

ON HEARSAY DRAGON-SLAYING

*Justin Sevier**

“It is no easy thing to slay a dragon, but it can be done.”

— *A Storm of Swords* (2000)¹

In ancient Mesopotamia, the Sumerians worshipped the primordial goddess of the ocean, Tiamat, who was believed to be the mother of the first generation of Mesopotamian deities.² According to legend, when those first-generation deities murdered her husband and attempted to usurp the throne, Tiamat—who became known as the “monstrous embodiment of primordial chaos”³ to the religion’s followers—declared war upon her children while taking on the form of a massive sea dragon.⁴ She was eventually defeated.⁵

Professor Liesa L. Richter evokes dragon imagery in her important debate with Judge Richard Posner over the future of Article VIII of the Federal Rules of Evidence, which governs the use of hearsay evidence at trial.⁶ As numerous evidence scholars have noted, the hearsay rule is the most chaotic of the Federal Rules of Evidence, with its byzantine structure, conflicting rationales for its existence, and Swiss-cheese style approach to its nearly thirty exceptions.⁷

In her article, titled *Posnerian Hearsay: Slaying the Discretion Dragon*, Professor Richter critiques Judge Posner’s latest proposal for analyzing hearsay, which appears in his concurrence in the Seventh Circuit case, *United States v. Boyce*.⁸ As I discuss in more detail below, there is actually much agreement between Professor Richter and Judge Posner with respect to the policy and doctrinal intricacies surrounding the

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1. GEORGE R.R. MARTIN, *A STORM OF SWORDS* 23–33 (2000) (recounting a conversation between the *A Song of Ice and Fire* series’ dragon-queen protagonist, Daenerys Targaryen, and her advisor, Jorah Mormont).

2. See THE SEVEN TABLETS OF CREATION 2–21 (L.W. King ed., 1902), <http://www.etana.org/sites/default/files/coretexts/14907.pdf>.

3. TROY KYNARD, *THE ESOTERIC CODEX: MESOPOTAMIAN DEITIES* 102 (2015).

4. See THE SEVEN TABLETS OF CREATION, *supra* note 2 at 2–21.

5. See *id.*

6. See Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1865–68 (2015).

7. See, e.g., Elliotte M. Harold, Jr., *The Hearsay Rule: The Law of Evidence’s Swiss Cheese*, 21 LOY. L. REV. 279, 279 (1975); see also JOHN H. WIGMORE, *A STUDENT’S TEXTBOOK OF THE LAW OF EVIDENCE* 238 (1935) (comparing hearsay to a “spoiled child”).

8. 742 F.3d 792, 799–802 (7th Cir. 2014).

rule barring hearsay evidence.⁹ However, they disagree strongly regarding the role of judicial discretion in determining whether certain types of hearsay are “reliable enough” to overcome Article VIII’s general bar on the use of second-hand information as evidence at trial. This Article briefly (1) analyzes Judge Posner’s proposed approach to hearsay, (2) examines Professor Richter’s critique, and (3) discusses other paradigms—supported by experimental psychology research—by which to evaluate out-of-court statements used as evidence at trial.

I.

The debate between Professor Richter and Judge Posner vis-à-vis the rule barring hearsay evidence stems from a depressingly common domestic violence dispute. The facts are amply discussed in the Court’s opinion¹⁰ and in Professor Richter’s critique of Judge Posner’s concurrence,¹¹ but at issue was the use of hearsay statements at trial under the present sense impression¹² and excited utterance exceptions¹³ to the hearsay bar. Judge Posner’s concurrence included an in-depth criticism of the wisdom of the law’s continued acceptance of the psychologically dubious rationale for including these types of hearsay statements as trial evidence.¹⁴

However, the final paragraph of Judge Posner’s concurrence also contains a much broader criticism of the current categorical approach to hearsay exceptions found in the Federal Rules of Evidence.¹⁵ Because these categorical exceptions rely on incorrect folk psychology, Posner argues, the categories should be disbanded in favor of a more flexible, discretionary test, in which judges determine on a case-by-case basis the reliability of a hearsay statement as well as the likelihood that the statement will lead juries to the correct legal outcome.¹⁶

Professor Richter and Judge Posner do not actually disagree about the current hearsay regime as much as it initially appears. Critically, they agree that the reliability of a hearsay statement should be the primary determinant of whether the statement can be admitted into evidence. And Professor Richter does not suggest that rule-makers eliminate the role of judicial discretion in evidence law (more broadly) or in the exclusion of hearsay (more specifically). Rather, their disagreement is one of degree, with Judge Posner advocating for much greater use of judicial discretion

9. *See infra* Part I.

10. *See Boyce*, 742 F.3d at 793–94.

11. *See Richter*, *supra* note 6 at 1876–81.

12. *See Boyce*, 742 F.3d at 796.

13. *See id.*

14. *See id.* at 801.

15. *See id.* at 802.

16. *See id.*

at the expense of what he views as an arcane (and empirically suspect) categorical approach to the admissibility of hearsay evidence. In contrast, Professor Richter sees Judge Posner's proposal as the regressive one, harkening back to an era of unpredictable hearsay analysis that she asserts is squarely in evidence law's rear-view mirror.¹⁷

Although Professor Richter repeatedly declines to engage Judge Posner's assertions regarding the folk psychology that underlies the current hearsay regime,¹⁸ Judge Posner's skepticism is well-founded. Over the past quarter-century, well-regarded social psychologists and legal scholars have published over 25 different studies, containing multiple experiments, in prestigious law reviews and peer-reviewed journals that examine how laypeople evaluate hearsay evidence.¹⁹ The methods used in these studies are sophisticated, diverse, and converge on two general propositions regarding hearsay: (1) jurors *do* pay attention to the reliability risks inherent in hearsay evidence and discount that evidence defensibly and (2) the folk psychology underlying the exceptions to the hearsay rule is highly suspect.²⁰

It may surprise readers to learn that jurors are careful consumers of hearsay evidence, because the primary rationale for the doctrine is to protect factfinders from faulty evidence whose probative weight—by implication—the fact finder is likely to overvalue. But several empirical studies suggest that this rationale is needlessly paternalistic. For example, a recent study examined whether mock jurors were attentive to (1) different types of infirmities found in hearsay evidence and (2) the effect of multiple levels of hearsay on the reliability of evidence presented in court.²¹ The researchers found that mock jurors were attuned to a hearsay declarant's potential motive to lie about an event, misperception of that event, faulty memory for that event, and inability to accurately express herself regarding the event.²² Each of these infirmities resulted in a discounting of the hearsay evidence, which was magnified when multiple

17. A preliminary note of caution is in order here. Judge Posner's "proposal" is contained in a mere paragraph at the conclusion of his *Boyce* concurrence. *See id.* Because I suspect that Judge Posner's intriguing framework was meant to be suggestive rather than comprehensive, it may behoove evidence scholars to await full briefing from Judge Posner regarding the contours of his proposal in his future scholarly work.

18. Professor Richter frequently discusses "perceived" defects in the rationale underlying various hearsay exceptions that "may" not reflect empirical reality without truly acknowledging that those defects exist. *See, e.g.,* Richter, *supra* note 6, at 1868, 1898, 1900, 1904, 1908.

19. Although Professor Richter suggests that the Advisory Committee is aware of these studies, she does not cite to any of them in her article. *See* Richter, *supra* note 6, at 1897.

20. For a comprehensive literature review, see Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 *GEO. L.J.* 879, 893–96 (2015).

21. *See Boyce*, 742 F.3d at 884–85.

22. *See id.* at 906, 912 (noting that jurors scrutinize the infirmities—sincerity, memory, perception, and narrative ability—to which they were exposed to during the experiment).

levels of hearsay were present.²³ These findings accord with other research demonstrating that mock jurors are sensitive to hearsay declarants' cognitive limitations, motivations to lie, and ability to communicate correctly.²⁴

Although the weight of the empirical research casts serious doubt on the primary rationale for the rule barring hearsay, it may be said that the rule's nearly thirty exceptions tempers that criticism, because many hearsay statements—provided they fall within broad categories of 'reliability'—are admitted into evidence anyway. Again, Judge Posner correctly recognizes the difficulty with this approach under the current hearsay regime: the categories rely on unsubstantiated—and indeed, incorrect—folk wisdom regarding the types of hearsay statements that are likely to be reliable. To my knowledge, no legal scholar has systematically studied the behavioral underpinnings of each of the categorical hearsay exceptions. Rather, research that casts doubt on the categorical framework comes from studies in an array of fields including medicine, economics, and psychology. Judge Posner discusses one of these studies in his *Boyce* concurrence, which undercuts the rationale for the present sense impression exception by finding that lies can, in fact, be formed and articulated while experiencing a specified event.²⁵ There are many other studies that cast doubt on the other categorical exceptions, and although it is beyond the scope of this Article to discuss them all, three additional examples serve to illustrate the problem with the categorical approach.

The excited utterance category of hearsay exceptions fares no better empirically than the present sense impression. Although excitement may still a person's capacity for untruthfulness, it is well-established that high levels of anxiety and arousal are associated with significant cognitive deficits in event perception, event encoding, and memory retrieval. In a particularly colorful study, participants walked through the famous London Dungeon attraction, in which they were subjected to frightening visual and auditory stimuli while wearing monitors measuring vital health statistics including heart rate and pulse.²⁶ Participants also unwittingly

23. *See id.* at 904–22.

24. *See, e.g.,* Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 685 (1992) (discussing the discounts that mock jurors place on hearsay); David F. Ross et al., *The Impact of Hearsay Testimony on Conviction Rates in Trials of Child Sexual Abuse: Toward Balancing the Rights of Defendants and Child Witnesses*, 5 PSYCHOL. PUB. POL'Y & L. 439, 446–47 (1999) (discussing narrative concerns with child hearsay); Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 14–20 (2012) (discussing motivational discounts).

25. Monica T. Whitty et al., *Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication*, 63 J. AM. SOC. FOR INFO. SCI. & TECH. 208, 208–09, 214 (2012) (finding that planned lies are not more frequent than spontaneous lies).

26. *See* Tim Valentine & Jan Mesout, *Eyewitness Identification Under Stress in the London*

took part in an eyewitness identification exercise based on what they had observed in the Dungeon.²⁷ The researchers found that as participants' anxiety levels rose—as measured by increased pulse and heart rate at the time of the identification—their perception of the perpetrator became compromised, such that they were less likely to make an accurate identification.²⁸

Statements made for the purpose of medical treatment—assumed to be reliable, at least on average, by the Advisory Committee to the Federal Rules of Evidence—are also of dubious reliability. A recent study in the medical literature found—consistent with prior research—that roughly one-quarter of survey participants freely admitted to lying to their doctor about matters relating to their health.²⁹ Participants listed several reasons for their lies, including embarrassment, a lack of a personal connection with their doctor, and a lack of time to explain the situation fully to their physician.³⁰ And most intriguingly, the study found that participants were more honest about their health with individuals who are *not* covered by a hearsay exception under the Federal Rules, including family members, beauty professionals, and personal trainers.³¹

Finally, the dying declaration exception to the hearsay rule is similarly suspect.³² One of the theoretical underpinnings of the dying declaration category is that, when people are truly on death's door, their sense of religiosity overcomes them, such that they would not want to meet their maker with a lie on their lips. Although this proposition is difficult to test directly, a recent randomized experiment in the economics literature examined the relationship between people's self-reported religiosity and their willingness to lie about a variety of financial matters.³³ In accord with previous research, the study found that roughly half of the

Dungeon, 23 APPLIED COGNITIVE PSYCHOL. 151, 154 (2009).

27. *See id.*

28. *See* Whitty, *supra* note 25, at 159.

29. *New Zocdoc Study Reveals Women Are More Likely than Men to Lie to Doctors*, ZOCDOC (Nov. 10, 2015), <https://www.zocdoc.com/about/news/new-zocdoc-study-reveals-women-are-more-likely-than-men-to-lie-to-doctors>. It is reasonable to assume that these figures actually may be higher if the survey instrument caused some participants to respond in socially desirable ways that do not actually reflect their behavior.

30. *See id.*

31. *Id.* Additional research supports the proposition that people routinely lie to their health care professionals. *See* Karen Ravn, *Body of Lies: Patients Aren't 100% Honest with Doctors*, L.A. TIMES (June 8, 2009), <http://articles.latimes.com/2009/jun/08/health/he-lying8>.

32. The dying declaration exception, as a technical matter, is defended on the ground of necessity and not reliability. *See* FED. R. EVID. 804 and Advisory Committee Notes. Nonetheless, perceived reliability also undergirds the exception. *Id.* Indeed, it would be senseless for the Advisory Committee to deem dying declarations “necessary” evidence if they were not considered reliable, at least to some extent.

33. Jason Childs, *Personal Characteristics and Lying: An Experimental Investigation*, 121 ECON. LETTERS 425, 426 (2013).

participants told a lie for financial gain during the experiment.³⁴ But—inconsistent with one of the assumptions of the dying declaration exception—the likelihood of lying during the experiment increased significantly if participants indicated that religion *does* play an important role in their lives.³⁵

This brief (non-exhaustive) review of the published research not only casts doubt on the psychological underpinnings of the hearsay rule itself, but on the validity of the categorical approach to the hearsay exceptions that Professor Richter defends. On these points, the scientific research overwhelmingly supports the views of Judge Posner. Nonetheless, Judge Posner's solution to the problem posed by the categorical hearsay approach is more controversial, and Professor Richter raises important concerns in her critique.

II.

Professor Richter argues, among other things, that Judge Posner's discretionary approach to the admissibility of hearsay would lead to inefficient trial outcomes because litigants would be unable, *ex ante*, to determine the worth of their case for the purposes of settling or plea bargaining. Professor Richter's concern is important not just for individual litigants—who may either settle unnecessarily or hold out for a trial when doing so is not in their economic interest—but also for the legitimacy of the trial system if laypeople perceive the courts to arbitrarily overcompensate certain litigants while they undercompensate others.³⁶ The published empirical literature also supports Professor Richter's assertion that a discretionary approach to the admissibility of hearsay evidence is unlikely to reduce the role of incorrect folk psychology in judicial decision making, because it opens the door to a host of well-documented cognitive biases and subconscious influences that may affect trial judges.³⁷

There are reasons, however, to question whether these important concerns are truly implicated by Judge Posner's proposal, or even if implicated, should persuade rule makers not to adopt his discretionary approach. For example, even assuming that Judge Posner's discretionary approach would increase the likelihood of biased decision making by trial judges, any errors are likely to be distributed randomly, because different judges would presumably be affected by different heuristics and biases, depending on the individual case. Judge Posner might prefer the

34. *Cf. id.* at 427 (noting that 46.5% were not incentivized to lie).

35. *Id.* at 426.

36. For an overview of the research examining popular perceptions of the legitimacy of legal institutions, see, for example, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

37. See, e.g., Chris Guthrie et al., *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 *JUDICATURE* 44, 50 (2002).

randomized error of his proposal over what social science suggests to be *systematic* error embodied in the current categorical hearsay regime. Such systematic error may even place certain litigants in predictably disadvantageous positions if, for example, prosecutors are more likely than defendants to successfully proffer excited utterances and present sense impressions that do not face the crucible of cross-examination in court.³⁸

Rule makers may also question whether the randomized error that Professor Richter asserts is endemic to Judge Posner's discretionary approach to hearsay would truly impose costs on litigants in practice. The psychological literature does indeed reveal a host of decision-making heuristics and biases that occur under conditions of uncertainty, such as a trial. But the research also reveals that these biases can be overcome if an individual (1) becomes aware of the bias, (2) is cognitively able to correct for the bias, and (3) is motivated to do so.³⁹ As a class, judges are highly intelligent and highly educated; they are also, presumably, invested in the fair and impartial administration of justice. Moreover, many programs—run by influential law and psychology scholars—are aimed at educating judges regarding their implicit biases and providing them with tools to correct for biased decision making. Research suggests that these programs have been successful.⁴⁰

Professor Richter's point regarding the role of judicial discretion in the economics of a party's litigation strategy is important and intriguing. At the outset, her argument regarding how litigants behave in this regard diverges remarkably from her argument regarding how judges behave. Judges, according to Professor Richter, may fall prey to decision-making biases that will affect their ability to make optimal hearsay decisions. But Professor Richter has significantly more confidence in the economic rationality of litigants and their attorneys, whom she assumes are optimally attempting to ascertain the value of their case for the purpose

38. Although I know of no study that has examined this particular issue, empirical evidence suggests that, in other contexts, criminal prosecutors have higher success rates of admitting expert scientific testimony than do criminal defendants and civil plaintiffs. *See, e.g.*, Paul C. Giannelli, Daubert and Criminal Prosecutions, 26 CRIM. JUST. 61 (2011).

Moreover, in the context of excited utterances and present sense impressions, the discretion afforded trial judges under Judge Posner's standard—which concerns Professor Richter—already occurs in the context of judges' preliminary determinations on conditional relevance. Under Federal Rule of Evidence 104, judges must make preliminary determinations regarding, for example, whether a hearsay statement was sufficiently excited when it was uttered (or, in the case of a present sense impression, that the impression was uttered in close proximity to the event at issue). *See* FED. R. EVID. 104(a). Judge Posner's proposal may make these discretionary determinations more transparent, which may benefit the legal system.

39. *See* Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697, 716–17 (2003).

40. Many such programs exist. For a review of coursework and other efforts in this area, see THE NAT'L JUDICIAL COLL., <http://www.judges.org> (last visited Sept. 26, 2016).

of settlement or plea bargains. Professor Richter therefore worries that Judge Posner's discretionary approach will create unacceptable noise in the data underlying these important litigation calculations.

Professor Richter's point is a fair one, although I wish I shared her optimism regarding how litigants and attorneys actually evaluate their cases. Putting aside the issue of how often the value of a case actually turns on the admissibility of hearsay evidence, which is an intriguing question that has no empirical answer to date, the same social science research that is applicable to judicial decision making may apply even more strongly to the legal decision-making capabilities of laypeople. Indeed, behavioral economics research on the endowment effect, the optimism bias, and the self-serving bias suggests that litigants consistently overvalue the probative worth of their own evidence while simultaneously devaluing the worth of their adversary's evidence.⁴¹

These effects are far from theoretical in the legal field. Peer-reviewed studies also suggest that litigants and their attorneys are irrational when evaluating the merits and strengths of their cases. A recent study by psychologist Jane Goodman-Delahunty and colleagues examined how nearly 500 practicing attorneys from across the country evaluated their active cases.⁴² Attorneys were asked to state the minimum goal that they could reach in their case to consider the case "a win," and were asked their degree of confidence that they could achieve that goal.⁴³ Participants were then asked—either before or after they gave their confidence estimates—to generate reasons why they might not achieve their goals for their clients.⁴⁴ The results showed, among other things, that many of the attorneys failed to achieve their self-reported minimum goals and vastly overestimated the likelihood that they would achieve them.⁴⁵ Interestingly, the attorneys' work experience had no effect on these findings⁴⁶ nor did asking attorneys to generate reasons for not achieving their goals.⁴⁷ Other researchers have reached similar conclusions with respect to the decisions of laypeople as well.⁴⁸

However, Professor Richter could correctly assert that her

41. See, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPECTIVES 193, 194–97 (1991) (explaining these biases); see also Tali Sharot, *The Optimism Bias*, 23 CURRENT BIOLOGY R941, R941 (2011) (explaining the optimism bias).

42. Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL., PUB. POL'Y & L. 133, 138–39 (2010).

43. See *id.* at 139.

44. *Id.*

45. See *id.* at 140–41.

46. See *id.* at 144.

47. See *id.* at 148.

48. See, e.g., George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEG. STUD. 135, 154 (1993).

observations have normative weight regardless of how attorneys and laypeople actually behave. After all, shouldn't rule makers create an evidentiary system that *encourages* litigants to engage in economic valuations of their cases, even if laypeople do not actually engage in it? This argument has persuasive force, but Judge Posner's proposal exists precisely because the actual behavior of legal actors deviates from the theoretical assumptions that underlie the categorical hearsay exceptions. Those who agree with Judge Posner would therefore be unpersuaded by a normative argument that is based on the speculative effects of hearsay admissibility rulings on the types of economic valuations that laypeople and their attorneys do not actually make.

Moreover, it is unclear how much Judge Posner's proposal would truly alter the litigation calculus even assuming, contrary to the empirical research, that litigants and attorneys *do* rationally calculate the value of their cases. Federal Rule of Evidence 403 almost always allows judges to exclude even highly relevant evidence, including hearsay evidence, if the prejudicial effect of that evidence substantially outweighs its probative value.⁴⁹ And although it is an exceedingly narrow exception to the rule barring hearsay, Federal Rule of Evidence 807 gives judges the discretion to allow into evidence hearsay that is deemed particularly reliable, but does not fall into the existing hearsay categories.⁵⁰

Finally, and relatedly, Professor Richter argues that Judge Posner's proposal will increase litigation costs, because there will be less authority on which litigants can rely in determining whether their hearsay evidence is admissible. Thus, courts' and litigants' valuable resources will be taxed unacceptably through burdensome pretrial hearings and appellate proceedings. Professor Richter's point is well-taken: Judge Posner's proposal may in fact burden all but the most resourceful litigants. It is worth noting, however, that *any* change in the substantive law will necessarily result in these additional costs, and I remain more optimistic than Professor Richter regarding how quickly those costs will be reduced. Many areas of the law, including the law of evidence, are composed of legal "totality of the circumstances" tests, which are, by their nature, fact-specific inquiries.⁵¹ Nonetheless, there are still bodies of case law surrounding, for example, Federal Rule of Evidence 403 and 807 that develop over time and give litigants at least some sense of how their evidence is likely to fare in comparison to that case law.⁵² More research

49. See FED R. EVID. 403 and Advisory Committee Notes.

50. See FED R. EVID. 807 and Advisory Committee Notes.

51. For a recent example of a fact-intensive ineffective assistance of counsel trial court ruling, see Respondent Adnan Syed's Conditional Application for Leave to Cross Appeal, *Syed v. State*, No. 199103042-046 (Md. Cir. Ct. 2016).

52. For such an example in the context of a claim for ineffective assistance of counsel, see *id.*

examining the effects of these legal startup costs is necessary, and Judge Posner's response to Professor Richter's critique on this point would be illuminating.

III.

The important debate between Professor Richter and Judge Posner regarding the future of the categorical exceptions to the rule barring hearsay evidence assumes that the reliability of the hearsay statement should be the determining factor regarding whether the statement overcomes the Article VIII hearsay bar. But Professor Richter's defense of the categorical hearsay regime is not dogmatic. She explicitly states—albeit as a second-best alternative to the current regime—that a hearsay rule that is not premised on reliability may be desirable instead. In so arguing, she discusses the relationship between the hearsay rule and the Sixth Amendment's Confrontation Clause as well as Professor Michael Seigel's proposal to create a “best evidence” rule for allowing hearsay into court.⁵³ As I have written elsewhere in more detail, I agree with Professor Richter that the time has come for rule makers to get out of the reliability business—and the empirical baggage that comes with it—in fashioning the rationale for the hearsay bar and its exceptions.⁵⁴

As intriguing as a “best evidence” approach to the hearsay rule is, I am not sure that I agree with Professor Richter that this approach is untethered to the reliability rationale that is so problematic with respect to the current hearsay regime. The paradigm is premised on the notion of forbidding parties from engaging in gamesmanship by proffering less reliable hearsay evidence in place of other, presumably more reliable evidence that would face the crucible of cross-examination. I agree with Professor Richter that if reliability must be the primary rationale for the hearsay rule, a “best evidence” approach may result in more reliable evidence, notwithstanding the empirical research that suggests that jurors already apply a “best evidence” discount to such type of testimony.⁵⁵

But as the empirical research suggests, reform proposals that focus on the reliability of hearsay evidence may be solutions in search of a problem. If rule makers wish to extract themselves from the reliability knot in which the hearsay rule currently finds itself, they might look to

53. See Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 896 (1992).

54. See Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 644, 688 (2016).

55. In that study, the researchers manipulated circumstantial evidence of the attorneys' motivation to proffer hearsay evidence instead of the best evidence available to the attorney. The study found that—consistent with psychological research on how people consider motivation when making behavioral attributions about environmental stimuli—mock jurors were attuned to the attorneys' motivations and discounted the evidence substantially. See Sevier, *supra* note 24, at 50.

other guiding rationales for the rule. One alternative rationale, a recent study found, centers on the procedural justice values that the hearsay rule protects.⁵⁶ That study found, among other things, that laypeople conceive of the hearsay bar not as a substantive rule, but as a *process* rule—similar to the Confrontation Clause—that protects their ability to look in the eye those who accuse them of legal wrongs.⁵⁷ Although a full-throated argument for the benefits and contours of a procedural rationale for the hearsay rule are beyond the scope of this Article, there is clear value in premising the hearsay doctrine on the normative philosophical concept of confrontation instead of premising it on slippery, empirically suspect notions of reliability.⁵⁸ It appears from her explicit endorsement of alternative models in her article—and his criticism of the incorrect folk psychology of the current regime in his *Boyce* concurrence—that Professor Richter and Judge Posner may, at the least, agree on that.

In conclusion, there are metaphorical dragons within the law of evidence that are even more ferocious than the hearsay rule. As other scholars have recently noted,⁵⁹ empirically suspect claims about human behavior and the effects of evidentiary rules on human behavior abound within the law of evidence. The debate between Professor Richter and Judge Posner implicates the importance and benefits of published scientific research on the formation and revision of evidentiary rules. Regardless of the outcome, their debate is important for the legitimacy of the law of evidence as well as the state and federal courts within which those evidentiary rules govern.

56. *See id.* at 50.

57. *See id.* at 51.

58. A hearsay rule modeled on principles of procedural justice would expand the rule's reach beyond the increasingly narrow and incoherent limits currently imposed by the Confrontation Clause. *Cf.* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865 (2012) (arguing for expanding the definition of a "testimonial statement" for the purpose of defining the constitutional limits imposed on the use of hearsay at trial).

59. *See generally* MICHAEL J. SAKS & BARBARA A. SPELLMAN, *THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW* (2016) (evaluating, from the perspective of two well-respected law and psychology experts, the scientific research to date with respect to nearly all of the Federal Rules of Evidence).