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The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence

EDWARD J. IMWINKELRIED*

The residual hearsay exceptions contained within the Federal Rules of Evidence permit a judge to admit trustworthy hearsay even if the declaration does not fall within a specific exception. In this Article, Professor Imwinkelried discusses the heated controversy which has arisen over the residual exceptions' scope. Many of the decided cases construe the exceptions narrowly and limit them to rare instances where the evidence has extraordinary probative value. Professor Imwinkelried considers the viability of a more liberal construction of the exceptions and concludes that a broad construction is more literal, purposive, and reasonable.

On July 1, 1975, the Federal Rules of Evidence became effective.1 Rules 803 and 804 list the exceptions to the hearsay rule.2 Both Rules

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conclude with a catch-all or residual exception.³ Rule 803(24) is illustrative:

A statement not specifically covered by any of the foregoing 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 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.⁴

These residual exceptions have proved to be one of the most controversial features of the Federal Rules. At first, the exceptions precipitated debate among the members of the Advisory Committee which drafted the Rules. In 1969, at the Annual Judicial Conference of the Second Circuit, one Committee member, Frank Raichle, charged that the exceptions gave trial judges undue discretion and promoted "government by men and not by law."⁵ The controversy next surfaced during the Congressional consideration of the Rules. The House Committee on the Judiciary voiced the fear that the residual exceptions would "[inject] too much uncertainty into the law of evidence and [impair] the ability of practitioners to prepare for trial."⁶ The Committee felt so strongly on the issue that it completely deleted the residual exceptions from the proposed legislation. Finally, after the Senate and Conference Committees reinstated the exceptions and Congress enacted the Rules,⁷ the controversy has reappeared in the courts.

In four recent cases the federal courts have grappled with the question of the appropriate scope of judicial discretion under the residual hearsay exceptions. In Lowery v. Maryland,⁹ United States v. Medico,¹⁰ and United States v. Mathis,¹¹ the courts opted for the view that the exceptions have a relatively narrow scope. In these

³ Id. 803(24) & 804(b)(5).
⁴ Id. 803(24).
⁷ Id. at 5-6, quoted in Resource Materials, supra note 6, at 357-58.
⁸ Fed. R. Evid. 803(24) & 804(b)(5).
¹⁰ 557 F.2d 309 (2d Cir. 1977).
¹¹ 559 F.2d 294 (5th Cir. 1977).
cases, the courts reiterated the Senate Committee's language that the exceptions should rarely be used and only in exceptional circumstances.\textsuperscript{12} By contrast, in \textit{United States v. American Cyanamid Co.},\textsuperscript{13} the court expressly repudiated the view that the residual exceptions may be used only in exceptional cases.\textsuperscript{14} The \textit{Federal Rules of Evidence News} accurately reported that the lower federal courts "vary widely" on the issue of the residual exceptions' scope.\textsuperscript{15}

This controversy is significant for three reasons. First, the hearsay article, Article VIII, is one of the most important parts of the new federal rules. It is the lengthiest article in the federal rules.\textsuperscript{16} It is also

\begin{footnotesize}
\item[12] United States v. Mathis, 559 F.2d 294, 299 (5th Cir. 1977); United States v. Medico, 557 F.2d 309, 315 (2d Cir. 1977); Lowery v. Maryland, 401 F. Supp. 604, 608 (D. Md. 1975). One commentator has suggested that United States v. Oates, 560 F.2d 45 (2d Cir. 1977), also stands for the proposition that the residual exceptions are "to be used only in unusual and exceptional cases and that they not serve as a facile end run around the more traditional exceptions." [1977] 2 FED. R. EVID. NEWS 77-87 (Callaghan & Co.). However, this suggestion overstates the holding in \textit{Oates}. In \textit{Oates}, a drug prosecution, the trial judge permitted the prosecutor to introduce a government chemist's official report and worksheet identifying the analyzed substance as heroin. The court did not deal with the general scope of the residual exceptions. Rather, the court first held that the documents were inadmissible under Rule 803(8) governing admissibility of official records. Rule 803(8) reads:

\begin{quote}
(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
\end{quote}

\textit{FED. R. EVID. 803(8)} (emphasis added). The court reasoned that Rules 803(8)(B) and (C) mandated the documents' exclusion; under Rule 803(8)(B) the analysis by a Customs Service chemist is an inadmissible "matter observed by . . . law enforcement personnel," and Rule 803(8)(C) implies that the government cannot use factual findings such as the identification of a contraband drug against a defendant in a criminal case. 560 F.2d at 87-88. The court secondly held that the legislative history of Rules 803 and 804 requires that evaluative police reports excluded under Rule 803(8) be automatically inadmissible under all other subsections. \textit{Id.} at 69-78. The court did not discuss the meaning of the "comparable circumstantial guarantees of trustworthiness" requirement in the residual exceptions. In fact, the court did not argue on appeal that the evidence fell within Rule 803(24). \textit{Id.} at 72. The court's footnote discussion of Rule 803(24) centered on the subsection's notice requirement rather than the evidence's trustworthiness. \textit{Id.} at 72 n.30.


\item[14] \textit{Id.} at 865-66.

\item[15] [1977] 2 FED. R. EVID. NEWS 77-48 (Callaghan & Co.).

\end{footnotesize}
one of the most innovative articles, engrafting new exceptions onto the federal hearsay rule, and liberalizing the requirements for several recognized exceptions.

Second, the residual exceptions epitomize the essential dilemma of the effort to codify federal evidence law; like the federal rules as a whole, the exceptions attempt to attain the goals of standardizing federal evidence practice while affording the trial judge sufficient discretion and flexibility to do justice in exceptional cases. Judge Friendly has remarked that evidence law does not lend itself to codification. Citing his remark, Representative Holtzman opposed the residual exceptions. She commented:

The problems with rule 803(24) illustrate the serious reservations I have about codification of rules of evidence. This provision recognizes that it is impossible to codify the hearsay exceptions. Instead of permitting, by statute, any kind of hearsay to be used, we ought to have allowed courts to develop evidentiary principles on a case-by-case basis—as they have done for 200 years of our Federal history.

Representative Holtzman’s comment highlights the tension between the drafters’ two goals: The more discretion and flexibility the exceptions grant the trial judge, the less uniformity and standardization the Rules will promote. The controversy over the residual exceptions raises the question whether there is so much tension between the two goals that the only possible resolution is to give the exceptions a severely narrow construction.

Third, the controversy affects the state courts as well as the federal courts. Eleven states have already adopted the federal rules in whole or large part. The state versions of the residual exceptions are as broad as or broader than the version Congress finally enacted.

This Article first summarizes the common law view of the trial judge’s power to recognize new hearsay exceptions. Next, the Article traces the legislative history of the residual exceptions. The author then analyzes the decided cases construing the exceptions. Finally, the Article discusses the question whether the courts should limit

17. See, e.g., Fed. R. Evid. 803(1) (present sense impression); id. 803(18) (learned treatise).
18. See, e.g., id. 803(4) (statements for purposes of medical diagnosis or treatment); id. 803(6) (records of regularly conducted activity); id. 804(b)(3) (statement against interest).
20. Id. at 16-18, quoted in RESOURCE MATERIALS, supra note 6, at 378-80.
23. 4 J. Weinstein & M. Berger, Weinstein’s Evidence 803-28 (1976). Nevada and Wisconsin are examples of states with broad residual hearsay exceptions. Id.
Rules 803(24) and 804(b)(5) to hearsay statements with extraordinary probative value. The thesis of this Article is that sound statutory construction dictates the rejection of that limitation.

THE TRIAL JUDGE’S COMMON LAW POWER TO RECOGNIZE NEW HEARSAY EXCEPTIONS

The hearsay rule is a familiar, common law doctrine. The doctrine teaches that assertive, extra-judicial statements and acts are generally incompetent to prove the assertion’s truth. We exclude such declarations because the opponent has not had an opportunity to cross-examine the declarant to test his or her perception, memory, narration, and sincerity. Although the hearsay evidence may be “fair on its face,” the evidence carries probative “dangers that could be exposed or eliminated by cross-examination.”

Of course, the common law judges realized that it would be intolerable to formulate an absolute, categorical rule. Consequently, they recognized numerous exceptions to the rule, notably former testimony, admissions of a party-opponent, declarations against interest, dying declarations, excited utterances, past recollection recorded, business entries, and official records. Since the rule's crystallization in the late 1600's, these exceptions have all become well-settled case law doctrines.

In addition to recognizing these specific, well-settled exceptions, the common law recognizes a residual discretion in the trial judge to create new exceptions. The forte of the common law system has always been its capacity for evolving new doctrines based on accumulated judicial experience. We have witnessed that capacity in operation during the past few decades. The Texas courts’ experience with the excited utterance doctrine led them to fashion a new excep-

25. Id.
27. Id. at 227.
29. Id. at 628-69.
30. Id. at 670-79.
31. Id. at 680-85.
32. Id. at 686-711.
33. Id. at 712-16.
34. Id. at 717-34.
35. Id. at 735-42.
36. Id. at 581-84.
tion for present sense impressions. The emergence of the present sense impression exception is another illustration of the exercise of the trial judge’s residual discretion at common law.

Wigmore, the great rationalist of evidence law, attempted to systematize the hearsay exceptions and incidentally provide a basis for predictable, future exercise of the residual discretion. After reviewing the various exceptions, he identified two common denominators. One denominator was the principle of circumstantial probability of trustworthiness, the other was the principle of necessity. As Wigmore must have realized, this scheme not only served to rationalize the exceptions but also provided criteria for the exercise of the trial judge’s residual discretion: The judge should exercise that discretion only when the declaration, although not falling within a recognized exception, is nevertheless supported by a circumstantial probability of trustworthiness and there is some necessity for introducing the hearsay evidence.

The New Hampshire courts were apparently the first to convert Wigmore’s two principles into criteria governing the exercise of the discretion to create new exceptions. During the 1950’s, they employed “a broad formula of necessity plus apparent trustworthiness” as the basis for admitting declarations which fell outside recognized hearsay exceptions. For example, in Gagnon v. Pronovost, the Supreme Court of New Hampshire upheld the admission of a private memorandum book. The court acknowledged that the book did not qualify as a business entry, but it reasoned that the book’s “apparent trustworthiness” warranted its admission. Later in the same decade, in Perry v. Parker, the New Hampshire court sustained the admission of a twenty-five year old surveyor’s plan. The court freely conceded that the plan did not satisfy the thirty year test of antiquity for ancient documents. However, citing its previous

39. 5 WIGMORE ON EVIDENCE § 1420 (3d ed. 1940).
42. Id. at 52.
43. 97 N.H. 500, 92 A.2d 904 (1952).
44. Id. at 502-03, 92 A.2d at 905.
decision in *Gagnon*, the court asserted that the plan’s admission was “sensible.” The New Hampshire courts’ progressive approach soon found adherents in other states such as New York.

During the 1960’s, this approach also found support in the federal courts, as they, too, asserted the power to create new hearsay exceptions. In one case, when the declarant was ill at the time of trial, the court admitted a stenographer’s transcript of an examination of an out-of-court declarant under oath by revenue agents. In another case, the court admitted a private check record even though the record technically did not qualify as a business entry. In still another case, the court admitted testimony about a police officer’s dying declaration statement at a hospital, holding that it was unnecessary to decide whether the statement qualified as a dying declaration or excited utterance. Rather, the court admitted the testimony on the straightforward rationale that the testimony was “fundamentally reliable” and conformed to “the general policies underlying the exceptions to the hearsay rule.”

Several federal cases explicitly used Wigmore’s criteria of trustworthiness and necessity. In *United States v. Barbati*, Judge Weinstein permitted a police officer to testify to the barmaid’s pretrial identification of the defendant.

The statement of the barmaid identifying defendant was spontaneously made within a few moments of the time the bill was passed and while defendant was still in his place at the bar. It is unlikely that her observation of the man who gave her the bill was mistaken—he was awaiting her return with his change. There was no time for lapse of memory. No reason for her to lie was suggested; in any event, any motive she might have had to falsify, would not have been substantially different at the trial than it was at the time of the event. The process of pointing out the defendant was so simple that an error in communication was improbable. The barmaid was unlikely to have remained silent if the police had collared an innocent bystander rather than the man she intended to point out.

*Id.* at 412-13.
stein admitted a witness' pretrial identification of the accused. The judge declared that it was "the current clear tendency" in federal courts to admit "necessary and trustworthy hearsay." In *Butler v. Southern Pacific Co.*, the Court of Appeals for the Fifth Circuit characterized contemporary federal practice as "liberal" and analyzed a report's admissibility in terms of trustworthiness and necessity. Finally, in *Chestnut v. Ford Motor Co.*, the Court of Appeals for the Fourth Circuit specifically cited Wigmore, observing that "the modern trend" is to "concentrate on" Wigmore's two principles in deciding the admissibility of evidence that does not fall within a well-settled exception.

Easily the most famous federal case embracing Wigmore's criteria is *Dallas County v. Commercial Union Assurance Co.* In *Dallas County*, the county sued its insurer when the county courthouse collapsed. The county alleged that lightning struck the courthouse. Lightning was a risk within the policy's coverage. The county introduced evidence that there were charred timbers among the debris. The insurer contended that the collapse was attributable to an excluded risk, the courthouse's structural weakness. To explain the presence of the charred timbers, the insurer offered a copy of the June 9, 1901, *Selma Morning Times*. The copy contained an article describing a fire at the courthouse which was then under construction. The trial judge admitted the copy, and the county attacked the ruling on appeal.

Judge Wisdom, the author of the opinion, echoed the "sensible" approach of the New Hampshire court by stating that there is no legal "canon against the exercise of common sense in deciding the admissibility of hearsay evidence." Citing Wigmore, the judge analyzed the paper's admissibility in terms of trustworthiness and necessity. He found it "inconceivable . . . that a newspaper reporter in a small town would report there was a fire in the dome on the new courthouse— if there had been no fire. He was without motive to falsify, and a false report would have subjected . . . him to embarrassment in the community." He likewise found necessity, for the long time lapse made it unlikely that any witness with personal

56. *Id.* at 412.
57. 431 F.2d 77 (5th Cir. 1970).
58. *Id.* at 80.
59. 445 F.2d 967 (4th Cir. 1971).
60. *Id.* at 972 n.5.
61. *Id.*
62. 286 F.2d 388 (5th Cir. 1961).
63. *See* notes 45-46 and accompanying text *supra*.
64. 286 F.2d at 397.
65. *Id.* at 395-96.
66. *Id.* at 397.
knowledge of the 1901 fire would be available. 67 Judge Wisdom refused to premise the paper's admissibility on the business entry doctrine or the ancient document rule or "any other . . . happily tagged species of hearsay exception." 68 Rather, he chose the rationale that the paper was "necessary and trustworthy" evidence. 69

In summary, prior to the federal rules, it was clear that a federal trial judge had the power to recognize new hearsay exceptions. 70 The courts were using Wigmore's two principles to determine when they should exercise discretion in favor of admitting hearsay falling outside traditional exceptions, 71 and the courts had taken a liberal, 72 flexible 73 approach in applying the two principles. The emergence of this approach coincided with the beginning of the consideration of the Federal Rules of Evidence. The coincidence would force Congress to reach this question: Should the Rules expand, preserve, contract, or eliminate the federal trial judge's common law power to recognize new hearsay exceptions?

THE LEGISLATIVE HISTORY OF THE RESIDUAL HEARSAY EXCEPTIONS IN THE FEDERAL RULES OF EVIDENCE

The first formal draft of the residual exceptions appeared in 1969. 74 The language of this preliminary draft was far broader than the language Congress finally enacted:

(a) General Provisions. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of the rule. 75

The most important reaction to the original draft was the criticism

67. Id. at 396-97.
68. Id. at 398.
69. Id.
71. See notes 39-69 and accompanying text supra.
75. 4 J. WEINSTEIN & M. BERGER, supra note 23, at 803-241.

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of the Committee of New York Trial Lawyers. On the one hand, the Committee expressed concern that the preliminary draft would minimize predictability of evidentiary rulings and increase hazards of trial preparation by giving the trial judge too much discretion. On the other hand, the Committee believed that the trial judge needs some flexibility and discretion. For that reason, the Committee proposed this language:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial probability of trustworthiness; provided that the proponent's intention to offer the statement was made known to the adverse party sufficiently in advance of the trial or hearing to provide him with a fair opportunity to prepare to meet it.

The Advisory Committee on Proposed Rules concluded that the proposal had merit. In the main, when the Advisory Committee issued its revised 1971 draft, it adopted the New York Committee's language. There were, however, two differences between the drafts. First, the Advisory Committee substituted “comparable” for “equivalent” circumstantial probability of trustworthiness. Second, the Advisory Committee omitted any requirement for pretrial notice. The Advisory Committee then submitted its draft to the United States Supreme Court.

The Advisory Committee's Notes accompanying the final draft reflect the controversy over the appropriate scope of judicial discretion under the residual exceptions. At the outset, the Committee points out that it had seriously discussed then Professor Weinstein's proposal for the abolition of class exceptions and the adoption of individual treatment of hearsay evidence with procedural safeguards. However, the Committee quickly adds that it ultimately "rejected this approach . . . as involving too great a measure of

78. See authorities cited note 77 supra.
81. Waltz, Article VIII: The Hearsay Rule and Its Exceptions, in RESOURCE MATERIALS, supra note 6, at 259, 263.
83. Id.
judicial discretion, minimizing the predictability of rulings, [and] enhancing the difficulties of preparation for trial." The Committee set its face against "an unfettered exercise of judicial discretion." Yet, in the same breath, the Committee states that it realized that the judge needs discretion in "presently unanticipated situations." The Committee concludes by citing Dallas County as an example of the sort of discretion the residual exceptions grant the trial judge.

Over Mr. Justice Douglas' dissent, the Supreme Court approved the rules on November 20, 1972, and ordered that they take effect on July 1, 1973. Congress intervened before the Rules took effect; it passed Public Law 93-12, deferring the Rules' effectiveness until Congress positively enacted the Rules.

The House was first to consider the Rules. The House referred the Rules to the Subcommittee on Criminal Justice of the House Committee on the Judiciary. The Subcommittee prepared House Report 93-650, recommending that Congress delete the residual exceptions. The report gave two reasons for the recommendation. The first was that now familiar argument that the exceptions would inject "too much uncertainty into the law of evidence and [impair] the ability of practitioners to prepare for trial." The second was that proposed Rule 102 would give the trial judge sufficient flexibility. That Rule directs trial judges to construe the Rules "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." The Subcommittee believed that given Rule 102, the courts

86. Id.
87. Id.
88. Id.
93. H. R. REP. No. 650, 93d Cong., 1st Sess. 6 (1973), quoted in RESOURCE MATERIALS, supra note 6, at 358.
94. Id.
95. Fed. R. Evid. 102.
would construe the enumerated exceptions with such liberality that any additional exceptions were unnecessary. The House adopted the Subcommittee's recommendation by passing House Resolution 5463 deleting the residual exceptions.96

The Senate then took up the question of the Federal Rules. The Senate Judiciary Committee prepared its own report on the Rules.97 In part, the Senate Report concurred with the House Report, cautioning against granting trial judges "broad license"98 or "unbridled discretion."99 The Report stated: "The Committee . . . agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules."100

However, on balance, the Senate Report concluded that a narrowed version of the residual exceptions should be reinstated.101 The Senate Report cited two reasons for its recommendation. First, Rule 102 gave trial judges insufficient flexibility.102 The Senate Report cited two of the most liberal common law decisions, Dallas County and Barbati,103 and stated that Dallas County "illustrates" the quantum of discretion the trial judge needs.104 Second, the Committee feared that unless it supplemented Rule 102 with residual exceptions, trial judges would "torture" the enumerated exceptions "beyond any reasonable circumstances which they were intended to include (even if broadly construed)."105 The Committee conjectured that trial judges would find the discretion under Rule 102 intolerably narrow and would be forced to strain the text of the enumerated exceptions to cope with unanticipated situations.

In its report, the Senate Judiciary Committee offered the following proposed language to the Senate as a whole:

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96. S. REP. NO. 1277, 93d Cong., 2d Sess. 6 (1974), quoted in RESOURCE MATERIALS, supra note 6, at 326.
97. Id. at 18-20, quoted in RESOURCE MATERIALS, supra note 6, at 338-40.
98. Id. at 20, quoted in RESOURCE MATERIALS, supra note 6, at 340.
99. Id. at 8, quoted in RESOURCE MATERIALS, supra note 6, at 328.
100. Id. at 19, quoted in RESOURCE MATERIALS, supra note 6, at 339.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id. United States v. Napier, 518 F.2d 316 (9th Cir. 1975), seems to confirm the Committee's fear. The case was decided prior to the Rules' effective date. The victim had been beaten severely. While she was in the hospital, her sister showed her a newspaper photograph of the defendant. She exclaimed, "He killed me, he killed me." The court admitted this identification on the theory that it was an excited utterance. The difficulty is that the utterance related to an event which had occurred weeks before. For a criticism of this decision, see K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 143 (Supp. 1976).
(24) OTHER EXCEPTIONS.—A statement specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) 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 (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.\footnote{106}

The language thus established four requirements for invoking the residual exceptions: an equivalent guarantee of trustworthiness and the three numbered requirements.\footnote{107} To assuage the supporters of the exceptions’ deletion, the Committee stated that its language had “much narrower scope and applicability than the Supreme Court version.”\footnote{108} The Committee added that it intended that the exceptions would be employed “very rarely, and only in exceptional circumstances.”\footnote{109} The Senate adopted the proposed language in late 1974.\footnote{110}

The disagreement between the House and Senate necessitated referring the Rules to the Conference Committee. The Conference Committee was persuaded by the Senate arguments favoring the reinstatement of the residual exceptions.\footnote{111} However, the Committee, at the urging of the District of Columbia Committee with Respect to Article VIII,\footnote{112} added a fifth requirement: pretrial notice of the proponent’s intention to rely on a residual exception.\footnote{113} With the addition of this fifth requirement, the residual exceptions took their present form.

The Conference Committee resubmitted the legislation to the Senate and House. During the House debate, Representative Holtzman stated her opposition to the residual exceptions and styled them

\footnotesize{\begin{itemize}
\item 107. Id. at 19-20, quoted in Resource Materials, supra note 6, at 339-40; 4 J. Weinstein & M. Berger, supra note 23, at 803-30-31.
\item 109. Id. at 20, quoted in Resource Materials, supra note 6, at 340.
\item 110. The Senate Report is dated October 18, 1974. Resource Materials, supra note 6, at 319. The Conference Report was finalized by December 14, 1974. Id. at 303.
\end{itemize}}
as "casual, [and] open-ended."

She claimed that even the Conference Committee’s version “basically abolishes the rule against hearsay and leaves it to the discretion of every judge to let in any kind of hearsay he wants.”

Notwithstanding Representative Holtzman’s vigorous opposition, the House and Senate adopted the compromise language hammered out in the Conference Committee. Like the other provisions of the Federal Rules, the residual exceptions took effect on July 1, 1975, by virtue of Public Law 93-595.

**The Judicial Gloss on the Residual Hearsay Exceptions in the Federal Rules of Evidence**

Some commentators predicted that the controversy over the residual exceptions’ scope would prove unimportant because there would be very few cases applying the exceptions. This prediction has proved inaccurate; there are now a fair number of cases interpreting the exceptions. Thus, there is a sufficient body of case law to permit some generalization about the major trends in the courts’ application of the residual exceptions.

For the most part, the cases construing the residual exceptions assume *sub silentio* that even after the Rules’ adoption, the courts have the same degree of discretion to admit hearsay which does not fall within an orthodox exception. On several occasions, the courts have used pre-Rule precedents to define the scope of discretion under...
the residual exceptions. As previously stated, Chestnut v. Ford Motor Co. is one of the leading pre-Rule precedents for the liberal admission of hearsay under Wigmore's criteria. This decision was cited in United States v. Carlson in explicating Rule 804(b)(5). Of course, Dallas County is the most famous pre-Rule precedent. In United States v. Gomez, Ark-Mo Farms, Inc. v. United States, and Muncie Aviation Corp. v. Party Doll Fleet, Inc., the courts referred to Dallas County in analyzing Rule 803(24). Muncie is undoubtedly the most significant case; like the Dallas County opinion itself, Muncie was authored by Judge Wisdom. Muncie was decided before the effective date of the Federal Rules. Judge Wisdom premised the decision admitting Federal Aviation Administration advisory circulars on Dallas County, but he added that “additional support is lent the decision today by Rules 803(24) and 804(b)(5) of the new Federal Rules of Evidence.”

Even when the cases construing the residual exceptions do not explicitly cite Dallas County or Chestnut, they exhibit the pre-Rule tendency to place primary emphasis on the testimonial quality of sincerity in determining the admissibility of hearsay. It is true that the common law recognized four testimonial qualities or sources of error: perception, memory, narration, and sincerity. However, in developing the common law exceptions, the courts placed primary emphasis on sincerity; if the circumstances supported an inference that the declarant was speaking sincerely, the court was likely to admit the declaration.

The cases construing Rules 803(24) and 804(b)(5) display the same tendency. For example, in Muncie, Judge Wisdom stressed that the circulars were prepared by a “governmental agency whose only con-
ceivable interest was in insuring safety."\textsuperscript{132} In \textit{Carlson}, the court admitted the grand jury testimony of an unavailable witness.\textsuperscript{133} The court mentioned some guarantees of accurate perception and memory, but most of the indicia of trustworthiness listed by the court related to the declarant's sincerity.\textsuperscript{134} This emphasis on the quality of sincerity is also manifested in \textit{United States v. American Cyanamid Co.}\textsuperscript{135} There the court ruled in favor of the admission of correspondence between certain producers and the Department of Justice. The only guarantee of trustworthiness the court identified was the fact that the producers authoring the letters probably would not lie in response to an official, government inquiry.\textsuperscript{136}

Cases excluding hearsay under the residual exceptions also focus on sincerity. One of the first cases rejecting evidence offered under Rule 804(b)(5) was \textit{Workman v. Cleveland-Cliffs Iron Co.}\textsuperscript{137} In \textit{Workman}, a party offered an eyewitness' statement which had been prepared by an attorney. The court's doubts about the evidence's trustworthiness centered on the sincerity of the lawyer.\textsuperscript{138} Similarly, in \textit{United States v. Yates},\textsuperscript{139} the ruling excluding hearsay was based on doubts about the declarant's sincerity. The defendant raised an alibi; he had been with Jones all evening. The trial judge admitted a police officer's testimony that while in the police car, Jones said he had been with Yates for only five minutes. The court stated that there was "little likelihood of a perception or memory problem."\textsuperscript{140} However, the court inferred from the circumstances that Jones was primarily interested in exculpating himself and therefore concluded that its

\begin{itemize}
  \item \textsuperscript{132} Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178, 1182 (5th Cir. 1975).
  \item \textsuperscript{133} United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976).
  \item \textsuperscript{134} There is strong indication of reliability in Tindall's testimony. His statements were made under oath and any misrepresentation or deliberate falsehood might subject Tindall to the sanctions of perjury. Tindall was relating facts surrounding a cocaine transaction in which he participated and of which he possessed firsthand knowledge; therefore, there was no reliance upon potential erroneous secondary information and the possibility of faulty recollection was minimized. Moreover, Tindall never recanted his grand jury testimony or expressed any belated reservations as to its accuracy. Rather, he specifically stated at the time of trial that he told the truth to the grand jury. \textit{Id.} at 1354.
  \item \textsuperscript{135} 427 F. Supp. 859 (S.D.N.Y. 1977).
  \item \textsuperscript{136} \textit{Id.} at 865.
  \item \textsuperscript{137} 68 F.R.D. 562 (N.D. Ohio 1975).
  \item \textsuperscript{138} The Court is well aware of the subtle shifts in meaning that can occur when one's statement is recorded by another. Such changes can be wholly unintentional, and without impugning at all the integrity of the attorney who took Mr. Stratton's statement, he was hardly a disinterested observer. The lawyer took that statement for the purpose of accident investigation with an eye towards litigation. \textit{Id.} at 564.
  \item \textsuperscript{139} 524 F.2d 1282 (D.C. Cir. 1975).
  \item \textsuperscript{140} \textit{Id.} at 1286.
\end{itemize}
“grave doubts . . . as to the sincerity of the self-serving statement” mandated the hearsay’s exclusion.\textsuperscript{141}

\textit{United States v. Gonzalez}\textsuperscript{142} also stressed the factor of sincerity. Like \textit{Carlson}, Gonzalez involved the grand jury testimony of an unavailable witness. However, distinguishing \textit{Carlson}, the court found several indicia of untrustworthiness: The prosecutor elicited the testimony before the grand jury by leading questions; when the witness refused to answer even after immunity, the prosecutor threatened to repeatedly call the witness before successive grand juries and give the witness “an unlimited number of . . . six-month contempt sentences.”\textsuperscript{143} The court concluded that because of the prosecutor’s pressure, the witness subjectively desired “to come up with an answer, whether or not it was true.”\textsuperscript{144}

Although the decided cases indicate that most judges believe they have retained their pre-Rule residual discretion, the courts have applied the residual exceptions cautiously. The courts have often cited the exceptions as merely an alternative basis for admission. In \textit{Ark-Mo Farms}, the court admitted a hydrological report prepared by the Corps of Engineers and invoked both the shopbook doctrine and the residual exceptions.\textsuperscript{145} In \textit{United States v. Pfeiffer},\textsuperscript{146} the court sustained the admission of certain delivery invoices. The court argued that the invoices were admissible under both Rule 803(6)’s business entry exception and the residual exceptions. In the most interesting case, \textit{United States v. Iaconetti},\textsuperscript{147} the defendant was charged with soliciting a bribe from Lioi. At trial, Lioi testified to the solicitation, and the defendant flatly denied the solicitation. Judge Weinstein then permitted the government to introduce the rebuttal testimony of Lioi’s partner and attorney that Lioi had mentioned the solicitation to them. Judge Weinstein is hardly diffident on evidentiary questions.\textsuperscript{148} Yet he cited Rules 801(d)(1) and 801(d)(2)(C) as well as 803(24) in justifying the admission of the rebuttal evidence.\textsuperscript{149}

The cautious tone evident in these cases becomes more pronounced.

\textsuperscript{141} Id.
\textsuperscript{142} 559 F.2d 1271 (5th Cir. 1977).
\textsuperscript{143} Id. at 1273.
\textsuperscript{144} Id.
\textsuperscript{145} 530 F.2d at 1386-87.
\textsuperscript{146} 539 F.2d 668 (8th Cir. 1976).
\textsuperscript{147} 406 F. Supp. 554 (E.D.N.Y. 1976).
\textsuperscript{149} 406 F. Supp. at 558-60.
in the cases espousing the view that the courts should only rarely use the residual exceptions. The first case adopting that view was *Lowery v. Maryland.*\(^{150}\) Lowery claimed that the prosecutor had knowingly used perjured testimony to secure his conviction. He offered the affidavit of the state's chief witness that he had given perjured testimony. Lowery argued that the statement was admissible as a declaration against interest under Rule 804(b)(3) and under the residual exception, Rule 804(b)(5). The court first held that the statement did not qualify as a declaration against interest. Citing the Senate Report, the court then declared: "It was the intent of Congress that this exception be used rarely and only in exceptional circumstances. Since statements such as Dixon's are covered by Rule 804(b)(3), the admissibility cannot be considered under Rule 804(b)(5)."\(^{151}\)

Both the majority and dissenting opinions in *United States v. Medico*\(^{152}\) embrace the view that the residual exceptions should rarely be used. A bank robbery had just been committed. A bank employee, Carmody, was locking the entrance door. A young man in a car outside the bank gave the getaway car's make and license number to a bystander who relayed it to Carmody. Carmody saw the young man's lips move, but he could not hear the young man speak. Once again, Judge Weinstein was presiding. He permitted Carmody to relate the double hearsay and based his ruling on Rule 803(24).\(^{153}\) The majority opinion acknowledged that the Rule's legislative history indicates that the Rule should rarely be used\(^{154}\) but found an exceptionally strong showing of reliability in the record.\(^{155}\) In dissent, Judge Mansfield argued that the trial judge erred in admitting the double hearsay. Like the majority, Judge Mansfield cited the Senate Report.\(^{156}\) He emphasized that Congress intended that trial judges would use the residual exceptions "sparingly."\(^{157}\) Focusing on the possible errors in perception and memory, he thought that the young man in the car or the bystander could easily have misstated the

\(^{151}\) Id.
\(^{152}\) 557 F.2d 309 (2d Cir. 1977).
\(^{153}\) Id. at 314.
\(^{154}\) The [Senate] committee report indicates that the provisions are not intended as "a broad license" to trial judges to admit hearsay but for use under rare and exceptional circumstances with the trial judge being admonished to "exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule."
\(^{155}\) Id. at 315.
\(^{156}\) Id. at 315-16.
\(^{157}\) Id. at 320.
facts. Judge Mansfield wanted to rigorously apply the standard announced in the Senate Report.

The third opinion subscribing to this view is United States v. Mathis. In Mathis, the prosecution wanted to have government agents testify to hearsay statements by the defendant’s wife and invoked Rule 803(24). However, because the wife was available as a witness, the court held that the hearsay testimony was not the most probative evidence the prosecution could procure; the wife’s live testimony was more probative, and the hearsay was therefore inadmissible under Rule 803(24)(B). The court cited the same legislative history referenced in Lowery and Medico and stated that “tight reins must be held” over the residual exceptions.

In sharp contrast, in United States v. American Cyanamid Co., the court repudiated the argument that the residual exceptions may be used only in exceptional cases. The issue was whether American Cyanamid had violated a consent decree. Under the decree, it had agreed to limit its melamine production until competitors had increased their “production capacity” by 25,000,000 pounds per year. The Justice Department had sent melamine producers an inquiry about the accepted industry meaning of “production capacity.” American Cyanamid wanted to introduce the producers’ responses under Rule 803(24); the government opposed the letters’ admission. Citing the Senate Report, the government contended that Rule 803(24) “was meant to apply only in exceptional cases.” The court rejected this argument for three reasons. First, on its face the Rule is not limited to exceptional cases or evidence with extraordinary probative value. The court believed that the text controlled over the legislative history. Second, the implication of such a limitation would be contrary to Rule 102. Rule 102 encourages liberal construction of the Rules, and the court felt that the implication of the

158. The young man in the car “may well have erred due to excitement, poor eyesight, poor lighting conditions or visual obstructions.” For his part, the bystander could have erred because of “faulty hearing, background noise, excitement, and similar circumstances.” Id. at 319.
159. 559 F.2d 294 (5th Cir. 1977).
160. Id. at 298-99.
161. Id. at 299.
162. Id.
164. Id. at 865.
165. Id. at 866.
166. Id.
limitation the government urged would "negate the requirement of Rule 102." Finally, the addition of the exceptional case limitation would add another element of uncertainty to the Rule's application: "[I]t would bring into each trial, the foot of the Chancellor, an historical enemy of our liberties." Anyone familiar with the residual exceptions' legislative history would seriously question the American Cyanamid court's analysis. The court's last two arguments virtually turned the legislative history upside down. The House Report argued that Rule 102 provided sufficient flexibility and made the residual exceptions unnecessary. Yet the American Cyanamid court invoked Rule 102 to support a broad construction of the exceptions. Similarly, the court inveighed against discretion, "an historical enemy of our liberties," to support a construction which will give trial judges more rather than less discretion. The comment is particularly ironic in light of Judge Friendly's previous attack on the exceptions that they represented "the Chancellor's foot with a vengeance." In short, any supporter of the House Report would find the American Cyanamid opinion not only unacceptable but infuriating. However, although the American Cyanamid court's analysis is flawed, it is this author's opinion that the American Cyanamid court reached the proper conclusion and that the contrary statements in Lowery, Medico, and Mathis are bad law.

THE PROPER CONSTRUCTION OF THE RESIDUAL HEARSAY EXCEPTIONS IN THE FEDERAL RULES OF EVIDENCE

The issue is whether the courts should construe the residual exceptions as admitting only evidence with the sort of extraordinary probative value Judge Mansfield demanded in Medico. At first blush, the position of the Lowery, Medico, and Mathis courts seems far more tenable; the position appears to have a sound basis in the residual exceptions' legislative history. However, a more realistic assessment of the exceptions' legislative history leads to the conclusion that those materials can give us little guidance; the legislative history materials are self-contradictory.

When the legislative history materials "lend great comfort to both sides," the materials are entitled to little weight in the statute's

167. Id.
168. Id.
169. See notes 94-95 and accompanying text supra.
171. 4 J. Weinstein & M. Berger, supra note 23, at 803-27.
172. See notes 156-58 and accompanying text supra.
construction.\textsuperscript{173} In \textit{American Chicle Co. v. United States},\textsuperscript{174} the court was more specific: "[A] legislative history, containing a direct statement of purpose pointing in one direction and an example pointing in the other, is of no real assistance in interpreting the statute."\textsuperscript{175}

The court's comment applies to the legislative history of the residual exceptions. The three courts advocating a narrow construction of the exceptions relied heavily on Senate Report 93-1277. Admittedly, the Report explicitly states that the exceptions should be employed "very rarely and only in exceptional circumstances."\textsuperscript{176} However, to illustrate the appropriate scope of judicial discretion under the exceptions, the Senate Report cites \textit{Dallas County} and \textit{Barbati}.\textsuperscript{177} These two decisions are two of the most liberal common law opinions on judges' residual discretion. The passage \textit{Lowery}, \textit{Medico}, and \textit{Mathis} rely on "point[s] in one direction," but the examples "point in the other." Indeed, the Report hedges on the critical issue. It states that under the exceptions, federal trial judges are to use "no less care, reflection, and caution than the courts did under the common law."\textsuperscript{178} The Report could have stated that federal trial judges were to have "less" discretion or the "same" degree of discretion which judges possessed at common law; either statement would have provided a forthright answer to the question. Rather, the Senate Report chose the most ambiguous language possible.

The ambiguity of the Report may be purposeful. The House had already deleted the residual exceptions.\textsuperscript{179} If the residual exceptions were to be reinstated, there would have to be a political compromise between the House and Senate. On the one hand, foreseeing the necessity for a future compromise, they had to justify the exceptions' reinstatement. On the other hand, they had to put their Conferees in a position to persuade the House Conferees that this draft was more palatable than the Supreme Court's version the House had already rejected. At least in part, political expedience accounts for the Senate

\textsuperscript{173} Dent v. St. Louis-San Francisco Ry., 406 F.2d 399, 403 (5th Cir. 1969); 2 J. SUTHERLAND, \textsc{Statutes and Statutory Construction} § 5001 (Cum. Supp. 1972).
\textsuperscript{174} 41 F. Supp. 537 (Ct. Cl. 1941), aff'd, 316 U.S. 450 (1942).
\textsuperscript{175} Id. at 543.
\textsuperscript{177} Id. at 19, \textit{quoted in Resource Materials}, supra note 6, at 340.
\textsuperscript{178} Id. at 20, \textit{quoted in Resource Materials}, supra note 6, at 340 (emphasis added).
\textsuperscript{179} See text accompanying notes 91-96 \textit{supra}. 

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Report's statement that its draft is of "much narrower scope and applicability than the Supreme Court version."\textsuperscript{180}

If the importance of the exceptions' legislative history may be discounted, then the conclusion reached in \textit{American Cyanamid} is preferable. \textit{American Cyanamid}'s liberal interpretation is a more literal, a more purposive, and a more reasonable construction of the residual exceptions.

In the first place, a broad construction of the statutes is more literal. A statute's text or language is "the best and most reliable index of its meaning."\textsuperscript{181} The text is entitled to special weight when the statute's legislative history is ambiguous or contradictory.\textsuperscript{182} As the \textit{American Cyanamid} court noted, the exceptions' text lends support to the conclusion that they are not to be used "only in exceptional cases."\textsuperscript{183} The court emphasized that Rule 803(24) provides the judge with a detailed list of express criteria.\textsuperscript{184} Although the Rule's language requires that the evidence have an "equivalent circumstantial guarantee of trustworthiness,"\textsuperscript{185} "[t]here is no requirement that the Court find a case to be 'exceptional'... in order to receive any evidence."\textsuperscript{186}

The court's argument has substantial merit. The statute's text is not merely the starting point for statutory construction analysis; the specific language used should be an important factor.\textsuperscript{187} The language should have great weight when the statute is a product of political compromise because then its language has probably been chosen with special care. The residual exceptions are the product of political compromise. The Advisory Committee, the Supreme Court, the House, the Senate, and the Conference Committee all participated in a process of compromise and negotiation culminating in the specific text signed by President Ford. The exceptions' wording is entitled to great weight, and the proponents of a broad construction can correctly charge that their opponents would in effect amend the exceptions' language and add a new requirement for admissibility.

\textsuperscript{181} Department & Specialty Store Employees' Union, Local 1265 v. Brown, 284 F.2d 619, 627 (9th Cir. 1960).
\textsuperscript{183} 427 F. Supp. at 865-66.
\textsuperscript{184} Id. at 866.
\textsuperscript{185} Fed. R. Evid. 803(24).
\textsuperscript{187} St. Joseph Hosp. v. Quinn, 241 Md. 371, 216 A.2d 732 (1966); E. Crawford, \textit{The Construction of Statutes} \S 203 (1940) ("Naturally, the first as well as the best source from which to ascertain the meaning of any statute is the statute itself.").
The statute reads "equivalent;" it does not read "exceptional" or "extraordinarily high."

Furthermore, the broad construction of the statutes is more purposive and consistent with the overall purpose of Article VIII. Numerous commentators have stated that the primary thrust of Article VIII is to liberalize federal hearsay practice. Because courts should choose the interpretation more consistent with the statute's primary purpose or thrust, a liberal interpretation of Article VIII is more appropriate.

The enumerated hearsay exceptions generally either maintain the common law exceptions, liberalize them, or add new exceptions. There are few provisions which can be construed as imposing stricter requirements than those prevailing at common law. If the courts adopt the narrow construction of the residual exceptions, the exceptions would be narrower than the pre-existing common law discretion. At common law, there was no requirement that the hearsay statement's probative value be inordinately high or extraordinary; the courts applied Wigmore's criteria and inquired whether the hearsay had a guarantee of trustworthiness comparable or analogous to that of a recognized exception. To accept the narrow construction of the exceptions would be a step backward; federal trial judges would then have less discretion than they had at common law. Consequently, given the liberal tone of Article VIII, it would be anomalous for the courts to opt for a narrow construction of the residual exceptions.


190. See notes 17-18 and accompanying text supra.

191. FED. R. EVID. 803(6) might have such an effect. On its face, the Rule requires that the entrant or informant be "a person with knowledge." It supersedes 28 U.S.C.A. § 1732 (West 1966), which in pertinent part read: "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility." Id. (emphasis added). See United States v. Oates, 560 F.2d 45, 80 n.33 (2d Cir. 1977).

192. See text accompanying notes 38-69 supra.
Finally, the broad interpretation is a more reasonable construction. As noted by Professor Davis, with whom other commentators have concurred, one of the most irrational features of hearsay law is that "technically incompetent hearsay is often more reliable than technically competent evidence." The broad construction of the residual exceptions would eliminate this irrationality because the liberal interpretation requires only that the declaration have an "equivalent" circumstantial guarantee of trustworthiness. The narrow construction, on the other hand, would perpetuate this irrationality; it would exclude hearsay even if the hearsay had a comparable or equivalent guarantee of reliability.

The hearsay statements admitted under the orthodox exceptions vary greatly in their reliability. There is "an enormous variation in the guarantee of trustworthiness" among the various traditional exceptions. Writing in *United States v. Iaconetti*, Judge Weinstein stated that "[t]he quality of the factors cited as insuring reliability for the [traditional] hearsay exceptions range over an entire spectrum."

Rather than ensuring extraordinary reliability, the traditional exceptions permit the admission of hearsay of frankly dubious reliability. In Professor McCormick's terse words, they sanction the admission of "[m]uch worthless evidence." In the case of some exceptions, the guarantee of trustworthiness seems "imagined" rather than real. On occasion, the common law seemed content with any guarantee other than the mere fact that the statement had been made.

Professor Morgan was one of the first to expose the suspect nature of some of the evidence routinely admitted under the traditional exceptions. For example, he pointed out that the continuity of state of mind theory overlooks probative memory dangers. Modern witness psychology has validated Morgan's criticism. This disci-

201. *Id.*
pline has provided new insights which confirm the high probability of error in such frequently admitted types of hearsay as excited utterances.203

The primary explanation for the relatively low quality and reliability of traditionally admitted hearsay is the common law’s obsession with perjury.204 There are four distinct probative dangers—perception, memory, narration, and sincerity. Nevertheless, the common law courts, in framing the exceptions, focused primarily on sincerity.205 For most exceptions, there is no real substitute for a cross-examiner’s ability to probe errors in perception, memory, or narration; realistically, there is only a substitute for the oath—some circumstantial inference that the declarant is not consciously lying.206 The hoary exceptions for dying declarations, declarations against interest, and excited utterances illustrate that the courts have placed the greatest emphasis on the testimonial quality of sincerity in evolving the traditional exceptions.207

The courts’ emphasis on the probative danger of sincerity has led them to neglect the probative dangers of perception, memory, and narration.208 Although “the exceptions . . . have stressed the element of sincerity . . . , [i]t is believed to be the common experience of attorneys in the trial of cases, when facts are not accurately reported, that witnesses are more often found to be mistaken than committing perjury.”209 Empirical, witness psychology studies of the testimonial process confirm the trial attorney’s experience: “[E]rrors and distortion in perception and memory are probably the most important source of testimonial conflict.”210 The traditional exceptions often sanction the admission of types of hearsay which witness psychology tells us are likely to be inaccurate.211

The traditional exceptions’ requirements do not ensure extraordi-

203. Id. at 9, 25-26.
209. Id. at 286.
211. Id. at 28.
nary probative value. Quite to the contrary, the exceptions often overlook significant probative dangers of perception, memory, and narration. To insist upon extraordinary probative value for the evidence admissible under the residual exceptions would be inconsistent; we do not require that quantum of probative value in the case of hearsay evidence we routinely admit. To impose that requirement under the residual exceptions would perpetuate the irrationality Professor Davis and other commentators have so convincingly attacked. In short, the American Cyanamid interpretation is the more reasonable construction.

CONCLUSION

With characteristic insight, Professor Rothstein once described the residual exceptions as "seemingly most revolutionary, yet in actuality most traditional."212 His description is accurate. In appearance, the residual exceptions seem to grant trial judges bold, new discretion. Yet in truth, even if the exceptions receive a liberal construction, they will merely preserve the pre-Rule common law scope of the federal trial judge's power.

A narrow construction would represent an unfortunate, reactionary step. The legislative history of the exceptions does not require that step backward; the legislative history materials are the product of political compromise and are almost predictably self-contradictory. The exceptions' text and Article VIII's liberal tone cut against the narrow construction. Finally, only the broad construction, giving "equivalent" its plain meaning, will eliminate the irrational inconsistency of hearsay law.

There are undoubtedly those who will take up the refrain that a liberal construction of the residual exceptions will unsettle federal hearsay law. However, even liberally construed, the exceptions will not unduly unsettle hearsay law so long as that law has the administrators the common law always assumes: trial judges of responsible judgment213 and creative ability.214