THE COSTS AND BENEFITS OF A CATEGORICAL APPROACH TO HEARSAY

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INTRODUCTION

The law of hearsay occupies a unique space in our legal landscape, striking fear in the hearts of law students, frustrating litigants, lawyers and judges during the course of trials, and setting legal commentators at odds for over a century.[1] Detractors have criticized it as a bloated, nonsensical mess that is detached from empirical reality and common sense.[2] Indeed, even supporters of the current rules on hearsay concede that it is far from perfect and that inertia, as much as anything else, is responsible for its continued existence.[3]

Recent remarks by Judge Richard Posner of the Seventh Circuit Court of Appeals have breathed new life into the old debate about hearsay. In a concurrence in *United States* v. *Boyce*[4]—a 2014 appeal revolving around two seemingly narrow, uncontroversial hearsay issues—Judge Posner offered a radical reimagining of the current approach to hearsay. Rather than determining whether a given piece of hearsay evidence fits into one of the numerous, substantive categories that purportedly carry some indicia of reliability, Judge Posner suggests that judges should examine the reliability of hearsay evidence directly:

> Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible

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1. *See* Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon,* 67 FLA. L. REV. 1861, 1870–73 (2015).

2. *See, e.g.*, David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 1 (noting the "esoteric formalism," "perplexing exceptions," "arbitrary harshness," and quirky dysfunctionality" of the hearsay rules).

3. *See*, *e.g.*, Jeffrey Bellin, *The Case for eHearsay*, 83 FORDHAM L. REV. 1317, 1318–20, 26 (2014) ("[T]he passage of time has likely made it more difficult as a practical matter to abolish a class-based hearsay framework, given litigators' long experience with the framework and its adoption in every American jurisdiction."); Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U PA. L. REV. 165, 194 (2006) ("[O]nce we appreciate that a principal argument for [evidence] rules derives from the advantages of having readily accessible and easily understandable indicators of deeper but harder-to-apply primary considerations, we can see that many of these advantages may well exist in an entire set of rules simply because of their existence."); Sklansky, *supra* note 2, at 1–2 ("About the best that anyone has to say for the hearsay rule in its traditional configuration is that it is the devil we know and have learned to live with.").

4. 742 F.3d 792 (7th Cir. 2014).

> when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.[5]

According to Judge Posner, this approach is tantamount to an expansion of Federal Rule of Evidence 807 (FRE 807)—the residual or "catch all" category designed to allow reliable hearsay that doesn't fit neatly into the pre-ordained boxes. Judge Posner has also compared his proposed rule to Federal Rule of Evidence 403 (FRE 403), which gives judges considerable discretion in balancing the probative value of evidence against its tendency to inject unfair prejudice or confusion into the trial.[6]

Against this backdrop, Professor Richter offers a helpful overview and a fresh take on the categorical approach to hearsay. Seeking to engage Judge Posner on terrain that he would appreciate, Professor Richter performs a cost-benefit analysis of his proposed rule. Her conclusion is that the flexible, three-pronged approach provided by Judge Posner is a "bad bargain"[7] for several reasons. First, and perhaps most importantly, the broad flexibility allowed by Judge Posner's approach would lead to inconsistency and, in turn, increased litigation costs.[8] Second, Professor Richter argues that the unfettered discretion afforded to judges under Judge Posner's test would allow biases to creep into the decision-making process.[9] Third, without anything to fill the substantial void created by Judge Posner's new system, judges would probably revert back to a less coherent version of the rules currently used to determine the admissibility of hearsay evidence.[10] In short, Judge Posner's proposed rule would cause confusion, unpredictability, increased litigation costs, and probably effect little substantive change in the final analysis.

In this brief response, I hope to unpack and complicate Professor Richter's claims a bit. My primary conclusion is that, while Professor Richter's proffered solution—stay the course; make incremental improvements to the current patchwork of categorical hearsay rules—is eminently sensible, her analysis glides somewhat easily over several assumptions about how Judge Posner's rule might operate in practice and, in turn, how the rule would impact the litigation process. Moreover, her cost-benefit analysis contains some omissions and

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5. *Id.* at 802.

6. *See* Hon. Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1467–68 (2016); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1530 (1999).

7. Richter, *supra* note 1, at 1893.

8. *Id.* at 1886.

9. *Id.* at 1885.

10. *Id.* at 1907.

(perhaps) some misunderstandings about Judge Posner's proposed rule. On the "costs" side of the ledger, for example, Professor Richter overlooks textual and scholarly cues that hint at a simple, and fairly predictable, interpretation of Judge Posner's rule. Similarly, on the "benefits" side of the ledger, Professor Richter fails to acknowledge that Judge Posner's rule—whatever its costs—might actually "buy" better, or more accurate, trial results.

Whether the above points, or any of the other arguments presented below, would ultimately tilt the cost-benefit analysis in favor of Judge Posner's rule is difficult to say. Predicting how a new rule of evidence will play out in the complicated swirl of litigation—a game in which there are many players with different motives, biases, and strategies—is nearly impossible, as is balancing the various trade-offs. This fact alone makes Judge Posner's proposal a risky one, whatever its merits and shortcomings appear to be from a hypothetical, ex ante perspective. It also makes Professor Richter's collection of insights particularly useful in evaluating Judge Posner's rule, and any future proposals regarding hearsay.

Following the structure of Professor Richter's article, my comments are broken down into the costs and benefits of Judge Posner's proposed rule. For the sake of brevity, this response will not dwell on the many insightful points made by Professor Richter. Rather, I will confine my comments to the few arguments that I find somewhat problematic; arguments that, in my view, distort the economic analysis by inflating the costs of Judge Posner's proposed rule somewhat and obscuring some of its potential benefits.

I. INFLATED COSTS

A. *Evidentiary Uncertainty and Its Consequences*

The first, and most important, critique of Judge Posner's proposal is that it would dramatically decrease the predictability of hearsay rulings. On this issue, Professor Richter notes:

> In litigation, some of the principal assets and liabilities come in the form of evidence admissible at trial to prove one's position. Judge Posner's discretionary approach to hearsay evidence would require litigation investors to "buy" into a litigation strategy by filing or defending a lawsuit, although they would learn the true worth of the investment only after the purchase . . . . [T]he Judge Posner approach would decrease the information litigants have to value their cases and increase the resources consumed in

> administering hearsay doctrine.[11]

The increased uncertainty surrounding hearsay evidence would translate, per Professor Richter's narrative, into decreased settlements, a reduction in plea bargains, and a general increase in litigation costs.[12]

Professor Richter's take on this issue aligns with the standard economic model of litigation, which posits that information about the "value" of a claim enhances the likelihood of settlement.[13] As rational parties to a dispute gain more knowledge about its merits, their assessments regarding the expected value of a claim converge, expanding the "bargaining zone" and making settlements more likely.[14] Put another way, when the parties agree on the expected outcome of a trial, the administrative costs associated with the trial become superfluous, and the parties can split this cooperative surplus among themselves by settling. When the parties disagree—because of irrational impulses, rational uncertainty about the value of a claim, or for other reasons—the surplus is used to fight it out in court.[15]

Professor Richter's conclusion on this particular issue can be broken down into two parts: (1) the claim that Judge Posner's rule would decrease predictability and (2) the claim that decreased predictability, or increased uncertainty, would lead to increased litigation costs overall. Regarding the first point, Professor Richter is certainly correct that the broad language contained in Judge Posner's suggested rule *could* allow for virtually unchecked discretion. There are, after all, no substantive categories distinguishing acceptable hearsay from unacceptable hearsay. Further, the rule articulated in *Boyce* provides almost no guidance regarding the substance of reliable hearsay, its preferred forms, or the social contexts that might give rise to reliable hearsay evidence.

On the other hand, the language of Judge Posner's rule sounds quite permissive in terms of its treatment of hearsay, particularly when coupled with his related commentary on the subject. In his various scholarly discussions of hearsay, Judge Posner has repeatedly referred to the fact that hearsay is a central feature of our understanding of the world:

> Most of what we know is hearsay, right? . . . Some of it is gossip and rumors, and so on, and third degree or fourth degree or fifth-hand or what have you. But much of it is perfectly good evidence. And I think the judge should make

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11. *Id.* at 1883.

12. *See id.*

13. *See, e.g.*, Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 HARV. L. REV. 55, 56–57 (1982).

14. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 391–93 (6th ed. 2012).

15. *See id.* at 402–03.

> a judgment whether the hearsay evidence that a party wants to introduce passes the 403 test: it has probative value; the prejudicial effect is much less.[16]

Judge Posner has also cited, with approval, empirical work that indicates jurors' ability to appreciate and appropriately react to the various reliability problems associated with hearsay evidence.[17] Finally, Judge Posner has said, unequivocally, that his criticism of the current hearsay doctrine is not motivated by a desire to reduce the amount of hearsay introduced in trials.[18]

If we treat the above commentary as a sort of "advisory committee notes" to the text of Judge Posner's proposed rule, it is easy to envision Judge Posner's rule being one of broad admissibility.[19] In short, Judge Posner's rule might allow most hearsay evidence as a matter of course, effectively reversing the current presumption against admissibility and allowing the trier of fact to determine its appropriate weight. After all, we deal with hearsay everyday, so we (as jurors) can generally "understand its strengths and limitations."[20] Further, psychological research suggests that individuals appropriately discount hearsay evidence, so the rule should be interpreted as having "a thumb on the scale" towards admissibility as FRE 403 does.[21] In fact, the only types of hearsay that Judge Posner's rule would appear to clearly and consistently preclude are present sense impressions[22] and excited utterances[23] (or more specifically, hearsay evidence whose *only* justification is excitement or contemporaneous reporting). If this interpretation is plausible, Judge Posner's rule would undoubtedly allow more hearsay into trials. However, it would operate in a fairly predictable manner, contra Professor Richter's narrative.

Even if Judge Posner's rule did not follow the interpretive path

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16. *Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323, 1334 (2016).

17. Posner, *On Hearsay, supra* note 6, at 1467 (citing Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 644 (2016) (discussing Sevier's empirical work on jurors' understanding of hearsay evidence)).

18. *See* United States v. Boyce, 742 F.3d 792, 802 (7th Cir. 2014) ("I don't want to leave the impression that in questioning the present sense and excited utterance exceptions to the hearsay rule I want to reduce the amount of hearsay evidence admissible in federal trials.").

19. Allowing for some outside commentary to guide the interpretation of Judge Posner's rule seems fair, not only because Advisory Committee Notes are vital to the operation of the current Federal Rules of Evidence, but also because the "rule" under consideration was not likely meant by Judge Posner to be analyzed as a final, polished bit of legal text.

20. *Boyce*, 742 F.3d at 802.

21. FED. R. EVID. 403 (excluding evidence only when its probative value "is *substantially* outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence") (emphasis added).

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

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

suggested above—and instead became a "purely discretionary," highly unpredictable black box—there is at least some reason to believe that litigation costs would not explode and settlements would not significantly decrease. First, as Professor Richter acknowledges, it is unclear how important hearsay evidence is to the valuation of claims in general.[24] Second, and more importantly, we already have an evidentiary rule that entails absolute discretion, and it has not managed to derail settlements or otherwise wreak havoc with the litigation process. I refer, of course, to FRE 403, which allows judges to exclude evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[25] FRE 403 affords judges virtually unreviewable power, not only to determine what counts as "unfair prejudice," but to weigh such prejudice (or confusion, delay, etc.) against the probative value of the evidence at issue. And, despite the fact that it is one of the most frequently invoked rules of evidence,[26] there is surprisingly little criticism of the discretion baked into FRE 403. To quote Justice Scalia—speaking on an unrelated issue of evidence—"perhaps the best indication that the sky would not fall . . . is that it has not done so already."[27]

Third, there are actually plausible arguments that increased uncertainty (if that's what Judge Posner's rule would, in fact, entail) may increase settlement. In his discussion of case selection bias, Professor Robert H. Gertner challenges the conventional economic wisdom by noting that "the relation between judicial uncertainty and settlement is far from obvious on a theoretical level."[28] Professor Gertner further concludes that "[s]ince trials are risky, litigants can benefit from avoiding a trial, preferring to settle for the expected judgment even if litigation is costless. Holding all else constant, additional uncertainty makes litigation more unattractive and increases the likelihood of settlement."[29]

Others have echoed this somewhat commonsense corollary of risk aversion. In their study of the factors influencing settlement, for example, Professors Gross and Syverud observe that "greater

24. *See* Richter, *supra* note 1 at 1886 ("To be sure, it may be an unusual case that hinges on a single piece of hearsay evidence.").

25. *See supra* note 21.

26. 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:12 (4th ed. 2016) ("So often is Rule 403 involved, and in such a wide variety of circumstances, that individual cases provide little guidance for future rulings.").

27. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009).

28. Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75, 94 (1993).

29. *Id.* at 93.

uncertainty also increases the proportion of cases that insurance companies will be anxious to settle because they present the risk of huge verdicts."[30] Further, Professor Russell Covey acknowledges a similar point in the context of criminal law: "Uncertainty by itself could, in theory, more or less make plea bargaining either more or less likely depending largely on the particular defendant's risk tolerance."[31]

To be sure, Professor Richter's view on the likely impact of evidentiary uncertainty appears to be a majority view in the theoretical literature on settlement. The fact that there is some lingering debate about the precise role of uncertainty in settlement decisions, though, warrants a degree of caution when making predictions about the hypothetical impact of a proposed rule of evidence on the litigation process. This is particularly true when the rule itself is amenable to substantially different interpretations.

B. *Bias in the Reliability Determination*

Another shortcoming of Judge Posner's proposed rule, according to Professor Richter, is that it invites bias into the reliability determination. Here, Professor Richter envisions a particular type of bias—one that benefits litigants who are either individually sympathetic to the judge, or who represent a legal position that aligns with the presiding judge's political beliefs.[32] Not only does Judge Posner's vague rule allow for this type of bias, but according to Professor Richter, it also explicitly encourages it:

> Judge Posner's proposed tripartite standard acknowledges the role that a judge's assessment of the merits of a case must play in administering a flexible reliability approach to hearsay. Judge Posner's test would instruct trial judges to admit reliable hearsay evidence when it "would materially enhance the likelihood of a correct outcome." Presumably, a trial judge following this standard should be more inclined to admit hearsay evidence if she determines that the proponent of the hearsay has the better case.[33]

The latter part of this claim—the notion that Judge Posner's proposed rule explicitly *requires* judges to allow hearsay evidence that makes their preferred outcome more likely—can be quickly dismissed. To admit a piece of evidence because it "materially enhance[s] the

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30. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 385 (1991).

31. Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV 213, 218 (2007).

32. *See* Richter, *supra* note 1, at 1886–87.

33. *Id.* at 1887.

likelihood of a correct outcome" is not to determine what the correct outcome is ex ante and make evidentiary rulings so as to bring about that (pre-determined, preferred) outcome. Rather, ruling in the interests of a "correct outcome" means to admit a piece of the story that is necessary in order to provide a full, meaningful engagement with the narrative of the case; to place the jury in the best possible position to make an informed decision *as they see fit*.[34] Under this reading of the third prong of Judge Posner's rule, a piece of slightly reliable evidence that is not duplicative or confusing might be allowed into evidence; whereas a piece of highly reliable evidence that is duplicative, confusing, or only marginally probative, might be left out. However, under this more natural reading of Judge Posner's rule, the judge's personal opinions about the correct outcome of the case need not be part of the analysis.

However, the portion of Professor Richter's argument regarding the general connection between discretion and bias is not so easily dismissed. There is simply too much experimental evidence on bias to hope that a flexible rule like Judge Posner's could avoid it entirely.[35] One can only hope to contain it. For several reasons though, it is not entirely clear how significant the problem of bias would be in the context of Judge Posner's rule. First, as mentioned in the preceding section, Judge Posner's rule might not end up operating as a discretionary black hole at all, but rather a predictably permissive rule under which most hearsay is allowed (and a few concrete areas where it is excluded). And, per the argument, less discretion translates to less bias.

Second, the empirical work Professor Richter cites to support her conclusion in this area—Professor Avani Mehta Sood's recent work on "cognitive cleansing"[36]—offers some hope that Judge Posner's rule would not result in unduly biased reliability determinations. For example, the legal context involved in the cited experimental studies is markedly different from most hearsay rulings. In Professor Sood's studies, participants acted as judges in deciding whether or not to exclude illegally obtained evidence under the "inevitable discovery"

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34. *See, e.g.*, Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule,* 72 B.U. L. REV. 893, 896 (1992) ("Achieving justice in the context of the fact-finding portion of a trial means determining the truth—that is, obtaining an accurate, unbiased picture of a historical event.").

35. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind,* 86 CORNELL L. REV. 777, 793–94, (2000); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics,* 50 STAN. L. REV. 1471, 1498 (1998); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANNU. REV. L. & SOC. SCI. 307, 309 (2013).

36. *See* Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1547 (2015).

exception to the exclusionary rule of the Fourth Amendment.[37] The evidence in these cases was highly probative—indeed dispositive—making it extremely tempting for the study participants to find a legal rationalization to allow it into the trial. Perhaps unsurprisingly, the study found that the participants were more motivated to do so when the crime was egregious, and more able to do so under a vague legal standard.[38]

In the context of hearsay rulings, though, the stakes are typically much lower. It is rare that a single piece of hearsay evidence will be dispositive in a legal sense, and also relatively rare that a single piece of hearsay evidence will definitively paint a negative picture of one side of a dispute. In Professor Sood's study, for example, the evidence under consideration—physical evidence in the form of heroin and needles to be sold to high school students[39]—is far more immediately damning in a drug case than, say, a secondhand statement about possession of drugs. Accordingly, the temptation to allow hearsay evidence into trial on improper grounds seems somewhat weaker in the context of Judge Posner's rule than in Professor Sood's illegal search example. Professor Sood's study also found that legal decisions based on improper, extra-legal factors were "markedly reduced when participants received the awareness instructions" that drew the experimental decision-makers attention to improper types of reasoning.[40] This suggests that a slight modification to Judge Posner's rule that spelled out improper considerations in the reliability determination might effectively serve to reduce bias as well.

None of this is to say that Judge Posner's rule, however it plays out on an operational level, would not invite any bias into the reliability determination. It certainly would, and Professor Richter correctly identifies it as a serious issue. But further studies specifically focusing on the operation of bias in rules more similar to Judge Posner's rule (like FRE 403) would be helpful in sorting out the magnitude of the problem and the feasible solutions in this context. Understanding the scope of potential bias would also allow for this particular cost to be weighed against any potential benefits of the proposed rule.

II. HIDDEN BENEFITS

Whether Judge Posner's proposed rule would ultimately make hearsay rulings more or less predictable, and whether any changes in the predictability of hearsay rulings would affect further changes in the cost of litigation, is extremely difficult to say. It's also only half the story.

37. *See id.* at 1567.
38. *See id.* at 1547.
39. *See id.*
40. *Id.* at 1594.

On the benefits side of the equation, Professor Richter has little to say about Judge Posner's rule except that it would likely result in a more chaotic, and less transparent, version of the current rules—which is to say that Judge Posner's rule would entail no benefits at all:

> A malleable case-by-case reliability standard . . . would create inconsistent application of hearsay doctrine across cases and courtrooms and could invite admissibility decisions based upon preconceived judicial assessments of correct outcomes . . . . Even more troubling, an experiment with discretionary treatment of hearsay would likely lead the trial process full circle, leaving the evidentiary system right where it started, with common law exceptions to the hearsay rule eerily reminiscent of the categorical exceptions in the Federal Rules.[41]

This conclusion is based on Professor Richter's assumption that folk psychology—even demonstrably bad folk psychology—is inescapable when it comes to reliability determinations.[42]

But, again, Professor Richter's prediction of how Judge Posner's rule would operate in practice is not the only plausible account. Indeed, it is strange to predict a reversion to the current categorical approach when Judge Posner's explicit motivation in proposing an alternative is to rid the current system of bad folk psychology.[43] If all Judge Posner's proposal managed to do was rid the current hearsay rules of the least supportable assumptions about human behavior—in Judge Posner's view, the assumptions supporting the present sense impression and excited utterance exceptions—it would likely make rulings marginally more accurate. If we go a step beyond this and assume that Judge Posner's rule would also eliminate the empirically questionable reasoning underlying the "dying declarations"[44] and "statements against interest"[45] exceptions (meanwhile allowing almost everything else in, as outlined in the preceding Part) the benefits might be more substantial.

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41. *See* Richter, *supra* note 1, at 1894.

42. *See id.* at 1892 ("The problem with replacing the hearsay exceptions with a reliability test to avoid folk psychology is that human nature and psychology are the only tools available to assess the reliability of hearsay statements.").

43. *See* United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014).

44. FED. R. EVID. 804(b)(2); *see also* Posner, *On Hearsay*, supra note 6, at 1471 ("The hearsay exception for dying declarations, as for present sense impressions and excited utterances, is a fossil.").

45. FED. R. EVID. 804(b)(3); *see, e.g.*, Daniel J. Capra, Essay, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of* Crawford, 105 COLUM. L. REV. 2409, 2424 (2005); John P. Cronan, *Do Statements Against Interests Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformulation*, 33 SETON HALL. L. REV. 1, 24 (2002).

CONCLUSION

It is worth noting that few of the observations made above run directly counter to Professor Richter's analysis; neither do they necessarily undermine her ultimate conclusions, which are defensible and well-supported. It seems likely, for example, that Judge Posner's proposal would increase discretion and the risk of bias *to some extent.* It also seems likely that judges operating under Judge Posner's rule would implicitly rely on *some* of the current rules in determining reliability. In the context of a cost-benefit analysis, though, the key question is "how much?" Perhaps more than anything, the concerns presented in this response demonstrate the difficulty of cost-benefit reasoning in an area that seems to defy clear predictions and valuations.