so long as the spontaneity, contemporaneity and verification criteria are fulfilled, these statements composed of a moiety of sensual image and remembered knowledge sufficiently neutralize the risks of fabrication or lack of memory on the part of the declarant to warrant admission. 24

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20. Id. at 849.
21. See Fed. R. Evid. 804(b)(5) and discussion at text accompanying note 127 infra.
22. See Surbaugh v. Butterfield, 44 Utah 446, 140 P. 757 (1914). The court excluded as hearsay a similar statement which was not part of the res gestae.
23. See text accompanying notes 116 through 127 infra. Admission of this statement, as well as those set forth at note 24 infra, under the theory exposed in this article, would depend upon satisfaction of the verification requirement.
24. See also State v. Brown, 161 La. 704, 109 S. 394 (1926) (detective permitted to testify to his knowledge that room in which jewelry and other loot was found belonged to defendant because defendant's wife told detective, "This is Charley Brown's room"); Hollifield v. Southern Bell Tel. & Tel. Co., 172 N.C. 714, 90 S.E. 996 (1916) (complaints of workers to their supervisor that there were too few workers to perform a job admitted as part of the res gestae); Wells Fargo & Co. Express v. Gentry, 154 S.W. 363 (Tex. Civ. App. 1913) (employee's statement that the "fish don't need any ice" held properly excluded on res gestae grounds).

These statements intermixing sensual impressions with remembered information must be distinguished from statements of physical perception which state a contemporaneously-made judgment or opinion on the part of the declarant, the admissibility of which poses no difficulty on subject matter grounds. E.g., in Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942), the most well-known of all present sense impression cases, the declarant's statement upon observing an automobile pass by was that, "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up." Id. at 5, 161 S.W.2d at 476. Although encompassing elements of judgment or opinion, the statement relies on no remembrance, but is no more than a graphic description of the perceived speed of the vehicle.

Some older cases exclude spontaneous statements on the ground that the utterances constitute mere opinion and thus create an undue risk to reliability. E.g., Elek v. Boyce, 308 F.
The sensual perception may be that of any observer; the declarant need not be a participant in the occurrence described by his statement, although, of course, the declarant must have first-hand knowledge of that which his utterance encompasses. This requirement that the declarant has personally observed that regarding which he speaks, overlies the admissibility of evidence generally. Yet courts, perhaps wary of admitting potentially unreliable statements allegedly made by unidentified passersby, have often re-

Supp. 26 (D.S.C. 1970) (eyewitness' statement "that man was not going to get to his destination. He was crazy. He was going too fast" excluded as a conclusion); Foster v. Dukes, 301 Ky. 752, 193 S.W.2d 159 (1946) (passerby's remark, "Are you gentlemen going to stand here and see this man beat to death?" held properly excluded on opinion rule grounds); Louisville & N.R.R. v. Cox, 145 Ky. 716, 141 S.W. 59 (1911) (statement of onlooking employee, "You had better watch out; you will kill somebody down there" properly excluded). Cf. Clements v. Peyton, 398 S.W.2d 477 (Ky. App. 1966) (testimony of witness that he heard a noise "like a wreck" admissible, but opinion that there had been another wreck on the corner inadmissible).

However, most courts, in agreement with Morgan, are untroubled by opinion aspects of spontaneous utterances, since such statements usually announce the opinion of the declarant. Morgan, The Law of Evidence, 1941-1945, 59 HARV. L. REV. 481, 576 (1946); see Commonwealth v. Coleman, 458 Pa. 112, 120, 326 A.2d 387, 391 (1974): "An impression of contemporaneous events or conditions is not at all similar to an opinion rendered on evidence presented at trial." See also Sears, Roebuck & Co. v. Murphy, 186 F.2d 8 (6th Cir. 1951); Tampa Elec. Co. v. Getrost, 141 Fla. 558, 126 N.E. 548 (1920) (opinion of lineman that circuit was open admissible); Thompson v. State, 166 Ga. 512, 143 S.E. 896 (1928); York v. Charles, 132 S.C. 230, 128 S.E. 29 (1925); State v. Smith, 36 Wis. 2d 584, 152 N.W.2d 538 (1967) (statement of arresting officer that "the person who broke into the place must have got cut or something" not an inadmissible opinion).

The intriguing issue regarding opinion testimony is whether the contemporaneous opinion of an expert can be the subject of a present sense impression. E.g., Green v. Lock-Paddan Co., 36 Cal. App. 372, 172 P. 168 (1918); Labanoski v. Hoyt Metal Co., 292 Ill. 218, 126 N.E. 548 (1920). Since this question involves analysis of the spontaneity of such statements, it is discussed at notes 70-73 infra and accompanying text.


26. People v. Poland, 22 Ill. 2d 175, 183, 174 N.E.2d 804, 808 (1961). Rule 602 of the Federal Rules of Evidence states the personal knowledge requirement: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself...." 27. Spontaneous Exclamations, supra note 12, at 440. Only admissions, FED. R. EVID. Rule 801(d)(2), are exempted from the first-hand knowledge requirement.

quired independent corroboration that the declarant actually had
an opportunity to perceive the subject matter of his declaration.29
This concern is misplaced if characterized as solicitude for adher-
ence to the personal knowledge requirement. That the declarant was
personally cognizant of the event or condition which impelled the
utterance may be inferred from the statement itself,30 unless circum-

29. See, e.g., McClure v. Price, 300 F.2d 538 (4th Cir. 1962); Martlatt v. Erie R. R., 154
App. Div. 388, 139 N.Y.S. 771 (1912); Kane v. Burrillville Racing Ass'n, 73 R.I. 264, 54 A.2d
401 (1947); Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939); Makoviney v. Svinth, 548 P.2d
(1967) (testimony that witness heard someone say defendant's car also struck decedent in-
properly admitted); Potter v. Baker, 162 Ohio St. 488, 124 N.E.2d 140 (1955) (statement of
bystander that motorist must have rushed light inadmissible when no evidence that state-
ment was made with reference to motorist who struck pedestrian).

Judicial dependence on res gestae analysis in determining the admissibility of spontaneous
statements has compounded the confusion in which this personal knowledge issue is im-
488 P.2d 269 (1971), for example, plaintiff instituted an action to recover for personal injuries
sustained when a helm seat on which she was sitting collapsed while she was a guest passenger
aboard defendant's motorboat. Plaintiff appealed a verdict for defendant, claiming that the
trial court erred in excluding a statement made by defendant's son approximately five min-
utes after the mishap. The son was not aboard the boat, but was sailing in the vicinity in a
small skiff. Upon approaching the boat, he inquired as to what had happened, and was
informed of the accident, to which he responded, "Well, that doesn't surprise me, that
happened twice before." The court properly affirmed exclusion of this remark, but erro-
neously based its decision on the ground that the son lacked personal knowledge of the
accident. Manifestly, the declarant's first-hand knowledge need extend only to the subject
matter of his statement, here, the fact of prior mishaps, and there is no reason to infer that
the son's first-hand knowledge of those occurrences was insufficient. Exclusion of statements
on the ground that the declarant did not actually observe the event on trial is a common
judicial error. See notes 42 through 44 infra and accompanying text. The Zukowsky court was
right, for the wrong reasons, in excluding the statement, however, since the declaration does
not describe a current sensual observation, but rather reaches back into the son's memory.

Had plaintiff been able to demonstrate the requisite shock and agitation on the part of the
son upon hearing of plaintiff's injury, the statement would qualify as an excited utterance,
Federal Rule 803(2), which related to a startling event.

A recent student comment advocates the incorporation of a requirement that the proponent
of a present sense impression adduce independent corroborative evidence "either direct or
circuitual, that the declarant was in spatial and temporal proximity to the event he
described." Note, The Present Sense Impression Hearsay Exception: An Analysis of the
Contemporaneity and Corroboration Requirements, 71 Nw. U.L. Rev. 666, 674 (1976). Imposi-
tion of such a condition misperceives not only the personal knowledge rule, the demands of
which are ordinarily satisfied by inference, see notes 30-31 infra, but also the actual accuracy
problems inherent in unverified present sense impression evidence. Such problems are better
solved by reformulation of the exception than by mischaracterization of the problem as one
involving absence of first-hand knowledge.

30. E. MORGAN, BASIC PROBLEMS OF EVIDENCE 59-60 (1962); MCCORMICK, (2d ed.), supra
note 13, § 10, at 21; G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE §§ 96-97, at
366-67 (1978). The Illinois Supreme Court has articulated the requisites of the personal
knowledge rule in People v. Poland, 22 Ill. 2d 175, 174 N.E.2d 804 (1961):
stances adduced in a particular case compel a contrary finding.\textsuperscript{31}

Although numerous cases dispose of admissibility questions concerning spontaneous statements by referring to the absence of affirmative proof of the first-hand knowledge of the hearsay declarant,\textsuperscript{32} it is submitted that the source of judicial concern, in actuality, is two-fold. First, doubt that the statement was made by the declarant contemporaneously, as opposed to being a product of the imagination of the witness reporting it, may plague the court. This concern is groundless, for the sincerity of the listener is subject to probing through the panoply of testimonial protections inherent in the trial process. Accordingly, the risk of perjured testimony regarding statements of hearsay declarants is minimized to the extent possible in our adversary system.\textsuperscript{33} Second, concern that the hearsay declarant inadequately perceived the matter which forms the substance of the statement may be expressed as a personal knowledge problem. Concern regarding perceptual acuity of witnesses not subject to cross-examination is warranted, yet it must be recognized that lack of perceptual accuracy is a hearsay risk, one which hearsay exceptions are theoretically formulated to diminish. The way to

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\textsuperscript{31} We do not understand the requirement to be that the party seeking to have the declaration admitted must prove by direct evidence beyond any possibility of speculation that the declarant personally observed the matters. If such were the rule, there would hardly ever be a case in which a declaration would be admissible. Rather, we think it is sufficient if it appears inferentially that the declarant personally observed such matters and that there is nothing to make a contrary inference more probable. \textit{Id.} at 183, 174 N.E.2d at 808 (citations omitted).

\textsuperscript{32} For example, in Montesi v. State, 417 S.W.2d 554 (Tenn. 1967), defendant was convicted of the murder of his wife. Police had been summoned to defendant's home by a neighbor, who placed the call at defendant's request when he appeared at her home in his pajamas stating that he had been robbed. Upon arrival, within minutes, the police observed the victim, still alive, on the lawn. Blood was found in various parts of the house, and much of the furniture was in disarray. Defendant maintained that his wife had been shot by an intruder who had also assailed him when he came upon the fallen figure of his wife.

At trial, the teenage daughter of defendant and the victim testified that she was upstairs in her room, with the door closed, on the night of the murder, and that upon hearing "crashes and disorder, and sounds like rumbling furniture being knocked over," \textit{id.} at 558, and her mother's screaming, she telephoned her boyfriend. He was permitted to testify that she stated, "I believe Mother and Daddy are fighting." \textit{Id.} at 560. On appeal, the court properly held this statement inadmissible as proof of a domestic fracas, since the declarant manifestly had no way of ascertaining the source or nature of the disturbance.

insure the hearsay declarant’s perceptual acuity is to reformulate the contours of the hearsay exceptions to take human perceptual problems into account, rather than to utilize the personal knowledge requirement as a guise for excluding evidence deemed undependable regardless of whether it qualifies under a hearsay exception.

An intriguing question concerning the construction of the present sense impression exception is whether the declarant’s physical perception actually must be communicated to a listener in order to be admitted, or whether statements uttered within no one’s hearing, or written down for personal use, likewise qualify under Rule 803(1). The question is, however, probably academic. If an oral statement is not communicated to a listener, the declarant himself must relate it to the finder of fact. In such a case, the opportunity for cross-examination alleviates the hearsay risks to the same extent as in the case of a present sense impression related by an auditor. If the statement is a writing, aducing convincing proof in order to satisfy the contemporaneity and spontaneity conditions for admissibility may prove difficult, but the writing should be admitted as readily as any verbal present sense impression if its proponent succeeds in advancing sufficient proof.

34. See notes 93 through 106 infra and accompanying text.

35. Arguably, a witness’ testimony that he “thought to himself,” or “said to himself” is not hearsay at all, since the witness’ non-verbal, nonassertive thoughts do not constitute a “statement” for purposes of the hearsay rule. FED. R. EVID. 801(a). In Marchand v. Public Serv. Co., 95 N.H. 422, 65 A.2d 468 (1949), at issue was whether the driver of the car in which plaintiffs were riding was capable of observing defendant’s truck from a certain point. One plaintiff testified that she saw the truck and that, although she made no remark aloud, she thought that the red truck looked “pretty well on the white snow.” Id. at 424, 65 A.2d at 470. In response to defendant’s hearsay objection to this testimony, the court found that this witness was merely “seeking to reproduce a clear impression made upon her mind at the time of the occurrence.” Id.


37. For example, a note in the handwriting of the victim of a robbery-murder which states, “Defendant is coming up the front walk,” is found at the scene of the crime, and offered as proof of identity of the culprit by the State. Cf. People v. Gauthier, 28 Mich. App. 318, 184 N.W.2d 488 (1971) (admission of hotel business log in murder case violation of hearsay rule).

38. See text accompanying notes 45 through 58 infra.

39. See text accompanying notes 59 through 60 infra.

40. That no present sense impression should be permitted unless the declarant testifies and is subject to cross-examination, or unless the person reporting the statement shared, and therefore, verified, the declarant’s stated observations is the crux of this article and is dis-
The subject of the declarant's perception, an "event or condition," covers an extensive range of circumstances, indicative of the potential breadth of this exception's utility. Much recent authority acknowledges that the condition or event which is the subject of comment need not be the event forming the subject matter of litigation. Often, proof of conditions existing or events occurring before, discussed further at text accompanying notes 115 through 131 infra. The unreliability of this evidence inheres in the utter lack of confirmation of the declarant's perception, as well as the relative weakness of the sincerity guarantees actually present. Compare Federal Rule 803(5), requiring presence of the declarant in court, and therefore providing opportunity for some semblance of cross-examination, as a precondition to admissibility of writings as past recollection recorded.

41. The distinction between an "event" and a "condition" has been described. A declaration would seem to describe a condition if uttered about things at rest, about an event if it concerns things in motion. Spontaneous Exclamations in the Absence of a Startling Event, supra note 13, at 435.

Events which evoke comment reported in the cases generally concern the passing of a vehicle, observed by the declarant prior to the accident, e.g., People v. Gillard, 216 Mich. 461, 185 N.W. 734 (1921); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942), although statements relating to witness' perception of a crime are often related, e.g., Mack v. State, 337 So.2d 74 (Ala. Crim. App. 1976) (witness who approached a filling station stated, "I don't know what's going on, but I think they are robbing the place."); State v. Goines, 273 N.C. 509, 160 S.E.2d 469 (1968) (statements of bystanders to "turn that woman a loose" admitted in prosecution for assault with intent to commit rape); Anderson v. State, 454 S.W.2d 740 (Tex. Crim. App. 1970) (statement of observer that "a car is being stripped down the street there" admissible in prosecution for theft).


or after, the disputed incident elucidates circumstances existing at the time of the event in question. The probity of statements of present sense impression made prior, or subsequent, to the main event is a question of relevance to be determined by the trial judge.

(b) Contemporaneity

The present sense impression exception embodied in the Federal Rules incorporates two of the conditions set forth by Thayer and Morgan for the admissibility of hearsay evidence. The statement must be spontaneous, in that it describes or explains the event or condition of which the declarant acquires knowledge through his sensual faculties. It must also be contemporaneous, meaning that the statement referring to that which is observed must concur in time with the declarant’s perception. The presence of both factors is indispensable, for each functions independently as a safeguard against infection of evidence by hearsay dangers.

The contemporaneity requirement fulfills a dual role. First, the fact that the declaration is uttered at the point in time when the

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43. It is Judge Weinstein’s view that: “The exception will probably prove most useful in admitting statements uttered minutes before the event in question and before the declarant was aware that something startling was about to happen.” 4 WEINSTEIN, supra note 5, § 803(1)[01], at 803-74.

44. FED. R. EVID. 403.

45. See text accompanying notes 59 through 80 infra.

46. Courts rarely articulate these requirements as independent values, but rather assess the statement to determine whether it was uttered before a motive to fabricate on the part of the declarant arose. See, e.g., Lazar v. Great A. & P. Tea Co., 197 S.C. 74, 14 S.E.2d 560, 561 (1940):

To make declarations a part of the res gestae, they must be contemporaneous with the main fact. . . . If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are considered as contemporaneous.

See also Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387 (1974). But see Illinois Central R. R. v. Lowery, 184 Ala. 443, 63 So. 952 (1913); Pacific Mutual Life Ins. Co. of Calif. v. Schlakzug, 143 Tex. 264, 183 S.W.2d 709 (1944). This requirement of coincidence of both spontaneity and contemporaneity is discussed at text accompanying notes 74 through 75 infra.
declarant observes an occurrence or condition precludes the risk of error from defective memory. The importance of contemporaneity in this regard is a function of the fact of psychology that memory is not a simple matter of the declarant either retaining his perception or forgetting it to some degree. Memory involves ongoing cognitive processes and interrelates in an inextricable fashion with perceptual processes to the extent that "[m]emory does not exist without perception, and there is no psychologically meaningful perception without memory." Like perception, memory operates selectively, and idiosyncratically; when a remembered image is retrieved, it is not merely drawn out from its storage place in a memory bank. Instead, the image is reconstructed at the time of its recall with the aid of various factors, such as knowledge acquired prior to the experience, initial perception of the occurrence, inferences drawn from sensory and perceptual data acquired subsequent to the event, and the influence of the emotional impact, if any, of the experience. Thus, the significance of requiring temporal concurrence of perception of an event or condition and oral description of it is to assure that the declarant's statement of his perception is tainted as little as possible by distortion of memory images due to the operation of cognitive processes.

Second, and more often articulated by courts, contemporaneity functions as an assurance that the utterance is truly spontaneous, or drawn from the declarant's perception of the event, rather than resulting from deliberation or reflective thought. Present sense impressions encompass unruffled observations; absent the shock of a startling occurrence, it is often difficult to discern whether the

47. Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942). See Gardner, The Perception and Memory of Witnesses, 18 CORNELL L.Q. 391 (1933) [hereinafter cited as Perception and Memory of Witnesses], wherein the author describes scientific studies describing the "curve of forgetting," which graphically demonstrate that the potential for the dissipation of memory accelerates very rapidly immediately subsequent to registering of the initial perception.

48. Perception, Memory and Hearsay, supra note 13, at 9.


Present Sense Impressions

episode described actually impelled the declarant to utter the statement. Thus, the permissible time lapse between the event and the declaration it triggers is much less than that recognized for excited utterances. Psychological studies demonstrate that alleviation of the danger of fabrication, whether deliberate or unwitting, is assured only where the interval separating utterance from perception does not exceed seconds, or fractions thereof.

These considerations dictate restrictive interpretation of the "immediately thereafter" language incorporated in Rule 803(1). Requiring that the utterance coincide precisely with the observation it depicts may operate to exclude many relevant statements. Therefore, permissible time lag must be considered, in the trial court's discretion, in conjunction with circumstances surrounding the making of the statement. Yet reliability considerations mitigate against extending the permissible time lapse beyond the few seconds inevitably required to articulate an observation. This rigid interpretation of the "immediately thereafter" proviso is supported by Congressional deletion of a proposed hearsay exception which would have allowed, upon fulfillment of the precondition of the declarant's unavailability, evidence which "narrates, describes, or explains an event or condition recently perceived by the declarant." The House Judiciary Committee, in striking this recent sense impression exception, declared that this class of utterance failed to manifest "sufficient guarantees of trustworthiness to justify admis-

53. The Advisory Committee notes that "in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable." Fed. R. Evid. 803(1)(2), Advisory Comm. Notes. See also 4 Weinstein, supra note 5, § 803(1)(01), at 803-74.
54. 4 Weinstein, supra note 5, § 803(1)(01), at 803-74-75; A Suggested Classification, supra note 7, at 237.
sibility.” Given the vagaries of human memory processes and the swiftly diminishing assurances of sincerity inherent in calm declarations, effectuation of the underlying rationale of the present sense impression exception compels stringent circumscription of the permissible interval between perception and verbal or written depiction of it.

(c) Spontaneity

Congruence in point of time between utterance and sensory apprehension of an event or condition, without more, is insufficient as assurance of the trustworthiness of a statement. The declaration in question must also be spontaneous; as such, the statement is “so


58. Adoption of this requirement that the utterance concur virtually instaneously with the observation it relates would alter the result in several cases which admitted declarations made after an appreciable interval of time. See, e.g., United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974) (indefinite; several minutes); State v. Smith, 195 N.W. 673 (Iowa 1972) (10-15 minutes); Starr v. Morsette, 236 N.W.2d 183 (N.D. 1975) (approximately two minutes); Jackson v. Utah Rapid Transit Co., 77 Utah 21, 290 P. 970 (1930) (3-4 minutes). It is submitted that, regardless of the admissibility of these statements under other hearsay exceptions, e.g., Rules 801(d)(2)(D), 803(2), 803(3), or either of the residual exceptions, FED. R. EVID. 803(24) and 804(b)(5), preservation of the integrity of the present sense impression exception requires exclusion under Rule 803(1).

An error commonly indulged in by courts is misperception of this demand of contemporaneity, as illustrated by Sears, Roebuck & Co. v. Murphy, 186 F.2d 8 (6th Cir. 1951). Plaintiff in that case, a customer in defendant’s store, injured her finger when she placed her hand on a glass-covered automobile seat cover that an employee of defendant was displaying for her. The trial judge’s admission of a statement by the employee that “there was a repair made here a few days ago. I suppose they have faild to get it all up,” id. at 9, was affirmed on appeal on res gestae grounds. Although this statement concurs in time with the condition it explains, it fails as a present sense impression because the declarant’s physical perception of the condition occurred prior to the accident. See also El Rancho Rest., Inc. v. Garfield, 440 S.W.2d 873 (Tex. Civ. App. 1969); City of Houston v. Cambeilh, 333 S.W.2d 192 (Tex. Civ. App. 1960).

Manifestly, it is the declarant’s perception which must temporally coincide with his explanation or description of it. Otherwise, the utterance is no more than a reconstruction of remembered knowledge, and is subject to all the whims which the contemporaneity requirement is designed to combat. Some courts recognize this problem and exclude such statements. See, e.g., Makoviney v. Svinth, 584 P.2d 948 (Wash. App. 1978) (statements of company employees, after accident occurred, that “they should have had that ice knocked off that roof that morning” held properly excluded on res gestae grounds); Illinois Central R.R. v. Lowery, 184 Ala. 443, 63 So. 952 (1913) (employee’s observation upon witnessing collapse of a derrick that, “the damn thing was about wore out anyhow, and they would keep running it until they killed somebody” held improperly admitted).

The mandate that the declarant’s cognizance of the condition or episode occur contemporaneously with his declaration describing or explaining it should operate to the exclusion of statements made during line-ups or show-ups under the present sense impression exception. When the declarant states “That is the cur who assaulted me,” he relates his reconstructed memory of his perception at the time of the crime; contemporaneity is thus abrogated.
dominated by considerations external to the self, that rational thought or personal will plays no part" in its emission. Thus insulated from the influence of conscious reflection, the utterance is theoretically unmarred by any flaws in the declarant's powers of sincerity, by any existing will to deceive. The effectiveness of this automatic quality as an indicium of truth may be more apparent than real, because the degree of unmeditated impulse impelling an utterance is difficult to precisely gauge, except as an aspect of the contemporaneity. However, the oft-quoted judicial justification for

59. *Spontaneous Exclamations*, supra note 12, at 432 n.2. "The dividing line between admissibility and nonadmissibility lies between the words outcry and narration; between impulse and reflection. Such statements are rarely admitted where they are made in response to interrogation, as that tends to remove the necessary element of spontaneity."* Cumberland Gasoline Corp. v. Field's Adm'r, 258 Ky. 417, 418, 80 S.W.2d 28, 28 (1934) (citations omitted).

The court appropriately observes that the fact that a declaration constitutes a response to a question often, but not necessarily vitiates spontaneity. The determining factor remains the impetus for the utterance. If it is drawn out of the declarant by his observation of an episode or existing condition, spontaneity does not dissipate; if it reflects an attempt by the declarant to form a rational response to the question, spontaneity is destroyed. Ottinger v. State, 156 Tex. Crim. 391, 242 S.W.2d 426 (1951); State v. Green, 38 Wash. 2d 240, 229 P.2d 318 (1951). *Contra,* Greener v. General Elec. Co., 209 N.Y. 135, 102 N.E. 527 (1913) (spontaneity necessarily vanishes where statement is a response to a question). An apt example of a truly spontaneous remark might be drawn from a reported occurrence. Assume that upon unsealing and entering an antechamber of the tomb of an ancient Egyptian Pharoah, Tutankhamun, an archeologist is asked by a companion waiting outside, "Do you see anything?" As his eyes adjust to the dim light, and he gazes upon splendid artifacts, the archeologist replies, "Yes, wonderful things. . . ."

The operation of spontaneity here is comparable to the excited utterance situation, Fed. R. Evid. 803(2), where the declarant's rational faculties are galvanized and the fact that the declarant is capable of responding to an inquiry is not necessarily indicative of the intrusion of deliberation. Love v. State, 64 Wis. 2d 432, 219 N.W.2d 294 (1974); Phifer v. State, 64 Wis. 2d 24, 218 N.W.2d 354 (1974).

60. Similar reasoning is applicable to present sense impressions embodied in a writing. Although the physical mechanics of putting pen to paper involve some degree of concentration, the act may be instinctively performed as a response to an image perceived, such as a fleeing automobile, State v. Smith, 286 So.2d 240 (La. 1973), which compels the perceiver to immediately record his observations. *See* note 37, *supra.* Thus, writings, so long as other conditions for admissibility are fulfilled, might constitute present sense impressions. Davis v. Texas Lumber Co., 146 So. 788 (La. App. 1933) is contra:

One has but to follow the process of the mind of the man taking, writing down, and offering the written number to plaintiff to conclude that his action was dictated by thought and calculation, and was not an unstudied unpremeditated exclamation inspired by the sudden happening of the accident.

*Id.* at 788-89.

61. *See* text accompanying notes 50-52 *supra.* Sometimes, the context and content of the statement made it clear that the utterance is motivated by perception of the event. *E.g.,* Kelly v. Hanwick, 228 Ala. 336, 153 So. 269 (1934) (statement by eyewitness to automobile accident, "we had better move, that car could not make that curve at that speed"); State v. Carraway, 181 N.C. 561, 107 S.E. 142 (1921) (eyewitness statement "Joe, he [the deceased] is going to cut him [defendant] to pieces, ain't he?" held improperly excluded when offered by defendant in self defense case).
hear'say exceptions premised on apparent absence of premeditation is that lack of retrospection on the part of the declarant ensures his sincerity and thus secures the guarantee of reliability. Such a justification, gives judicial approval to the theory that man's primal instinctual impulses are toward truth. Regardless of the cogency of that assumption, it is probably a fair assessment of the effectiveness of the spontaneity condition in precluding departures from truth to state that spontaneity does not guarantee that equivocation will not adulterate the declarant's statement, but does render that eventuality less likely to occur.

That spontaneity is a requisite to admissibility is reflected in the provision of Rule 803(1) that the utterance "describe" or "explain" its subject matter. Thus, statements which are inspired by the

62. [E]ssentially, [the declaration] must be the apparently spontaneous product of that occurrence operating upon the visual, auditory, or other perceptive senses of the speaker. The declaration must be instinctive rather than deliberative—in short, the reflex product of immediate sensual impressions, unaided by retrospective mental action. These are the indicia of verity which the law accepts as a substitute for the usual requirements of an oath and opportunity for cross-examination.


63. Historically, exceptions to the law of hearsay have been founded upon assumptions of testimonial reliability based largely on the subjective and unsystematic study of human testimony, with more than a small touch of a highly rationalistic view of man. These assumptions have been carried forward in the . . . Rules of Evidence.

Perception, Memory, and Hearsay, supra note 13, at 8.

64. Cf. Spontaneous Exclamations, supra note 12, at 436-40. The question then becomes, is this sufficient assurance? That spontaneity provides a meager guarantee of the declarant's incapacity of altering is discussed again at text accompanying notes 89 through 92 infra.

65. The position of the Advisory Committee is that "spontaneity, in the absence of a startling event, may extend no farther." Fed. R. Evid. 803(1), (2), Advisory Comm. Notes.

The Federal Rule version of the present sense impression is narrower than prior formulations, which in addition, permitted statements which "narrate" the declarant's perception. American Law Institute, Model Code of Evidence, Rule 512 (1942); Uniform Rules of Evidence, Rule 63(4) (1953). Deletion of this ambiguous term is wise, for a "narration" connotes a recounting of past facts currently remembered, and thus abrogates the memory guarantees fostered by the contemporaneity requirement, and detracts from the spontaneity of the statement. Elimination of the term "narrates" furnishes additional justification for the strict circumscription of the contemporaneity requirement urged in this article. See notes 45 through 58 supra and accompanying text.
declarant's cognizance of an incident, but which do not "describe" or "explain" the matter are excluded by Rule 803(1). The battleground for admissibility is likely to involve hearsay statements by an employee offered to establish agency, so that any declarations pertaining to the occurrence on the part of the employee might be admissible as vicarious admissions. While such declarations would be admissible as "relating" to the event under Rule 803(2), assuming the requisite trauma is present, statements professing agency do not "describe" or "explain" the subject matter of the declarant's perception, and are therefore excluded as present sense impressions.

Circumscription of the relationship between utterance and observation to one of description or explanation, in order to foster spontaneity, raises a question regarding the admissibility of out-of-court remarks by experts as present sense impressions. For example, a state safety inspector examines the lead smelting plant operated by defendant, and proclaims during his tour, "Ventilation is good here, this is a safe operation." Should this extrajudicial declaration be admitted in a subsequent lawsuit by the widow of an employee of defendant who perished after contracting lead poisoning? Or, plaintiff, a purchaser of farmland, seeks rescission of the contract on grounds of fraudulent misrepresentation, alleging unsuitability of the soil for its intended purpose due to a concentration of hardpan. Plaintiff offers to testify, regarding the condition of the soil, that a soil expert, upon examination of the soil, declared, "This is nothing but a gravel pit."

The issue is whether the opinion of an expert, albeit contemporaneous with his cognizance of an event or condition, shares in the qualities of automaticity and instinctiveness which characterize the spontaneity requirement. In performing even an instantaneous appraisal, data and other criteria considered are perceived in light of

66. 4 Weinstein, supra note 5, § 803(1)[01], at 803-77.
68. See, e.g., Murphy Auto Parts Co. v. Ball, 249 F.2d 508 (D.C. Cir. 1957) (statement of employee to mother of injured pedestrian that "he was sorry, that he hoped my son wasn't seriously hurt, he had to call on a customer and was in a bit of a hurry to get home").
69. 4 Weinstein, supra note 5, § 803(1)[01], at 803-78. See Zibelman v. Gibbs, 252 F.Supp. 360 (E.D.Pa 1966) (statement by driver following a rear-end collision that he worked for defendant and was on an errand for him excluded on res gestae grounds).
70. Cf. Labanoski v. Hoyt Metal Co., 292 Ill. 218, 126 N.E. 548 (1920). The court affirmed exclusion of the statement, observing that the "correctness of the ruling is so obvious as not to require discussion." Id. at 223, 126 N.E. at 550.
his expertise; the expert relies on the evaluative skill which is the hallmark of expertise, so that his conclusions are the product of judgment and reasoned analysis, rather than reflex.

Moreover, the function of in-court cross-examination relative to probing sincerity diverges when the witness testifies as an expert. The concern is not so much falsification by the expert, as utilization of inappropriate or inaccurate criteria, improper evaluation, or forming erroneous conclusions even where data is properly analyzed. Affording the adversary an opportunity to examine the basis upon which the expert relies in formulating his stated opinion remains an objective of the Federal Rules of Evidence, although restrictions related to the adducement of expert evidence have been eased.\textsuperscript{72} This combination of lack of spontaneity and reluctance to dispense with cross-examination regarding the basis for conclusions reached by the expert minimizes the desirability of including expert opinion within the exception for present sense impressions. Thus, it is submitted that Rule 803(1) does not intend to encompass remarks by experts which involve reliance upon evaluative, analytic, or other skills of expertise, and should not be so construed.\textsuperscript{73}

Both criteria, contemporaneity and spontaneity, must exist. The absence of one destroys admissibility of the utterance as a present sense impression, as both are essential to alleviation of the hearsay risks of flawed memory and equivocation. Courts have misperceived the contemporaneity condition by failing to require temporal concurrence of perception and utterance in two situations: first, where the statement arises from an event or condition, but relates sensory knowledge acquired at some earlier time;\textsuperscript{74} second, where the time


\textsuperscript{73} Of course, declarations that do not involve the exercise of expert evaluation or analysis remain unaffected. For example, in Edwards v. West Tex. Hosp., 89 S.W.2d 801 (Tex. Civ. App. 1935), plaintiffs brought a malpractice action to recover for the death of a patient. The decedent had been pregnant with twins, only one of which was delivered. Severe complications resulted from the unborn fetus being left in its mother’s womb. After treating the decedent for a month, defendant decided to perform surgery, and thereupon discovered the fetus, badly decomposed. Decedent soon died.

Decedent’s husband was present during the operation, and offered to testify to the surgeon’s remark, “Here is another baby.” Under these circumstances, observation of the condition described involves little, if any, expertise, and the court correctly held the statement improperly excluded.

An additional reason for excluding expert opinion as a present sense impression is the inability, in most situations, of the auditor who relates the statement to the trier of fact to verify or evaluate the expert’s perception, in any sense. See discussion of this criterion at text accompanying notes 115 through 131 infra.

\textsuperscript{74} See note 58 supra, and cases cited therein.
lapse is impermissibly protracted. Hopefully, decisions under Rule 803(1) will properly interpret and apply these conditions to effectuate the rationale of the exception.

The amorphous nature of the \textit{res gestae} notion necessitated relegation of a large amount of discretion to the trial court in attempting to decipher whether a particular spontaneous declaration fell within or without the \textit{res gestae}; most common law decisions acknowledge that admissibility of spontaneous statements is a matter committed to the sound discretion of the trial court. A few courts, however, decree that so long as a proffered statement fulfills requirements of both contemporaneity and spontaneity and constitutes relevant evidence, admissibility is mandated, thereby annulling discretion in the court to exclude such evidence. Similarly, once a

75. See discussion \textit{supra} at notes 45 through 58 and accompanying text. A particularly egregious instance of this error, bred from reliance on \textit{res gestae}, is Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926). Plaintiff sued to recover a diamond from defendant which, allegedly, was plaintiff's property. The diamond had been set in a ring which was worn by plaintiff's wife. The court affirmed, on \textit{res gestae} grounds, allowing plaintiff to testify that while accompanying his wife to a tent meeting, she informed him that she had lost the stone, even though her statement was made, according to the court, some 15 minutes after she detected the loss. Dispensing with hearsay safeguards seems inexcusable under these circumstances.

76. A current example of proper interpretation of Rule 803(1) is Pittsburgh Press Club v. United States, 579 F.2d 751 (3d Cir. 1978). The Internal Revenue Service in that case challenged plaintiff's tax-exempt status on the ground that plaintiff's facilities were being utilized more often than was permissible under tax regulations for entertainment by outside groups, which proved profitable to plaintiff. Taxes were assessed for the exempt years, which plaintiff paid under protest, and sued for a refund. Following protracted trial proceedings and appeals, the trial judge found for plaintiff, basing his findings as to the nature of affairs which were held by "outside" groups (and therefore nonexempt) on a survey of plaintiff's members who had hosted the affairs in question. The members had been sent a form containing questions concerning the nature of the entertainment hosted by the member, and a cover letter which explained the reasons for the survey and advised which responses would benefit plaintiff in its battle with the Internal Revenue Service, and which would not.

The court of appeals reversed, holding that this survey suffered "from a severe dearth of any circumstantial guarantees of trustworthiness." \textit{Id.} at 759. The survey elicited not present impressions, but responses concerning events which had transpired years previously, negating any possibility of contemporaneity and consequently any protection against dimmed memories. Spontaneity was destroyed by the contents of the cover letter, which specifically informed members, who had some stake in the outcome of the litigation in any event, which answers were desirable and which were not. Emphasizing the lack of any safeguards of accuracy and reliability, the court held the survey improperly admitted as a present sense impression.


78. The Texas court in Houston Oxygen Co. v. Davis, 139 Tex. 1, 7, 161 S.W.2d 474, 477
declaration demonstrably satisfies the admissibility conditions set forth in Rule 803(1),79 the court’s discretion is restricted to evaluating the probative value of the utterance as proof of the proposition on which it is offered.80

Utility of the Exception

In view of attempts of recent codifications of evidence law to restrict the expansion of hearsay exceptions and disentangle to the extent possible a legal area notorious for its convolutions and pecadilloes, what is the impetus to add yet another hearsay exception to the extensive number of those commonly recognized? So long as the evidence proffered under the present sense impression exception demonstrates the requisite circumstantial guarantees of trustworthiness, as articulated in this article, it introduces elements of immediacy and concreteness to testimonial evidence.81 A simultaneous remark upon observance of some episode or condition, stated in everyday, unornamented language, adds an aspect of refreshing naturalness and unprompted persuasiveness to the case.82 Statements uttered at the time and place of the perception they depict aid in transporting the trier of fact to the scene, recreating the event and its context vividly by serving as oral photographs.83

79. 4 WEINSTEIN, supra note 5, § 803(1)(01), at 803-74-75. Of course, determination of the existence of the admissibility conditions reserves a fairly broad latitude of discretion to the trial judge. FED. R. EVID. 104(a).
80. FED. R EVID. 403.
83. E.g., People v. Rice, 109 Ill. App. 2d 391, 248 N.E.2d 745 (1969) (bystander’s statement to victim of robbery and aggravated battery, “Look out. He has got a razor”); Nelson v. Wabash R.R., 194 S.W.2d 726 (Mo. App. 1946) (statements by firemen and engineer, “What is that laying out there?” offered to negative plaintiff’s contention that her injuries were caused by being struck by defendant’s train, and to substantiate defendant’s claim that
Declarations contemporaneous with the incident may be more reliable than an in-court recounting of the occurrence;\textsuperscript{84} they lend color and substance to the trier of fact's reconstruction of the events,\textsuperscript{85} and are of considerable value as corroborative evidence.\textsuperscript{86}

Thus, the present sense impression exception extends the eventuality of admitting evidence of utility to the fact-finder which was often excluded previously on \textit{res gestae} grounds.\textsuperscript{87}

Rule 803(1) is a narrow exception, narrowly drawn. It is not intended, and should not serve, as a repository for rejected \textit{res gestae} statements which fail to gain admission under any other hearsay exception.\textsuperscript{88} Yet, even assuming that the limiting construction of Rule 803(1) advanced herein is preferable, it is necessary to more

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84. \textit{E.g.}, Emens v. Lehigh Valley R.R., 223 F. 810 (N.D.N.Y. 1915) (statement of bystander, "Why don't the train whistle?" admitted on issue of whether engineer sounded a warning); Mack v. State, 337 So.2d 74 (Ala. Crim. App. 1976) (statement of eyewitness, "I don't know what's going on, but I think they are robbing the place"); Barrett's Adm'r v. Brand, 179 Ky. 740, 201 S.W. 331 (1918) (statements of physician during surgery on decedent describing conditions he found); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942).

85. \textit{E.g.}, Reardon v. Marston, 310 Mass. 461, 38 N.E.2d 644 (1941) (statement of eyewitness to bicyclist struck by defendant's car, "Don't worry, Lee, I have got his number," admitted to substantiate plaintiff's claim that defendant attempted to flee the scene of the accident, and thereby raise an inference of negligence); Stodder v. Rosen Talking Mach. Co., 241 Mass. 245, 135 N.E. 251 (1922) (patrons' responses to noise admitted in nuisance suit); Stanley v. Bowen Bros., 96 N.H. 467, 79 A.2d 1 (1951) (statement, "My God, what is that?" admitted to characterize brightness of headlights of oncoming car in case where issue was whether darkness had fallen at the time of the accident).

86. These statements have independent trial significance and are not merely cumulative, as the court intimated in Jackson v. Utah Rapid Transit Co., 77 Utah 21, 290 P. 970 (1930). See People v. Gillard, 216 Mich. 461, 185 N.W. 734 (1921). See also Spontaneous Exclamations, supra note 12, at 440.

87. \textit{E.g.}, Eveready Cab Co. v. Wilhite 66 Ga. App. 815, 19 S.E.2d 343 (1942); Kudrna v. Comet Corp., 572 P.2d 183 (Mont. 1977) (statement of motorist to his passengers upon observing defendant drive by, "[Y]ou wait and see; just a few miles down the road he'll either be in a ditch or have killed someone" excluded); State v. Feaganes, 272 N.C. 246, 158 S.E.2d 89 (1967) (bystander's statement, "Come and stop them; they're going to fight" held admissible on appeal).

88. For examples of cases abusing the exception, see United States v. Gutierrez, 576 F.2d 289 (10th Cir. 1978); United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974), both admitting in part under the aegis of Rule 803(1), statements demonstrating neither contemporaneity nor spontaneity. See also United States v. Bell, 351 F.2d 898 (6th Cir. 1965), \textit{cert. denied}, 383 U.S. 947 (1966), and McCaskill v. State, 227 So.2d 847 (Miss. 1969), both admitting thoroughly unreliable statements under the guise of \textit{res gestae}. 
closely scrutinize the actual potency of the sincerity and memory guarantees embodied in the exception. Further, it is necessary to undertake an examination of situations wherein the exception has potential application, in order to ascertain whether, as promulgated, Rule 803(1) is in derogation of traditional safeguards against the unreliability of hearsay evidence.

THE EXCEPTION’S POTENTIAL

As incorporated in the Federal Rules, the present sense impression exception boasts safeguards against the hearsay dangers of equivocation and flawed memory. This protection is inadequate to insure the accuracy and reliability of evidence submitted for consideration by the trier of fact without benefit of oath, presence and cross-examination. Two reasons exist for this deficiency: first, the spontaneity requirement affords too meagre a guarantee of the declarant’s sincerity; and second, the exception takes no account of the declarant’s perceptual acuity. Even assuming that the contemporaneity condition assures the accuracy of the declarant’s memory, this lone guarantee is demonstrably insufficient to warrant forging a hearsay exception for an entire class of statements.89

89. That the exception, as drafted, offers flimsy protection against hearsay dangers might be demonstrated by resort to a brilliant schematic device designed by Professor Tribe. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957 (1975) [hereinafter cited as Tribe]. Professor Tribe exposes the structure of the hearsay rule and its exceptions by graphically plotting the rule on a triangular form. The risks of ambiguity and sincerity constitute the left side of the triangle, representing the problems associated with the inference of the declarant’s belief from the declarant’s statement. Problems of perception and memory constitute the right side of the triangular form, representing the difficulties of the inference of the existence of the event from the belief of the declarant. Obviously, no hearsay exception alleviates risks from all dangers on both sides of the triangle. But Professor Tribe’s analysis of existing exceptions demonstrates that most, at least theoretically, wholly neutralize dangers on one side or the other of the triangle, thus engendering the conclusion that, generally, “one good leg is enough.” Id. at 966.

Satisfaction of the left leg dangers allows the finder of fact to infer that the declarant himself believed his statement. Alleviation of right leg risks permits the inference that the declarant’s statement, whether subjectively sincere, deceitful, or jocular, is reflective of objective reality. Thus, treatises, *Fed. R. Evid. 803(18)*, which seek to inform and share knowledge, are generally written in language which is thoughtful and deliberate, albeit somewhat ponderous, evidence strong guarantees against the left leg dangers of fabrication and ambiguity. Statements of currently-existing physical or mental state, *Fed. R. Evid. 803(3)*, satisfy dangers on the right leg; if contemporaneous, the statement suffers no memory defects, and no one is better equipped to perceive the declarant’s sensations or emotions than the declarant himself. The exceptions have become exceptions because they are deemed conducive to admission of reliable evidence when both dangers on one of the legs are mitigated.

The present sense impression exception, triangulated, is a hybrid, for it alleviates only the memory risk on the right leg, and perhaps the falsification danger on the left leg. There are no guarantees of perception or precision of language, and one of the themes of this article is that any safeguard against equivocation afforded by the spontaneity requirement in the
The theory that spontaneity is sufficient as a guarantee of the declarant’s sincerity is premised on the assumption that all distortion of what is accurately perceived is necessarily the product of deliberative thought. So long as an utterance occurs quickly enough upon perception of an event, is wrenched from the declarant by the episode and is relatively narrow in scope, simply describing or explaining that which is perceived, it is deemed spontaneous enough to assure sincerity and dispense with the need for in-court probing of the declarant. Several flaws may be detected in this theory. In many instances, it is virtually impossible to ascertain whether the utterance is generated by the episode observed or by the operation of the declarant’s mental processes, even where the declaration is present sense impression exception is at best shallow. Satisfying only half of the right leg, or at best, half of each leg, the exception is an anomaly.

The one other exception which does not wholly alleviate risks of hearsay dangers on one triangular side or the other is that for excited utterances, Fed. R. Evid. 803(2), where only the sincerity of the declarant is assured. Several points must be made: first, there may be some guarantees against ambiguity in an excited utterance situation, since frenzy generally induces people to speak in uncomplicated language. Second, it may be that the sincerity guarantee is so strong as to, in and of itself, dispense with the need for cross-examination or other trial safeguards, although this proposition is disputed, see notes 121 through 123 infra and accompanying text. In any event, accurate memory, in and of itself is less convincing as a protection of accurate, reliable testimony than demonstrated sincerity. Finally commentators have traditionally denounced the excited utterance exception as a purveyor of inaccurate and undependable evidence, see authorities cited as note 12, supra, so that its efficiency as a screening device for reliable evidence is a matter of contention.

Triangular analysis thus exposes inherent deficiencies in the present sense impression exception, as incorporated in the Federal Rules.

90. See, e.g., United States v. Bell, 351 F.2d 868 (6th Cir. 1965), cert. denied, 383 U.S. 947 (1966) (statement of declarant that he had just been offered a bribe by defendant); Adams Express Co. v. National Bank of Middlesboro, 162 Ky. 400, 172 S.W. 660 (1915) (employee’s statement concerning amount of money contained in a package forwarded to another bank); Silver Seal Products Co. v. Owens, 523 P.2d 1091 (Okla. 1974) (employee’s statement that the cause of his injury was a fall on ice in employer’s parking lot); State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (1970) (statement of victim concluding a telephone conversation, “I have to hang up now; my husband is here”); State v. Canaday, 79 Wash. 2d 647, 488 P.2d 1064 (1971) (statement of victim to her neighbor describing a visit by a “husky young man in a navy blue peacoat” who was returning to victim’s apartment).

Often, of course, the declarant harbors no conceivable motive to misrepresent his observation. However, any secret biases or motives that do exist remain concealed absent in-court probing of the declarant.

In many cases, the utterance is obviously evoked by the declarant’s observation of the event or condition described. See cases cited at note 61 supra. See also State ex rel. McKinney v. Richardson, 76 Idaho 9, 277 P.2d 272 (1954) (statement of passenger that truck had “plenty of clearance”); Hodge Drive It Yourself v. Cincinnati Gas & Elec. Co., 90 Ohio App. 77, 96 N.E.2d 325 (1950) (telephone statement of declarant that there was a gas leak in the basement); Ashby v. Philadelphia Transp. Co., 356 Pa. 610, 52 A.2d 578 (1947) (statement of passing motorman that a woman had been hit by a trolley). These cases present other problems, namely perceptual acuity of the declarant, discussed at notes 93 through 101 infra and accompanying text.
emitted virtually instantaneously upon cognizance of the event. Yet it is speed which usually forms the crux of the spontaneity requirement.

The swiftness with which an utterance ensues, in and of itself, is insufficient as a guarantor of the declarant’s veracity. Commentators cite psychological studies indicating that the interval which separates cognition from the deception reaction is minute, often a matter of fractions of seconds, and impossible to gauge without the aid of instruments. Thus, as a logical proposition, the fact that the declarant spoke quickly and lacked the time in which to reflect and deliberate provides only questionable assurance that the declarant is uninfected by concealed biases and is, in no way, fabricating or consciously distorting what he perceives. Moreover, it assumes that man’s primal instincts, absent deliberate reflection or rumination, are directed toward objective truthfulness, that subtle biases and misrepresentations of all sorts are perforce the product of contemplation and cerebration. It also assumes that reflexive responses never encompass sarcasm, cynicism, irony, facetiousness, or jocularity. That the utterance rapidly follows the observation merely diminishes the possibility that the unperturbed declarant has time to distort, color or equivocate; absent the intellectual paralysis which often accompanies emotion, his capacity to twist, shade or deceive, should he be impelled to do so, remains unaffected. Thus, even where the contemporaneity requirement is strictly applied, mere speed, as an aspect of spontaneity, at best renders the veracity of a response more likely, but not a certitude.

The difficulty of assuring truthful responses, although troublesome, is not paramount. Despite the disproportionate concern evidenced by the law for calculated and deliberate deception, many authorities identify unwitting distortions in perception, memory and articulation as the primary source of testimonial inaccuracies.93


92. It is interesting to contrast the different forms of the spontaneity requirement operating in the present sense impression exception and the exited utterance exception. Rule 803(1)’s spontaneity proviso goes to the declarant’s lack of time to utter falsehoods. The spontaneity requirement incorporated in Rule 803(2) relies on the declarant’s lack of capacity, due to the shock produced by the startling event, to equivocate. Intellectual processes are temporarily paralyzed. Although it is true that “[o]ne need not be a psychologist to distrust an observation made under emotional stress,” *Spontaneous Exclamations, supra* note 12, at 437, the sincerity guarantees are actually stronger in the excited situation, particularly where the declarant is either biased in some sense or a practiced liar.

93. A. TRANKEL, RELIABILITY OF EVIDENCE 70-72 (1972) [hereinafter cited as RELIABILITY OF
Much of the evidence admitted in the trial context is subjectively accurate and precise, yet objectively false, an amalgam of misperceptions, misinterpretations and distortions.\(^4\)

Perceptual processes interact with those of memory, both being the product of an intricate blend of neurological, psychological, and physiological processes. Perceptual acuity is profoundly influenced by subtle motivational and behavioral components that operate to distort raw sensory data. Experimental psychologists agree that functioning of the process termed “perception” is substantially reliant upon the character of data previously ensconced in the mind of the perceiver; the individual unwittingly interprets external stimuli restricted by the selective limitation of his prior experiences.\(^5\)

We see that which interests us and we become aware of details we have earlier learned to discern. This explains the profound difference we often find between descriptions of one and the same event, even though it was observed by the witnesses under equal external conditions. Already in the moment of perception the observations become colored by the observer’s personal experiences; they are sifted from details the observer does not recognize and also in other ways formed by the individuality of the “registering instrument.”\(^6\)

Articulable factors affect perceptual acuity. For example, the per-

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The vagaries attendant to the exercise of these respective human faculties are well-documented in both legal and scientific literature. In addition to the aforementioned authority, see generally S. Freud, Psychoanalysis and the Ascertainment of Truth in Courts of Law, in 2 COLLECTED PAPERS 13 (1906); Buckout, Psychology & Eyewitness Identification, 2 LAW & PSYCH. REV. 75 (1976); Buckout, Eyewitness Testimony, 15 JURIMETRICS J. 171 (1975); Marshall, Marquis & Oskamp, Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony, 84 HARY. L. REV. 1620 (1971); Redmount, The Psychological Basis of Evidence Practices: Memory, 50 J. CRM. L.C. & P.S. 249 (1959); Saxe, Psychiatry, Psychoanalysis, and the Credibility of Witnesses, 45 NOTRE DAME LAW, 238 (1970); Slovenko, Witnesses, Psychiatry and the Credibility of Testimony, 19 U. FLA. L. REV. 1 (1966); Weinstein, Some Difficulties in Devising Rules for Determining Truth in Judicial Trials, 66 COLUM. L. REV. 223 (1966).


96. Reliability of Evidence, supra note 93, at 17.
ceiver arbitrarily selects signals from among a universe of sensory stimuli, occasioning the occurrence of perceptual lacunae. A “logical completion mechanism” operates to supply appropriate material to fill in these gaps. The perceiver then coalesces the fragments into a sequence of events which are subjectively logical and acceptable, but may bear only a tenuous relationship to the objective reality of the occurrence perceived. Training, education, preferences, attitudes, biases and expectations, as well as stress, profoundly influence the perceptual interpretation of data. Thus, even elimination of the hearsay risk of flawed memory provides scant assurance that the declarant’s perceptual acuity operated at

97. Id. at 18; Marshall, Evidence, Psychology and the Trial: Some Challenges to the Law, 63 Colum. L. Rev. 197, 207-08 (1963).
98. Reliability of Evidence, supra note 93, at 18. An illustration of this phenomenon, involving a commonplace occurrence, is as follows. A pedestrian observes, while crossing a busy street, a car stop suddenly, and an elderly man fall unconscious to the street, lying next to the open car door on the driver’s side. The automobile is unoccupied. The pedestrian, upon assimilation of this data, assumes that the injured man had either fallen out or had been thrown out of the car, and reports his “perception” of the incident as such. In fact, however, the car had braked suddenly to avoid hitting the elderly man, who had wandered into the intersection. The unavoidable collision had knocked the man to the ground. The driver immediately had hurried to a telephone to summon an ambulance, leaving the door open. The pedestrian had, in actuality, perceived only a few fragmentary impressions, but had integrated them into a logical sequence which was acceptable to him, but only slightly related to the actual occurrence. Id.
99. It has been demonstrated that particularized training may have an effect on perception, so that the trainee perceives with a greater degree of accuracy that which he has been trained to perceive. A study comparing the perceptual ability of police to that of perceptually untrained persons to perceive details in pictures containing both neutral and crime-related details demonstrates the superiority of the police in perceiving crime-related elements—such as weapons, a person running, a police car—but proves both groups perceptually equal in perceiving neutral details. Lezak, Some Psychological Limitations on Witness Reliability, 20 Wayne L. Rev. 117, 127 (1973).
100. Reliability of Evidence, supra note 93, at 19-20. Additional factors include the degree of significance attached to the occurrence observed and the length of the observation period. Buckout, Psychology and Eyewitness Identification, 2 Law & Psych. Rev. 75, 77-82 (1976). The author details a classic experiment illustrating the influence of bias and expectation upon perception. Observers were shown a playing cards for several seconds and asked to report the number of aces of spades contained in the display. Most observers reported three spade aces, although, in actuality, the display contained five. Two of the aces were colored red, and these remained unperceived by those who were prepared only to perceive the more familiar color, black. Id. at 80.
See also Perception, Memory and Hearsay, supra note 13, at 8-22. The author persuasively demonstrates through utilization of a number of psychological studies in which unexcited participant observed commonplace occurrences, that in the event of conflict between actual perceptive fact and idiosyncratic functioning of perceptual processes colored by factors such as expectation and bias, the situation itself was often a less potent determinant of the image perceived than these individualized factors. See also Perception and Memory of Witnesses, supra note 47, 394-408.
the time in question to produce anything more than an idiosyncratic image bearing only slight relationship to objective reality.

[C]ognitive processes of the human organism are not the equivalent of a photographic process which renders and preserves an essentially accurate counterpart of some event. Although the legal system uses the organism as a source of "facts," perception and memory operate in a way that enables a person to cope with his environment within the limitations that inhere in the neurological and psychological functioning of the organism. The degree of correspondence between the testimony of an event and the reality it purports to represent may, therefore, vary widely according to the effect of numerous factors. The imperatives of successful adaptation do not require that the individual's cognitive process operate in all instances to provide information having the degree of objective accuracy necessary for accurate, after-the-fact reconstruction which is attempted by judicial fact determination.101

The touchstone of the rule prohibiting untested hearsay, the opportunity for cross-examination, enjoys its greatest utility in probing the accuracy of evidence which is the end-result of the operation of the witness' cognitive processes, testing the accuracy of the witness' memory, and eliminating or restricting the risk of misapprehension on the part of the trier of fact due to perceptual errors.102

By means of cross-examination. . .personality traits that influence cognitive functioning may be disclosed; the effect of the witness's mental set at the time of perception, possible suggestive influences, and numerous other factors which affect a witness's mental processes may be investigated. Obviously, a witness who testifies to hearsay can usually provide the trier of fact with none of the same information.103

The risk that error through perceptual distortion will infest factual determination during the course of a trial inheres in all hearsay evidence. However, the danger is aggravated when the accoutrements of trial fairness, oath, personal presence and cross-examination are dismissed as superfluous without concomitant safeguards being provided against the hearsay risks. The potential

101. Perception, Memory and Hearsay, supra note 13, at 21.
102. Actually, very little deliberate deception occurs on the witness stand, reinforcing the significance of cross-examination in exposing defects in the witness' perceptual capacity. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 186-88 (1948). See also Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan. L. Rev. 682 (1962); Perception, Memory and Hearsay, supra note 13, at 22; Perception and Memory of Witnesses, supra note 47, at 396.
103. Perception, Memory and Hearsay, supra note 13, at 22.
for perceptual distortion would be tolerable in a rational legal system, were the circumstantial reliability guarantees manifested by a category of evidence particularly effective in insuring that the declarant is sincere and relatively adept at articulation. In such a case, the finder of fact could infer with some degree of confidence that the declarant at least believed his utterance. Likewise, defects in the sincerity or articulation powers of the declarant are endurable where the functioning of his cognitive processes, perception and memory, is circumstantially dependable enough to afford the reasonable certainty that the declarant’s statement, regardless of his bona fides and biases, is reflective of objective reality. The Federal Rule formulation of the present sense impression exception conforms to neither of these models. It furnishes, at best, meagre guarantees of the declarant’s veracity and fails to take account of articulation problems. It embodies reliable protection only against imperfect memory, a guarantee which pales in view of the unchecked risk of perceptual distortion; one’s memory of an event can be no more accurate than initial perception of it. These deficiencies imbue Rule 803(1) with the potential to allow consideration by the trier of fact of evidence manifesting none of the circumstantial guarantees of reliability ordinarily required as a precondition for dispensing with personal presence, oath, and cross-examination. This potential may be demonstrated by examination of situations where Rule 803(1), even if narrowly interpreted, would permit admission of untrustworthy evidence.

Assume, for example, a murder prosecution wherein defendant is

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104. Articulation is the process by which the incident perceived and reconstructed is translated from mental image to communication. Distortion may occur in two ways. The use of words may prompt the narrator to verbally sketch in missing details, or the words used may fail to convey the degree of clarity or preciseness in which the narrator holds the image. In either case, the conversion from image to words may result in the integration of the image into the language used to describe it. In effect, what remains in the mind of the narrator is no longer the abstract image, but merely the label and the description attached to it during the process of verbalization. Hutchins & Slesinger, Some Observations on the Law of Evidence—Memory, 41 Harv. L. Rev. 860, 867 (1928). “Once, however, the image becomes words, it takes on all colors of the words, and becomes retroactively clear, sharply defined, and complete.” Id.

105. It is only the very strong sincerity guarantee which preserves the excited utterance exception, allowing hearsay statements of a declarant who, by definition, is undergoing traumatization of his perceptive, judgmental and memory powers, from the realm of the ludicrous. If the numerous commentators who have criticized this exception, supra note 12, are correct, as this author believes they are, hearsay exceptions which offer little or no protection against the risk of perceptual distortion should not be adopted absent strong assurances of the declarant’s sincerity and precision in the use of language. See Tribe, supra note 89.

106. See Tribe, supra note 89. Federal Rule 803(3) is a hearsay exception evidencing circumstantial guarantees of perceptual and memory reliability.
Present Sense Impressions

accused of shooting her husband. Defendant relies on an alibi defense, contending that her husband was probably killed by an intruder, which would account for the state of disarray in the room where decedent’s body was found. The State offers the testimony of Witness, a friend of the deceased, who conversed with the deceased shortly before his death. The deceased concluded the conversation by stating, “I have to hang up now. My wife is home.” Witness’ statement, of course, is relevant to the issue of the identity of the murderer. Although contemporaneous with an event, if one occurred, is it trustworthy, or is it impelled by some variety of self-interest, perhaps something so mundane as a desire to politely conclude a conversation? Moreover, no safeguards regarding the perceptual acuity of the deceased are present. Absent all guarantees of sincerity and perception the statement is hardly trustworthy, since it, in effect, assures no more than that deceased had not forgotten whatever image, if any, had registered upon his consciousness.

The fact pattern may be varied; for example, assume that Witness, wife of declarant, enters a room while her husband is conversing via telephone with an unidentified person. Declarant shields the mouthpiece with his palm and murmurs, “It’s defendant. He is offering me a bribe.” The statement partakes of the same reliability risks, evidencing assurances only that the declarant’s memory is intact.

Difficulties in the above statements inhere, in part, from the impossibility of determining that spontaneity is actually present, that the event observed, rather than jocularity, irony, sarcasm, self-interest or facetiousness on the part of the declarant, spurred the utterance. Even where circumstances surrounding the statement imply spontaneity, the perceptual acuity of the declarant and the perceptual bases for his observation remain an enigma. In fact, statements which fail to yield any guarantee whatsoever as to the perceptual acuity of the declarant are potentially more risky than those in which the primary flaw involves the declarant’s sincerity; factors affecting sincerity, such as bias, motives borne of self-interest, or general disposition may be evident to the finder of fact.


or may be discovered by the adversary prior to trial, and exposed as impeachment of the hearsay declarant. 10 Any existing perceptual defects of the declarant remain virtually impossible to detect and expose, absent cross-examination, given the complexity of factors which impact upon perceptual processes.

Situations wherein the declarant’s perceptual acuity remains unprobed and unverified, so that the reliability of the utterance must be questioned, are legion; a few examples will suffice. Defendant, accused of bank robbery, claims alibi. The prosecution offers testimony by Witness, a bank employee, who states that although he did not personally observe the vehicle used as a get-away car, declarant called out to him a description of the year, make, model and license number of the car, which description identifies defendant’s car. 11 Without examination of declarant’s perceptual acuity, as well as external factors affecting perception, such as agitation on the part of declarant, visual obstructions, defective lighting conditions, etc., hearsay risks inherent in this statement, save that of faded memory, remain untouched. 12 Moreover, even expressions of mundane observations lack dependability absent the opportunity to explore the declarant’s perceptual abilities as well as the objective bases upon which his observations are premised. Utterances informing the listener, for example, upon the entrance of a large truck into the portal of a bridge, that “there is plenty of clearance,” 13 or upon entering a room that, “there is gas in here,” 14 evidence the requisite

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109. E.g., “He’s a great kidder,” or “He’s a pretty sarcastic guy,” or “He and the defendant never got along.”
110. FED. R. EVID. 806.
112. The dissenting judge in United States v. Medico, 557 F.2d 309 (2d Cir. 1977) detailed factors affecting the reliability of this type of declaration, and quoted United States v. Wade, 388 U.S. 218, 228 (1967) in observing that such untested eyewitness evidence has long been deemed “peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially derogate from a fair trial.” 557 F.2d at 319.

circumstantial guarantees of trustworthiness, and are therefore reliable, only insofar as the perceptual prowess of the declarant can be credited. Yet only the hearsay danger of flawed recollection is alleviated.

Each of the foregoing statements is admissible within the contours of the currently existing Rule 803(1), demonstrating the validity of the implicit concern which motivated exclusion of the present sense impression exception from the Proposed Illinois Rules of Evidence. However, an approach intermediate to the Federal Rules perspective of unquestioned admission, which might allow hearsay evidence which fails to manifest the ordinarily required circumstantial guarantees of reliability, and the Illinois Rules posture of wholesale exclusion, which might deprive the trier of fact of relevant evidence which is demonstrably trustworthy, is proffered.

A PROPOSAL FOR MODIFICATION

The salient obstacle to unrestrained acceptance of the present sense impression exception is its inability to assure the dependability of evidence encompassed within its bounds.115 The inadequacy of the spontaneity requirement as a warrantor of the declarant’s sincerity inhibits drawing the inference of the declarant’s belief from the fact of his utterance. The absence of any check whatsoever of the perceptual ability and perceptual bases for the statement prohibits drawing the inference of the existence of that which is observed from the belief of the declarant. Yet, remedying these deficiencies would effect a salutary hearsay exception, one which would introduce evidence useful to the fact finder.

A simple restorative device is available. The terms of the exception should incorporate the requirement assumed by its progenitors to be among its integral conditions,116 presence at trial of either the

In Wragge v.King, 114 Kan. 539, 220 P. 259 (1923), the court excluded the proffered statement of a witness for defendant that although he himself did not observe the accident wherein plaintiff was stricken by defendant’s car his companion stated, “See that fellow [plaintiff] jump in front of that automobile.” Upon affirmance, the court pointed out not only the lack of guarantee regarding the declarant’s perceptual powers, but also an articulation difficulty, in that, “there is no guaranty that what he said was not, after a common mode of speech, a superlative interpretation of his impression.” Id. at 542, 220 P. at 261. Although the connotation of language used, perhaps imprecisely, by the declarant poses an unalleviated danger, it is submitted that were the perceptual guarantee present to some degree, or were the sincerity guarantee less superficial, the admission of a statement the language of which is uncross-examined would be tolerable.

115. See authorities cites at note 13, supra.
116. The leading notion in the doctrine. . .seems to have been that of withdrawing from the operation of the hearsay rule declarations of fact which were very near in time to that which they tended to prove. . .and so [were] open, either
declarant or the auditor, who also observed the event depicted by the statement, and thus verifies the perception of the declarant. Thus, a modified form of the exception would provide a hearsay exception for:

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, where

(A) the declarant is subject to cross-examination concerning the statement; or
(B) the statement is made to a person with similar opportunity to observe the event or condition, and that person is subject to cross-examination concerning the statement.

Availability of the declarant for cross-examination is perhaps relatively ineffective in ascertaining whether what he retains is an image which was initially misperceived; this perceptual difficulty, however, inheres in all testimony, and cross-examination is generally deemed a vigorous implement through which the risk of initial misapprehension is at least mitigated, if not eliminated. Subjec-

immediately or in the indications of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to those indications. Bedingfield's Case, supra note 7, at 107. See also E. Morgan, Basic Problems of Evidence 296-97 (1954); A Suggested Classification, supra note 7, at 236; Morgan, Res Gestae, 12 Wash. L. Rev. 91, 95-97 (1937); Spontaneous Exclamations, supra note 12, at 440. Other commentators have suggested a similar modification to the Federal Rules. See Waltz, Present Sense Impressions and the Residual Exceptions; A New Day for "Great" Hearsay?, 2 Litigation 22 (1976). Although the Federal Rules omit specific reference to this requirement in the formulation of Rule 803(1), it is mentioned in the Advisory Committee's Notes as an additional safeguard which is usually present. See note 15, supra.

In recognizing the present sense impression exception, the Pennsylvania Supreme Court, in accordance with Rule 803(1), discussed, yet rejected, verification of the declarant's perception as a condition of the exception. Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387, 390 (1974).

117. Concededly, Morgan and Thayer described the exception only in terms of third-party verification. However, the presence of the declarant allows cross-examination concerning his sincerity and the perceptual bases for his statement, thus allaying the unreliability risks of his extrajudicial utterance. Accord, Commentary, Minn. Court Rules—Minn. R. Evid. 801 (Supp. 1977), quoted at note 2, supra.


119. See authorities cited at note 102, supra.

Professor Stewart, in a masterful analysis of the weaknesses inherent in untested hearsay evidence, concludes that admissibility of statements of present sense impression should be contingent upon demonstration of the declarant's unavailability. Perception, Memory and Hearsay, supra note 13, at 24, 29. Professor Stewart's theory is that rules concerning admissibility of hearsay evidence must accommodate the conflict between a need for the hearsay evidence and its inferior reliability. He resolves the conflict "by viewing the need for hearsay evidence in something of an inverse ratio to the circumstantial probability of its trustworthiness." Id. at 23. It is submitted, however, that where the reliability of hearsay evidence is established, the proponent need not bear the onus of producing all available declarants,
tion of the declarant to cross-examination, however, affords opportunity to expose defects in declarant’s perceptual acuity, to plumb his perceptual bases, to clarify language ambiguities, and to examine his sincerity. Thus, although hearsay, the witness’ own present sense impression statement evinces ample reliability guarantees.

Observation by the auditor of the phenomenon depicted in the declarant’s statement authenticates the accuracy of the declarant’s perception, and allows cross-examination concerning that of the witness. Thus, in conjunction with the safeguard against faulty memory, this verification enables the trier of fact to infer the existence of the event from the belief of the declarant. Insofar as the witness’ independent observation of the episode corresponds with that reflected in the declarant’s statement, some guarantees concerning the declarant’s use of language and veracity are furnished.

Although superficially inconsistent with Rule 803(2), which permits frenzied outbursts as a hearsay exception, regardless of the presence of the declarant at trial or the verification of his statement by the auditor, the additional safeguard is warranted, as has been demonstrated. Despite Wigmore’s support, the trustworthiness of statements admittedly the product wholly of the declarant’s stupefaction has been vehemently disputed. That the drafters of the Federal Rules expressed doubt concerning the effectiveness of the excited utterances exception for screening evidence unreliable due to perceptual distortion, yet capitulated to widespread judicial recognition in including it among hearsay exceptions codified in Rule 803, testifies to the fact that inertia, rather than logic, compels

Tribe, supra note 89, at 968-69, although as a practical matter, many declarants will be present to relate their own extrajudicial utterances to the finder of fact. Thus, it is urged that the present sense impression exception remain codified under Rule 803, where the availability of the declarant is immaterial.

120. State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939). The wisdom of denoting a witness’ own prior extrajudicial statements as hearsay is a topic beyond the scope of this article. See Gooderson, Previous Consistent Statements, 26 CAMBRIDGE L.J. 64 (1968); Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177 (1948); Reutlinger, Prior Inconsistent Statements: Presently Inconsistent Doctrine, 26 HASTINGS L.J. 361 (1974).

121. See authorities cited at note 12, supra. Hutchins & Slesinger demonstrate the relative worthlessness of evidence induced from shock, relating observations of agitated witnesses that a helpless woman had been “deliberately and vindictively” run down by a carriage (when, in fact, the unfortunate incident was purely accidental), and that hundreds of people, whose heads were rolling down the street, had perished in an accident (when, in fact, one man was killed). Spontaneous Exclamations, supra note 12, at 437-38.

122. FED. R. EVID. 803(1) AND (2), ADVISORY COMM. NOTES.

123. See also Spector, Impeachment Through Past Convictions: A Time for Reform, 18 DE PAUL L. REV. 1 (1968), wherein the author discusses the impact of the forces of inertia in sustaining the rule permitting impeachment of a witness by introduction of his prior convic-
the persistence of Wigmore's exception. Existence of this anomalous exception for excited utterances does not warrant, in the interests of consistency, creation of another hearsay exception embodying the potential for allowing statements manifesting too few of the traditional circumstantial reliability guarantees.

Nor would incorporation of the proposed modification weaken the utility of the present sense impression exception to one encompassing only statements which are merely cumulative or corroborative. As demonstrated, the effectiveness of the exception lies in its capacity to present for consideration by the trier of fact evidence which conveys a sense of urgency and immediacy, which imparts the declarant's observation in uncluttered, comprehensible language, which lends color and substance to the context surrounding the conduct at issue. Qualification of the exception thus insures the reliability of statements qualifying under its terms, yet does not sacrifice its capacity to admit worthy, relevant evidence.

The proposed formulation of the present sense impression exception would operate to exclude many statements previously deemed sufficiently trustworthy to warrant admissibility on Rule 803(1) or res gestae grounds. However, the decision to accommodate the oft-conflicting considerations of need for the evidence and assurance of its trustworthiness in favor of guaranteeing reliability through promulgation of a narrowly-constructed exception does not dictate exclusion of statements ineligible for admission as present sense impressions. The residual hearsay exceptions are incorporated

A study analyzing the phenomenon of inertia as an influence upon the development and maintenance of legal norms is contained in W. Hurst, LAW AND SOCIAL PROCESS IN THE UNITED STATES 28-76 (1960).

Of course, it might be argued that the tumult in which the reflective powers of the declarant are submerged provides such a strong guarantee of sincerity that the reliability of the evidence is assured, regardless of the utter lack of perceptual capacity. Common sense and examples similar to those noted at note 121, supra, conclusively rebut this argument.

124. See notes 81 through 87, supra, and accompanying text. 125. The case most often cited in support of adoption of the present sense impression exception, Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942), wherein the listener who related the declarant's description of a passing vehicle also observed the incident, and the declarant herself also testified, is a prime example of the utility of the exception as modified.


127. FED. R. EVID. 803(24) and 804(b)(5). Each provision is as follows:

Other exceptions. A statement not specifically covered by any of the foregoing
within both the Federal and Illinois versions of the Rules of Evidence in order to accommodate declarations manifesting articulable reliability guarantees. Thus, highly trustworthy evidence may be presented to the finder of fact without the necessity of enacting a broad present sense impression exception which lacks the capability to insure the dependability of each statement arguably within its provisions.

**CONCLUSION**

As devised by Thayer and Morgan, the present sense impression exception is salutary, embodying ample assurances of reliability. Exclusion of the exception would abrogate the desirable result in cases like *Houston Oxygen Co. v. Davis*,\(^{128}\) thus depriving the trier of fact of much useful, reliable information. Further, exclusion might impel courts to resort to the common law ruse of expanding existing exceptions almost unrecognizably in order to accommodate trustworthy evidence in a particular case.\(^{129}\) Such a process fails to

exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes it known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Federal decisions extrapolating the terms of these provisions indicate strict judicial construction. See, e.g., United States v. Garner, 574 F.2d 1141 (4th Cir. 1978); United States v. West, 574 F.2d 1151 (4th Cir. 1978); United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978); United States v. Williams, 573 F.2d 284 (5th Cir. 1978); United States v. Lyon, 567 F.2d 777 (6th Cir. 1977); United States v. Ward, 552 F.2d 1080 (5th Cir.), cert. denied, 434 U.S. 850 (1977); United States v. Carlson, 547 F.2d 1946 (8th Cir. 1976); United States v. Leslie, 542 F.2d 288 (5th Cir. 1976); United States v. Iaconetti, 540 F.2d 574 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977); Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975); Ark-Mo Farms, Inc. v. United States, 530 F.2d 1384 (Ct. Cl. 1976); 36 A.L.R. Fed. 742 (1978).\(^{128}\) But see United States v. Medico, 557 F.2d 309 (2d Cir. 1977).


\(^{128}\) 139 Tex. 1, 161 S.W.2d 474 (1942).

enhance either the objective of predictability in the application of rules of law or the integrity of existing exceptions. Should the Proposed Illinois Rules of Evidence be reconsidered, a properly construed and modified present sense impression exception would establish an "ideal exception" to the hearsay rule.

130. For discussion of suggested construction of the subject matter of the statement and the contemporaneity condition for admissibility, see notes 16 through 58 supra, and accompanying text.

131. Spontaneous Exclamations, supra note 12, at 439.