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A Statute Overtaken by Time: The Need to Reinterpret Federal Rule of Evidence 803(8)(A)(iii) Governing the Admissibility of Expert Opinions in Government Investigative Reports.

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ARTICLE

A STATUTE OVERTAKEN BY TIME: THE NEED TO REINTERPRET FEDERAL RULE OF EVIDENCE 803(8)(A)(iii) GOVERNING THE ADMISSIBILITY OF EXPERT OPINIONS IN GOVERNMENT INVESTIGATIVE REPORTS

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INTRODUCTION

"The scythe of Time mows down."
—John Milton[1]

The administrative branch of government has assumed tremendous importance in modern American society. In the twentieth century, administrative law emerged as one of the most important doctrinal areas.[2] Created by the legislature and overseen by the executive branch, administrative agencies perform vital governmental functions.[3] Agencies collect vast amounts of data about society and issue thousands of reports addressing issues affecting the society as a whole and the individual members of that society.[4]

The contents of these reports are often relevant to issues in litigation.[5] Consequently, litigants frequently have occasion to attempt to introduce these reports at trial. The official record exception to the hearsay rule serves as a link between the administrative branch and the legal system.[6]

1. JOHN MILTON, PARADISE LOST bk. X, at l. 606 (London, S. Simmons 1669).

2. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 1 (2d ed. 2001) ("The rise of administrative bodies probably has been the most significant legal trend of the last century . . . ." (quoting Mr. Justice Jackson)); *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (5th ed. 2010) (emphasizing the importance of administrative law).

3. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 1 (2d ed. 2001).

4. *See id.* ("Administrative law pertains to those agencies of government assigned the task of implementing various social, economic, and quality of life programs within our nation . . . .").

5. Note, *The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C)*, 96 HARV. L. REV. 492, 509 (1982).

6. *Id.*

By virtue of this exception, a litigant may introduce a government record as evidence over a hearsay objection.[7] Every American jurisdiction recognizes some variation of the official record hearsay exception.[8] Currently the courts accept public records generated by domestic, local, state,[9] and national agencies, including agencies of foreign governments.[10]

In some cases, the government record is simply a recitation of factual information. For example, the courts have admitted government records listing disbursements by the Treasury Department[11] and describing a licensee's driving record.[12] However, in many cases, passages in the records include inferences or conclusions based on factual data collected by the government. Thus, the courts have received public records detailing the analysis of suspected contraband drugs,[13] gunshot residue,[14] the causation of boating accidents,[15] and gas explosions.[16] While these reports concerned specific incidents, the courts have also admitted government records relating to more generalized phenomena such as the dangers of smoking[17] and the possible causal nexus between tampon use and toxic shock syndrome.[18]

It is undeniable that on numerous occasions, under the official record

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7. *See id.* (discussing the introduction of government documents).

8. *See* DAVID F. BINDER, HEARSAY HANDBOOK § 17:2, at 503 (4th ed. 2013–2014).

9. 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 895 (4th ed. 2009); Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 928 (2009).

10. *See* United States v. Mena, 863 F.2d 1522, 1530–32 (11th Cir. 1989) (referring to a document signed by the Commander General of the Honduran Navy).

11. *See* Chesapeake & Del. Canal Co. v. United States, 250 U.S. 123, 127–28 (1919) (holding that such documents from the Department of Treasury were admissible public records).

12. *See* State v. Leis, 397 N.W.2d 498, 499–500, 502 (Wis. Ct. App. 1986) (describing a printout from the Wisconsin Department of Transportation, Division of Motor Vehicles that was admitted into evidence).

13. *See* Caw v. State, 851 S.W.2d 322, 323–24 (Tex. App.—El Paso 1993, pet ref'd) (holding that drug reports from laboratories are admissible as a public record).

14. *See* Estate of Griffin v. Hickson, No. CIV. A. 98-3805, 2002 WL 988006, at *1 (E.D. Pa. May 9, 2002) (stating that "two particles of gunshot residue . . . were found . . . [t]his indicates that 'Griffin either [had] discharged a weapon, handled a firearm or was in close proximity to a firearm when it discharged'").

15. *See In re* Complaint of Munyan, 143 F.R.D. 560, 562–64 (D.N.J. 1992) ("This court will first address the admissibility of the investigation reports prepared by the Coast Guard, the New Jersey Marine Police and the Seaside Police Department . . . .").

16. *See* Matthews v. Ashland Chem. Inc., 770 F.2d 1303, 1309–10 (5th Cir. 1985) (excluding the fire report to be admitted in this case, to prove that the fire was caused by a gas explosion).

17. *See* Boener v. Brown & Williamson Tobacco Co., 394 F.3d 594, 600–01 (8th Cir. 2005) (explaining the admissibility of Surgeon General reports).

18. *See* Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 617–18, 620 (8th Cir. 1983) (describing the admissibility of a report prepared by the Centers for Disease Control).

hearsay exception, the courts have admitted expert opinions that amounted to educated inferences.[19] If a proponent called a witness to testify in regard to either the analysis of an unknown drug or an asserted causal nexus between tampon use and toxic shock syndrome, any judge would rule that the witness must qualify as an expert under Federal Rule of Evidence 702 and that the theory or technique underlying the expert's opinion must satisfy Rule 702(c).[20] The use of a public record to introduce an expert opinion is an especially attractive option for a litigant with limited resources;[21] doing so can save the litigant the considerable expense of hiring an expert to analyze the facts before trial and having the expert provide live testimony at trial. Even if the litigant does not have limited resources, he or she may prefer to resort to the public report. The trier of fact may put a discount factor on the testimony of an expert paid by the litigant calling the witness to the stand.[22] In contrast, the same opinion might enjoy "an aura of special reliability and trustworthiness"[23] because it has received an imprimatur[24] from an apparently impartial[25] government expert.

At common law, the English courts have long been receptive to expert opinions in government investigative reports.[26] However, until the adoption of the Federal Rules of Evidence in 1975, the American courts were far more conservative.[27] The pronounced tendency in the American cases was to admit only passages in public records that were both based on

19. *See The Admissibility of Opinions Contained in Public Records*, 13 EXPERT EVIDENCE REP. NO. 17, at 456, 456–57 (May 28, 2013).

20. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993); *see also The Admissibility of Opinions Contained in Public Records*, 13 EXPERT EVIDENCE REP. NO. 17, at 456, 459 (May 28, 2013) (explaining that expert testimony based on scientific or specialized knowledge must be based on a reliable, well-reasoned, and relevant foundation).

21. Note, *The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C)*, 96 HARV. L. REV. 492, 505–06, 510 (1982).

22. *See* Michael H. Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 IND. L.J. 35, 35 (1977) (describing expert witness bias due to financial interest); *see also* Logan Ford & James H. Holmes III, *Exposure of Doctors' Venal Testimony*, 32 INS. COUNSEL J. 221, 222 (1965) (discussing doctors who sell their testimony to the highest bidder).

23. City of New York v. Pullman, Inc., 662 F.2d 910, 915 (2d Cir. 1981).

24. *See* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 929, 953 (2009) (analyzing the inferred impartiality of a government endorsement).

25. *See id.* (illustrating the inferred weight of a government endorsement).

26. Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363, 364 (1957).

27. *See id.*; Thomas J. MacCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 925 (2009) (noting that prior to *Beech*, American courts excluded opinions found in public records).

personal knowledge and couched in the form of a recitation of factual data.[28]

However, a seminal event occurred in 1957; Dean Charles McCormick—the original author of the popular Evidence treatise[29]—published an often-cited article in the *Iowa Law Review*.[30] In the article, McCormick urged American courts to follow the example of their English counterparts.[31] He pointed out that public agencies are inconvenienced when the courts demand that a public official leave his or her office to appear and give testimony as a witness regarding the contents of a report prepared by the official.[32] He also noted that the government witness's testimony was likely to have little probative value, since in many cases the official would only have a vague recollection of the events and data recorded in the report.[33] Further, he contended that in terms of the factors determining the trustworthiness of hearsay evidence, the typical opinion in a government report is extraordinarily trustworthy.[34] More often than not the official who created the report is a specialist on the subject,[35] and the official is more impartial than the partisan experts hired by the litigants to testify at trial.[36] As a matter of fairness, McCormick recommended the adoption of special procedures.[37] Citing a proposed Uniform Rule of Evidence 64,[38] he endorsed a requirement that the litigant contemplating introducing the report provide the opposition with advance notice and a copy of the report.[39] Pretrial notices afford the opposition with an opportunity to investigate the trustworthiness of the

28. *See* Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363, 363–64 (1957) (admitting evidence of first hand facts in an officer's report); *see also* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 925 (2009) (explaining the purpose of the hearsay exception).

29. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (1954); *see* 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE, at iii (7th ed. 2013) (stating that "[t]he authors have tried to be faithful to the pragmatic approach to analyzing evidence issues taken by the original author of this book, Dean Charles McCormick").

30. Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363 (1957).

31. *Id.* at 364.

32. *Id.*

33. *Id.* at 365.

34. *Id.* at 363.

35. *Id.* at 365.

36. *Id.*

37. *Id.* at 365, 368.

38. *Id.* at 368.

39. *Id.*

report.[40]

As previously stated, all American jurisdictions recognize some form of the official record hearsay exception.[41] However, they disagree sharply over the wisdom of Dean McCormick's proposal. More specifically, they differ markedly over the question of whether the exception should extend beyond recitations of fact to permit the admission of expert opinions contained in the reports.[42]

- Some jurisdictions adhere to this narrow common law rule[43] restricting the scope of the exception to recitations of fact based on personal, firsthand knowledge. Two handfuls of states continue to adhere to the traditional, restrictive American practice.[44]
- The clear majority of states have adopted a version of Federal Rule of Evidence 803(8)(A)(iii) authorizing the admission of "factual findings from a legally authorized [government] investigation."[45] In federal court and most states, in addition to authorizing the admission of such findings, the statute or court rule empowers the judge to exclude the finding if "[]either the source of information []or other circumstances indicate a lack of trustworthiness."[46] However, the states vary in the manner in which they construe the statute; for example Maryland courts have announced that they strictly construe "factual findings" as excluding evaluative opinions.[47]
- However, as we shall see in Part I, most states that have adopted a version of Rule 803(8)(A)(iii) interpret the statute liberally. In these

40. Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363, 365, 368 (1957).

41. DAVID F. BINDER, HEARSAY HANDBOOK § 17:2, at 503 (4th ed. 2013–2014).

42. 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:8, at 362 (7th ed. 2012) (stating that there is a disagreement between jurisdictions).

43. Bradbury v. Ford Motor Co., 358 N.W.2d 550, 552 (Mich. 1984).

44. *See* DAVID F. BINDER, HEARSAY HANDBOOK § 17:2, at 503–05 (4th ed. 2013–2014) (listing CAL. EVID. CODE § 1280, FLA. EVID. CODE § 90.803(8), MICH. R. EVID. 803(8), OHIO R. EVID. 803(8), 42 PA. CONST. STAT. § 6104, TENN. R. EVID. 803(8), and WASH. REV. CODE § 5.44.040); *see also* Bradbury v. Ford Motor Co., 358 N.W.2d 550, 552 (Mich. 1984) ("[MRE 803(8)(B)] . . . reflects the narrow common law rule which limits public reports of matters observed by agency officials to reports of objective data observed and reported by these officials."); Swartz v. Dow Chem. Co., 326 N.W.2d 804, 808 (Mich. 1982) ("This rule [MRE 803(8)], . . . unlike FRE 803(8)(C), rejects the introduction in private civil actions of factual findings resulting from an investigation made in accordance with authority granted by law.").

45. FED. R. EVID. 803(8)(A)(iii).

46. *Id.* 803(8)(B).

47. *See* Ellsworth v. Sherne Lingerie, Inc., 495 A.2d 348, 364 (Md. 1985); *see also* DAVID F. BINDER, HEARSAY HANDBOOK § 17:6, at 552 (4th ed. 2013–2014) (detailing how the Maryland courts construe factual findings).

jurisdictions, if the proffered entry is in the nature of an expert opinion in a purported government investigative report, the courts not only reject a hearsay objection to the admission of the entry but also assume that the admission of the entry is in accord with the expert testimony rules set out in Article VII of the Federal Rules.[48] The proponent's failure to establish the government official's status as an expert does not bar the introduction of the report[49] because the courts presume that the authorized government investigator qualifies as an expert.[50] The upshot is that today most courts interpret Rule 803(8)(A)(iii) as meaning that if the entry qualifies as a "factual finding . . . from a legally authorized [government] investigation," the entry not only surmounts a hearsay objection, but also presumptively satisfies Rule 702's requirements for expert opinions.[51] To be sure, Rule 803(8)(B) empowers the judge to exclude an untrustworthy finding;[52] but the courts almost uniformly allocate the burden of showing untrustworthiness to the opponent resisting the admission of the factual finding.[53] An amendment to

48. *See* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 939 (2009) (explaining that some courts hold a liberal view of Rule 803(8)(C)).

49. *See* 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:8, at 422–24 (7th ed. 2012) (citing Larsen v. Decker, 995 P.2d 281, 283–85 (Ariz. Ct. App. 2000) (excluding a social security disability report from evidence in a personal injury case), *amended* (Feb. 22, 2000)).

50. *See* DAVID F. BINDER, HEARSAY HANDBOOK § 17:2, at 564 (4th ed. 2013–2014) (citing Sabel v. Mead Johnson & Co., 737 F. Supp. 135, 143 n.7 (D. Mass. 1990)) ("Given that courts often lack evidence to assess the individual qualifications of government investigators in Rule 803(8)(C) situations, the court believes it is proper to presume that the official has the skill and expertise to perform the task assigned to him by law . . . ."); *see also* Wilson v. Attaway, 757 F.2d 1227, 1245 (11th Cir. 1985) (refusing to admit a report regarding an incident witnessed by a mediator and observer for a government agency because it was "suspect").

51. FED. R. EVID. 702, 803(8)(A)(iii); DAVID F. BINDER, HEARSAY HANDBOOK § 17:2, at 564 (4th ed. 2013–2014).

52. FED. R. EVID. 803(8)(B) ("[N]either the source of information nor other circumstances indicate a lack of trustworthiness.").

53. *See* DAVID F. BINDER, HEARSAY HANDBOOK § 17:7, at 552–53 (4th ed. 2013–2014) (citing United States v. Sepulveda, 392 F. App'x 529 (9th Cir. 2010) and United States v. Loyola-Dominguez, 125 F.3d 1315, 1318 (9th Cir. 1997)) (explaining the burden being placed on the opponent who resists the admission); *see also* 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:8, at 418 (7th ed. 2012) (citing Beavers v. Northrop Worldwide Aircraft Servs., Inc., 821 S.W.2d 669, 674–75 (Tex. App.—Amarillo 1991, writ denied)) (showing that if a party resists, they often have the burden of proof placed on them); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:52, at 909 (4th ed. 2009) ("[T]he burden is on the objecting party to show it is untrustworthy."); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.10[2] (2d ed. 2014) ("The burden of proof concerning the admissibility of public records is on the party opposing their introduction."); Harvey Brown, Daubert *Objections to*

Rule 803(8)(B), effective December 1, 2014, clarified that the opponent has the burden.

The thesis of this article is that two developments in 1993 require a reinterpretation of Rule 803(8)(A)(iii). The first part of the article traces the history of the rule. This section highlights the Supreme Court's 1988 decision in *Beech Aircraft Corp. v. Rainey*.[54] In *Beech*, the Court provided an expansive reading and construed the rule as authorizing the receipt of conclusory, factual findings that amount to expert opinions under Rule 702.[55] Part I explains that at this stage of the evolution of the doctrine, the proponent of the evidence still had at least a modest motivation to call the government investigator as a witness. It is a bromide of trial advocacy, now borne out by empirical research,[56] that a jury may attach less weight to an item of evidence if the proponent elects to present the evidence in hearsay form, denying the trier an opportunity to assess the declarant.

However, Part II explains that after 1993, the proponent of an expert opinion in a public report can have a powerful incentive to present only the hearsay report. In 1993, the federal courts adopted an amendment to Federal Rule of Civil Procedure 26, mandating pre-discovery disclosures.[57] The amended rule provides that when a litigant contemplates calling an expert as a trial witness, the litigant must file a report, comprehensively setting out the witness's qualification as an expert, the theory or technique the witness proposes to rely on, and the case-specific facts to which the witness will apply the theory or technique.[58] However, the proponent must make the mandatory pre-discovery disclosures only when the proponent intends to call the person to give live testimony.[59] The proponent may obviate the necessity for any disclosures by the simple expedient of offering the expert opinion in hearsay form.[60]

Public Records: Who Bears the Burden of Proof?, 39 HOUS. L. REV. 413, 417 (2002) (explaining that "the report is admissible unless the opposing party can show the untrustworthiness of the report.").

54. Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988).

55. *Id.*

56. *See* Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys*, 40 FLA. ST. U. L. REV. 1, 49 (2012) ("[I]t appears that jurors view the strategic choice to proffer hearsay . . . as a way of 'hiding' probative weaknesses . . . and jurors weigh the hearsay evidence consistent with this suspicion.").

57. *See* EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, PRETRIAL DISCOVERY: STRATEGY AND TACTICS § 5:2 (rev. 2004).

58. FED. R. CIV. P. 26(a)(2); *see* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 929 (2009) (setting forth disclosure requirements to use expert testimony).

59. FED. R. CIV. P. 26(a)(2).

60. Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 929 (2009).

The other significant development in 1993 was the Supreme Court's rendition of its expert testimony decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[61] Prior to 1993, most federal courts had followed the hoary *Frye* doctrine, which permits the introduction of scientific testimony so long as the expert testimony was based on a generally accepted theory or technique.[62] Given the *Frye* standard, the courts were comfortable admitting expert opinions in government reports because the courts probably correctly assumed that government investigators routinely use well-accepted methodologies.[63] However, in *Daubert*, the Supreme Court ruled that after the enactment of the Federal Rules, *Frye* was no longer good law in federal cases.[64] Instead, the Court construed the expression, "scientific . . . knowledge," in Rule 702 as announcing a new empirical validation test.[65] The question became whether the proponent had presented sufficient empirical data and reasoning to demonstrate that the witness's theory or technique rests on valid scientific methodology. Standing alone, the theory's popularity or general acceptance is no longer an adequate showing of the theory's reliability.[66] If the proponent could assume that successfully invoking Rule 803(8)(A)(iii) eliminated the need to lay a foundation satisfying *Daubert* and Rule 702, a proponent fearing that the witness's theory would not pass muster under Rule 702 would

61. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993).

62. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (stating the principle that admissible expert testimony cannot be based on unproven experimental theories, but must be based on theories that have gained general acceptance in the field); 1 PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE § 1.06, at 12 (5th ed. 2012) (discussing the *Frye* requirement that a scientific theory must be generally accepted, as opposed to experimental, before a court may admit expert testimony based on that theory).

63. Ellis v. Int'l Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984) (allowing expert testimony based on government studies performed by the CDC and state agencies regarding the effects of toxic shock syndrome); DAVID F. BINDER, HEARSAY HANDBOOK § 17:7, at 546–47 (4th ed. 2013–2014) (explaining that the general presumption of trustworthiness given to admission of government records places the burden of proof on the opponent).

64. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 586–87 (1993) (holding that the *Frye* test was superseded when Congress adopted the Federal Rules of Evidence).

65. *See id.* at 589–90 (requiring that "scientific . . . knowledge" be the basis for admissible expert testimony).

66. In *Daubert*, the Court lists several factors that trial judges should consider in deciding whether there is adequate, methodologically sound support for the expert's theory or technique. *Id.* at 593–94. General acceptance is only one of those factors. *Id.* The Court strongly implied that even "conventional," generally accepted theories are subject to scrutiny under the new empirical validation test. *Id.* at 592 n.11. Seizing on that implication, the lower courts have held that even traditional theories and techniques must pass muster under the new test. *See* United States v. Starzecpyzel, 880 F. Supp. 1027, 1051 n.14 (S.D.N.Y. 1995) ("Although the *Frye* decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence.").

have an overpowering incentive to introduce the opinion in hearsay form. If the judge interprets Rule 803(8)(A)(iii) as allowing the proponent to do so, in effect, the proponent can evade Rule 702 and expose the jury to expert testimony that is unreliable under the *Daubert* standard. Part II concludes that the cumulative effect of these two 1993 developments—the advent of pre-discovery disclosure requirements for live expert testimony and the enunciation of the new empirical validation standard for expert testimony—necessitates the reinterpretation of Rule 803(8)(A)(iii).

Part III, the final part of the article, turns to the possible reinterpretations of the rule. This part explores a number of possibilities, including shifting the burden of proof on the issue of trustworthiness under Rule 803(8)(A)(iii) to the proponent of the evidence, and folding *Daubert*'s reliability inquiry into the trustworthiness analysis under 803(8)(A)(iii). However, this part concludes that those half-measures are unsatisfactory. Instead, the courts ought to abandon the current interpretation of Rule 803(8)(A)(iii) that satisfying the rule either automatically or presumptively satisfies the Rule 702 requirements. Instead, the courts should demand that the proponent satisfy both Rule 803(8)(A)(iii) and Rule 702.

Part III further anticipates the potential counter-argument that this demand will impose an unfair, undue burden on the proponent. Turning to Federal Rules of Evidence 104(a), 201, and 301 demonstrates that this counter-argument is exaggerated. As Milton might say, in 1993 the "scythe of Time mow[ed] down" the conventional view that the satisfaction of Rule 803(8)(A)(iii) eliminates the need for compliance with Rule 702.[67] Today, to protect the integrity of the fact-finding process from spurious expert testimony, the opponent should be entitled to demand that an expert opinion in a government investigative report run the gauntlet of Rule 702.

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67. John Milton poetically explains the circle of life:

> To whom the incestuous mother thus replied.
> Thou therefore on these herbs, and fruits, and flowers,
> Feed first; on each beast next, and fish, and fowl;
> No homely morsels, and, whatever thing The scythe of Time mows down, devour unspared;
> Till I, in man residing, through the race, His thoughts, his looks, words, actions, all infect;
> And season him thy last and sweetest prey.

JOHN MILTON, PARADISE LOST bk. X, at l. 602–09 (London, S. Simmons 1669).

I. THE CURRENT INTERPRETATION OF FEDERAL RULE OF EVIDENCE 803(8)(A)(iii): THE PRE-1993 HISTORY OF THE RULE

In 1948, Congress enacted Title 28, Section 1773 of the U.S. Code. The statute codifies a version of the official record hearsay exception that is very much in the conservative, common-law mold.[68] However, at the time of enactment, in several jurisdictions there were statutory codifications of the business entry exception that had been construed as allowing the admission of entries representing diagnostic opinions.[69]

A. *Dean McCormick's Advocacy of the Admissibility of Expert Opinions Resulting from Official Investigations*

Against this backdrop, Dean McCormick released his famous 1957 article calling on the courts to be more receptive to admitting the evaluative opinions of government investigators.[70] In the article, McCormick constructed a case in terms of the classic factors that determine the trustworthiness of hearsay evidence—the perception, memory, and sincerity of the declarant.[71] In McCormick's mind, the perceptual factor cuts in favor of admitting inferences by government investigators, since the investigator is ordinarily a specialist on the subject.[72] Likewise, the memory factor favors admissibility because the investigator is usually on the scene shortly after the incident[73]—days, weeks, or months before the partisan experts hired by the litigants could

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68. The current version of Title 28, Section 1733 of the U.S. Code reads:

> (a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
> (b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.
> (c) This section does not apply to cases, actions, and proceedings to which the Federal Rules of Evidence apply.

28 U.S.C. § 1733 (2012).

69. Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363, 364 (1957) (discussing several case decisions based on statutes that permitted official opinions to be offered under the business entry rule in some jurisdictions).

70. *Id.*

71. *Id* at 364–65.

72. *See id.* at 365 (pointing out that the officer preparing the official report is frequently an investigative specialist).

73. *See id.* at 364 ("The most important reason is time. The officer comes on the scene usually as early as it is feasible to get there.").

visit and examine the scene.[74] Further, especially when the government official's position required him or her to repeatedly conduct the same type of investigation, the official is likely to have little recollection of the specific investigation;[75] in that light, it made little sense to insist on the investigator's personal appearance as a witness. Finally, in the vast majority of cases the government investigator is impartial and far more objective than the partisan experts.[76]

However, McCormick cautioned that if the legislatures and courts embraced his proposal, as a matter of fairness, they should give the opposing litigant special discovery rights.[77] The opponent deserved advance notice of the proponent's intent to offer the opinion contained in the hearsay report in order to enable the opponent to probe the circumstances surrounding the preparation of the report.[78] Aside from that cautionary note, though, McCormick championed "widening [the] admissibility of" expert opinions set out in "official reports of investigation."[79]

B. *The United States Judicial Conference's Decision to Endorse Dean McCormick's View and Fashion a Hearsay Exception for Expert Opinions Resulting from Official Investigations*

When the United States Judicial Conference established an Advisory Committee to draft a set of rules of evidence for federal courts, the committee heeded McCormick's view. The Advisory Committee prepared notes for each of its draft rules. The two most frequently cited authorities in the notes are Wigmore's monumental treatise and Dean McCormick's writing. In 1969 the committee prepared the following draft of a

74. *See id.* at 365 ("Usually the investigators of the parties come later and the statements they take are frequently partial and one-sided.").

75. *See id.* (discussing the need to refresh witnesses' dim recollection with contemporaneous statements taken at the scene).

76. *See id.* at 364–65 (stating that an officer is usually impartial as opposed to the parties' own investigators who come into the investigation much later and often take witness statements designed to further their own case).

77. *See id.* at 365, 368 (explaining that Rule 64 requires that the party offering the report "must have delivered a copy to the adverse party").

78. *See id.* at 368 (warning that special discovery protections are needed—including reasonable advance notice to the adverse party, allowing that party to investigate the circumstances of the report, and if necessary, call the maker of the report as a hostile witness).

79. *See* Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363, 369 (1957) (supporting the wider admissibility of official reports which may also produce, as a by-product, development of improved investigation reporting standards when officers know their report may be used in court).

codification of the official record hearsay exception:

> Rule 8-03. Hearsay Exceptions: Availability of Declarant Immaterial
>
> (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 this rule:
>
> . . . .
>
> (8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public officials or agencies, setting forth (a) the activities of the official or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases 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 the method or circumstances of the investigation indicate lack of trustworthiness.[80]

Rule 8-03(b)(8)(c) embodied the type of hearsay exception for investigative findings that McCormick had advocated.[81]

The accompanying Advisory Committee note bore McCormick's imprint. Just as McCormick's article analogized to the business entry statutes permitting the introduction of diagnostic opinions, the note compiled a long list of federal statutes allowing the admission of findings resulting from various kinds of government investigations.[82] As secondary authority, the note relied on McCormick's hornbook as well as his *Iowa Law Review* article.[83] The note elaborated that in deciding whether the proffered opinion is a sufficiently trustworthy "factual finding[]," the trial judge ought to consider the following: "(1) the timeliness of the investigation . . . ; (2) the special skill or experience of the official . . . ; (3)

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80. COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES 173–75 (Mar. 1969).

81. *See* Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363, 364–65 (1957) (arguing that courts should take advantage of conclusions and opinions of government investigators as stated in official reports).

82. COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES 192–93 (Mar. 1969) (listing various reports admissible under federal statutes).

83. *Id.* at 191, 193.

whether a hearing was held and the level at which conducted . . . ; [and] (4) possible motivation problems."[84]

The note then commented on the "unless" clause at the end of the proposed exception.[85] The note stated that the provision "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present."[86]

C. *Congress's Approval of the Proposed Hearsay Exception*

After the Judicial Conference submitted the draft rules to Congress, Congress deliberated over them. The House of Representatives issued the first report on the draft rules in 1973.[87] Its committee included the following statement about the proposed exception:

> The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public records shall not be admissible under this Rule.[88]

Ultimately, the House passed a version of the rule excluding matters observed by police officers and other law enforcement personnel in criminal cases.[89]

The Senate took up the draft rules in 1974. The Senate concurred with the House's decision to exclude observations by law enforcement personnel in prosecutions.[90] However, the Senate flatly rejected the House's position on the breadth of the interpretation of "factual findings." The Senate report asserted:

> The [Senate] committee takes strong exception to this limited understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The . . . notes . . . point out that various kinds of evaluative reports are now admissible under Federal statutes. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive

84. *Id.* at 193.
85. *Id.*
86. *Id.* (assuming admissibility but allowing exceptions where trustworthiness is suspect).
87. H.R. REP. NO. 93-650, at 4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7077.
88. *Id.* at 14.
89. S. REP. NO. 93-1277, at 17 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7064.
90. *Id.*

> interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."[91]

The Senate report's discussion of the proposed exception closed with approving citations to McCormick's 1957 article and the list of four trustworthiness factors in the Advisory Committee Note.[92]

Later in 1974 a Conference Committee convened to reconcile the differences between the House and the Senate versions of the draft.[93] Unfortunately, the committee left unresolved the two houses' disagreement over the manner in which the courts should construe "factual findings."[94] When the rules took effect in 1975, it became the courts' task to grapple with that question. Predictably, the Conference Committee's failure to settle that issue led to a split of authority among the lower courts.[95] In turn, that split of authority set the stage for the Supreme Court's 1988 decision in *Beech Aircraft Corp. v. Rainey*.[96]

D. *The Supreme Court's Construction of the Hearsay Exception in its* Beech *Decision*

The Court's 1988 decision in *Beech* is not the Court's only decision on the admissibility of findings resulting from government investigations.[97] However, *Beech* is easily the Court's most celebrated decision on the topic.

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91. *Id.* at 18.

92. *Id.*

93. CONF. REP. NO. 93-1597, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098.

94. *Id.* at 11.

95. In *Beech Aircraft Corp. v. Rainey*, the Supreme Court acknowledged the divide among federal courts, stating the following:

> Controversy over what "public records and reports" are made not excludable by Rule 803(8)(C) has divided the federal courts from the beginning. In the present litigation, the Court of Appeals followed the "narrow" interpretation of *Smith v. Ithaca Corp.*, . . . which held that the term "factual findings" did not encompass "opinions" or "conclusions." Courts of Appeals other than those of the Fifth and Eleventh Circuits, however, have generally adopted a broader interpretation.

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 161–62 (1988) (quoting Smith v. Ithaca Corp., 612 F.2d 215, 220–23 (1980)).

96. *Id.*

97. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 113 (1991) (discussing admissibility of a finding by the New York State Division of Human Rights that there was not probable cause to believe that the defendant had fired the plaintiff because of the plaintiff's age); Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976) (considering admissibility of a probable cause finding by the Equal Employment Opportunity Commission).

In *Beech*, a Naval flight instructor and her student were killed when their aircraft crashed during a training exercise.[98] The defendant, Beech Aircraft, had manufactured and serviced the plane.[99] The decedents' survivors later filed a product liability lawsuit against Beech Aircraft. The pivotal question was the cause of the crash.[100] After the crash, pursuant to the Manual of the Naval Judge Advocate General (JAG), a Naval Lieutenant Commander conducted an investigation of the incident, and concluded that pilot error was the most likely cause of the crash.[101] At trial, the defense attempted to introduce that passage in the JAG report.[102] When the plaintiffs lodged a hearsay objection to the admission of the report, the trial judge found the report sufficiently trustworthy and admitted the report under Rule 803(8)(C) (now Rule 803(8)(A)(iii)).[103] At that time, the statute referred to

> [r]ecords, 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 there was a duty to report, . . . 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.[104]

Justice Brennan, writing the opinion for a unanimous court, began his analysis by acknowledging the division of authority among the lower courts.[105] Moreover, he noted the House report's position advocating a narrow interpretation of "factual findings."[106] However, he immediately made it clear that he favored a broad, liberal interpretation of the statutory language.[107] Like the Advisory Committee and both legislative houses,

98. *Beech*, 488 U.S. at 156–58.

99. *Id.*

100. *Id.*

101. *Id.* at 157–58.

102. *Id.* at 157.

103. *Id.*

104. *Id.* at 161. The Federal Rules of Evidence were restyled in 2011, and Rule 803(8)(C) became Rule 803(8)(A)(iii).

105. *See id.* at 161 ("Controversy over what 'public records and reports' are made not excludable by Rule 803(8)(C) has divided the federal courts from the beginning.").

106. *See id.* at 164–65 ("The Committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule." (quoting H.R. REP. NO. 93-650, at 14 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7088)).

107. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169–70 (1988) (interpreting the plain language of the federal rule to permit a broader approach).

the Justice approvingly referred to Dean McCormick's writings,[108] notably the dean's "influential" *Iowa Law Review* article.[109] The Justice relied heavily on the Advisory Committee Note.[110] Like the committee, he was impressed by the large number of "federal statutes 'that made certain kinds of evaluative reports admissible in evidence.'"[111] The Justice concluded that the Senate's position, favoring a broad interpretation of factual findings, was "more in accord with the wording of the Rule and with the comments of the Advisory Committee."[112] As an example of the proper application of the rule, Justice Brennan pointed to the Sixth Circuit's 1978 decision in *Baker v. Elcona Homes Corp.*,[113] upholding the admission of a police report finding that one of the vehicles "entered the intersection against a red light."[114] In the Justice's mind, the Sixth Circuit was justified in treating the finding as sufficiently trustworthy even though the officer lacked personal knowledge and "there was no direct witness as to the color of the traffic lights at the moment of the accident."[115] Before concluding his analysis, the Justice endorsed both the Advisory Committee's list of the trustworthiness factors that trial judges should consider[116] and the committee's assertion that the statutory wording "assumes admissibility in the first instance."[117]

Yet, it is important to appreciate what the Court did not say or decide. To begin with, although the Court upheld the characterization of the reference to pilot error as a factual finding, the Court declined to express any opinion on the question of "whether legal conclusions contained in an official report are admissible" under the statute.[118] Further, the Court did

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108. *Id.* at 166 n.10.

109. *Id.* (citing Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363 (1957)).

110. *See id.* at 177 (Rehnquist, J., concurring in part and dissenting in part) (referencing the Court's reliance on the Advisory Committee Note).

111. *Id.* at 166 (majority opinion).

112. *Id.* at 165.

113. Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978).

114. *See Beech*, 488 U.S. at 162 n.6 (discussing *Baker*, 588 F.2d at 557–58).

115. *Id.* at 162 n.6.

116. *See id.* at 167 n.11 (indicating that a trial judge has an obligation to consider the trustworthiness factors).

117. *Id.* at 163 n.8.

118. *Id.* at 170 n.13. Later, the Eleventh Circuit answered that question in the negative. Hines v. Brandon Steel Decks, Inc., 886 F.2d 299, 302–03 (11th Cir. 1989), *cert. denied*, 503 U.S. 971 (1992); *see* DAVID F. BINDER, HEARSAY HANDBOOK § 17:6, at 538–39 (4th ed. 2013–2014) (discussing the Court's decision in *Beech* regarding factual conclusions and subsequent circuit court decisions addressing admissibility of legal conclusions). However, the courts have gone to the brink. *See* Union Pac. R.R. Co. v. Kirby Inland Marine, Inc. of Miss., 296 F.3d 671, 678–80 (8th Cir. 2002)

not hold that all factual findings are sufficiently trustworthy to be admissible.[119] In footnote,[120] the Court cited *Fraley v. Rockwell International Corp.*[121] Like *Beech*, that case involved a Naval JAG report about an airplane accident.[122] However, the *Fraley* trial judge excluded the report on the ground that the report "was prepared by an inexperienced investigator in a highly complex field of investigation."[123]

Most importantly, the Court did not hold that findings qualifying under Rule 803(8)(A)(iii) automatically or presumptively satisfy Rule 702.[124] There was no Rule 702 objection in *Beech*.[125] There was not—and could not have been—an objection premised on the *Daubert* Court's interpretation of Rule 702, since *Beech* antedated *Daubert* by five years.[126] In the view of several commentators, "some of the [Supreme] Court's language [in *Beech*] suggests that admissibility of the JAG opinion depended solely on satisfying the requirements of Rule [803(8)(A)(iii)]."[127] However, the suggestion is a weak one; the Court never says in so many

(determining a legal conclusion contained in a Coast Guard's Order to Alter is admissible because it was deemed trustworthy), *cert. denied*, 537 U.S. 1188 (2003); Litton Sys., Inc. v. AT&T Co., 700 F.2d 785, 818–19 (2d Cir. 1983) (stating no reversible error occurred where the trial court admitted into evidence a Federal Communications Commission report that concluded AT&T's tariff was "unjust and unreasonable discrimination"), *cert. denied*, 464 U.S. 1073 (1984).

119. *See Beech*, 488 U.S. at 167 (defining the trial court's obligation to evaluate factual findings to determine if sufficiently trustworthy prior to admitting into evidence).

120. *See id.* at 176 n.11 (pointing out the similarities between the *Beech* case and the *Fraley* case).

121. Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264 (S.D. Ohio 1979).

122. *Id.* at 1265.

123. *Id.* at 1267; *see* DAVID F. BINDER, HEARSAY HANDBOOK § 17:7, at 558–59 (4th ed. 2013–2014) (discussing Jenkins v. Whittaker Corp., 785 F.2d 720, 725-27 (9th Cir. 1986), in which the court excluded a report about the malfunction of an atomic simulator because the authors of the report did not qualify as experts on the subject); 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.10(4)(b), at 803-106 n.31 (2d ed. 2014) (collecting cases excluding findings for the stated reason that the government official lacked expertise on the subject matter).

124. Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 431 (2002).

125. *See* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 946 (2009) ("As long as the conclusion [in the JAG Report] is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible . . . ." (alteration in original) (quoting *Beech*, 488 U.S. at 170)).

126. Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 431 (2002).

127. Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 946 (2009) (pointing to the following language appearing on page 170 of the Court's opinion: "As the conclusion [in the JAG report] is based on factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible.").

words that findings that satisfy Rule 803(8)(A)(iii) are invulnerable to objections under Rule 702. More to the point, even if the Court had said that, the statement would have been dictum, since again, the plaintiffs did not make any objection premised on Rule 702.

E. *Summary: The State of the Law Prior to 1993*

As we have seen, a close reading of *Beech* reveals that the Court did not formally rule that hearsay findings qualifying under Rule 803(8)(A)(iii) automatically or even presumptively satisfy Rule 702. There was no Rule 702 objection in *Beech*, and the Court did not purport to specify the requirements of Rule 702 or apply them to the finding in the Naval JAG report.[128] However, as a practical matter, post-*Beech*, the lower courts interpreted Rule 803(8)(A)(iii) in that fashion. The prevailing view at the time of *Beech* was that Rule 702 incorporated the traditional *Frye* general acceptance test for the admissibility of expert testimony, and most courts assumed that government investigators employed generally accepted techniques and theories.[129] On that assumption, the Rule 702 question was essentially moot. By default, the only substantive question was whether the expert opinion was trustworthy enough to satisfy 803(8)(A)(iii). That interpretation of 803(8)(A)(iii) did not give the proponent an artificial incentive to offer the opinion in hearsay form. Positing that Rule 702 codified the *Frye* test, if the opinion satisfied 803(8)(A)(iii), the opinion would almost certainly comport with Rule 702. The proponent had no need to present the expert opinion in hearsay form to evade Rule 702.

Nor did the state of the procedural law in 1993 create any perverse disincentives for the proponent not to call the government investigator to the witness stand.[130] Just as *Beech* preceded *Daubert*, *Beech* antedated the 1993 amendment to Federal Rule of Civil Procedure 26. Whether the opinion was proffered in hearsay form or through live testimony, the proponent and opponent had the same pretrial discovery tools to

128. *See id.* ("[T]he Supreme Court's opinion in *Beech* makes no attempt to apply the then-existing standards of Rule 702 to the JAG Report.").

129. *See* Ellis v. Int'l Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984) ("Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data."); DAVID F. BINDER, HEARSAY HANDBOOK § 17:7, at 565 (4th ed. 2013–2014) (outlining a summary of courts' decisions portraying a belief in government's ability to employ accepted investigative methods); Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 926 (2009) (stating that opinions in public records are presumed to meet standards for admissibility of evidence).

130. FED. R. EVID. 803(8) advisory committee's note.

investigate the validity of the opinion. It would not be until five years later that the amendment requiring disclosure of detailed reports for testifying experts would take effect.

II. THE DEVELOPMENTS NECESSITATING THE REINTERPRETATION OF RULE 803(8)(A)(iii): THE 1993 WATERSHED

A. *The Impact of the* Daubert *Decision on the Congruence Between Rule 803(8)(A)(iii) and Rule 702*

1. Rule 803(8)(A)(iii), Hearsay Policy, and the *Frye* Standard

In the eighteenth century, the English courts began developing the common law exclusionary rules, including the restrictions on hearsay and opinion testimony.[131] The development of the rules coincided with notorious public scandals involving Crown witnesses (gang members who received plea bargains for betraying fellow gang members) and thief catchers (bounty hunters who made their living catching and testifying against the criminals they apprehended).[132] The gist of the scandals was that in many instances, these Crown witnesses and thief catchers had obviously committed perjury in order to obtain the plea bargains and monetary rewards they desired.[133] In 1676, Parliament passed the original statute of frauds.[134] In the preamble to the statute, Parliament voiced the widely held belief that there were "many fraudulent practices, which [were] commonly endeavored to be upheld by perjury and subornation of perjury."[135] "Earlier English statutes included preambles asserting that 'perjury . . . horribly continues and daily increases in the kingdom.'"[136] In short, there was an acute concern about insincere, untruthful testimony when the English judges were formulating the hearsay rule.[137]

131. *See* Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 48 U. MIAMI L. REV. 1069, 1077 (1992) (recognizing the "birth of an elaborate system of common law evidentiary rules").

132. *Id.* at 1078–79.

133. *See id.* at 1080 ("Like the crown witness scandals, the thief catcher scandals made the legal community even more conscious of the problem of perjury.").

134. An Act for the Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 2 § 17, *reprinted in* JOHN P. DAWSON ET AL., CASES AND COMMENTS ON CONTRACTS app. 1, at 942 (5th ed. 1988).

135. *Id.*

136. RONALD L. CARLSON, EDWARD J. IMWINKELRIED, & EDWARD J. KIONKA, EVIDENCE IN THE NINETIES 548 (3d ed. 1991) (quoting 1363, 38 Edw. 3, c. 12; 1360, 34 Edw. 3, c. 8; 1331, 5 Edw. 3, c. 10).

137. *See* Edward J. Imwinkelried, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten*, 41 FLA. L. REV. 215, 219–20 (1989)

Today the courts and legislatures still assign great weight to the risk of insincerity in shaping hearsay doctrine.[138] By way of example, in one of its early decisions recognizing the official record hearsay exception, the Supreme Court emphasized that since the government author of the report usually has no stake in the litigation, there is a "reduction to a minimum of [any] motive . . . to either make false entries or to omit proper ones."[139] Affirmatively, the government official is assumed to be disinterested[140] and impartial.[141] Negatively, the official presumably lacks any motive to distort[142] or falsify.[143] The courts and legislatures have embraced the official record hearsay exception in no small part because they are confident that the typical government author is truthfully reporting his or her observations and inferences. As previously stated, in its Note to Rule 803(8) the Advisory Committee indicated that in order to decide whether a finding is trustworthy enough, the trial judge ought to consider the "possible motivation" of the government author.[144]

A concern about untruthful testimony also explains the exceptions

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("[T]he hearsay rule emerged at a time when the courts and legislators assumed that perjury, the epitome of insincerity, was rampant.").

138. *Id.* at 219–20. A common-sense inference of sincerity plays a major role in the rationales for such exceptions as Rule 803(2) (excited utterance) and 803(4) (statements to treating physicians). Jon Y. Ikegami, Note, *Objection: Hearsay—Why Hearsay-Like Thinking Is a Flawed Proxy for Scientific Validity in the* Daubert *"Gatekeeper" Standard*, 73 S. CAL. L. REV. 705, 711–12 (2000).

139. Chesapeake & Del. Canal Co. v. United States, 250 U.S. 123, 129 (1919); *see* DAVID F. BINDER, HEARSAY HANDBOOK § 17:1, at 501 (4th ed. 2013–2014) (emphasizing that the rationale for the hearsay exception is grounded in the presumption that authors of public records lack motive).

140. *See* DAVID F. BINDER, HEARSAY HANDBOOK § 17:7, at 555 (4th ed. 2013–2014) ("Courts assume that public servants, when making records, generally perform their duties conscientiously and disinterestedly."); Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 436 (2002) (comparing hired testifying experts and public officials and concluding that public officials are disinterested parties).

141. *See* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 929 (2009) (stating that governmental bodies are assumed impartial); Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363, 365 (1957) (discussing the impartiality of government investigators).

142. *See* Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 431 (2002) (discussing a case in which the court found that the reports prepared by officials were made with no motive to distort the results).

143. *See* 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803.8, at 418 (7th ed. 2012) ("[T]he Court noted that the rationale for the exception for public records contained in Rule 803(8) is premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports."); Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 415 (2002) ("Public officers lack a motive to make or keep false records." (quoting CATHLEEN C. HERASIMCHUK, TEXAS RULES OF EVIDENCE HANDBOOK 806 (4th ed. 2001))).

144. FED. R. EVID. 803(8) advisory committee's note.

carved out in Rule 803(8). Rule 803(8)(A)(ii) bars the admission "in a criminal case, [of] a matter observed by law-enforcement personnel."[145] Similarly, Rule 803(8)(A)(iii) precludes the introduction of factual findings by the prosecution against an accused.[146] These exceptions reflect the drafters' concern that law enforcement investigators sometimes become overzealous[147] and biased against the suspect.[148] Consciously or subconsciously,[149] police engaged in the enterprise of crime investigation[150] may succumb to a subjective, adversary bias against the suspect.[151] If the trial judge has substantial doubts about the truthfulness or subjective bias of the government author, the judge may exclude the finding under 803(8)(B).[152] That provision gives the judge discretion to exclude otherwise admissible findings when "[]either the source []or other circumstances indicate a lack of trustworthiness."[153]

However, suppose that there are no facts making it unjustifiable for the judge to assume that the government investigator had a disinterested, impartial frame of mind. On that supposition, the judge is likely to conclude that the finding qualifies under 803(8)(A)(iii) and is not excludable under 803(8)(B). The decisive question then becomes whether the proponent of the finding must also make a showing satisfying Rule 702 on expert testimony. Prior to 1993, most courts did not demand that the proponent do so.[154] The courts interpreted Rule 803(8) as obviating the necessity for a separate Rule 702 showing.[155]

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145. *Id.* R. 803(8)(A)(ii).

146. *Id.* R. 803(8)(A)(iii).

147. *See* DAVID F. BINDER, HEARSAY HANDBOOK § 17.1, at 502 (4th ed. 2013–2014) ("[T]he rationale is that governmental agents are so often overzealous in their desire to solve crimes and obtain convictions . . . .").

148. *See id.* § 17.4, at 527–28 (expressing an apprehension that governmental agents are sometimes biased "against those accused of criminal activity, and that their findings will be infected by this bias").

149. *Id.* § 17.4, at 527–28.

150. 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803.8, at 418–19 (7th ed. 2012) (citing State v. Hammell, 917 A.2d 1267, 1270–71 (N.H. 2007)).

151. *Id.* at 355 (citing Wigglesworth v. Oregon, 49 F.3d 578, 580–81 (9th Cir. 1995)) (stating that under the public records exception, the results of a standard test would be admissible while a report based on a biased evaluation would not be admissible).

152. FED. R. EVID. 803(8)(B).

153. *Id.*

154. *See* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 939–40 (2009) (commenting on how some courts did not require proof that evidence satisfied Rule 702 so long as the evidence was trustworthy and satisfied Rule 803(8)(C)).

155. *See id.* at 940 ("Others have argued that the trustworthiness requirement of Rule 803(8)(C) is sufficient . . . .").

Prior to 1993, that interpretation of Rule 803(8) was defensible.[156] Until 1993, the prevailing view in both federal and state court was that the *Frye* general acceptance test determined the admissibility of scientific evidence.[157] According to *Frye*, a witness could testify to an expert opinion so long as the witness's underlying theory or technique had gained general acceptance within the pertinent scientific circles.[158] The courts construed Rule 702 as dictating that the courts continue to enforce the general acceptance standard. Government officials tended to meet that standard because when they conduct authorized investigations, government officials ordinarily resort to generally accepted, conventional methodologies.[159] In the words of the Court of Appeals for the Fourth Circuit, "[m]ost government sponsored investigations employ well accepted methodological means of gathering and analyzing data."[160] Unless there are facts suggesting the contrary, a judge is entitled to assume that a government investigator has done so.[161] In sum, if the facts neither called into question the investigator's motivation nor suggested that the investigator had utilized an avant-garde methodology, it was defensible for the trial judge to assume that the admission of the investigator's finding complied with both Rule 803 and Rule 702.

2. The Advent of the *Daubert* Standard

In 1993, the Supreme Court handed down its decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[162] In *Daubert*, the Court made two significant rulings.

First, the Court ruled that the general acceptance test was no longer the standard for the admissibility of expert testimony in federal court.[163] The

156. *Cf. id.* at 938 (expanding on this interpretation of Rule 803(8) by specifying what the proponent also has to prove under Rule 702).

157. 1 PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE § 1.06, at 13–15 (5th ed. 2012).

158. *Id.* at 12.

159. *See* DAVID F. BINDER, HEARSAY HANDBOOK § 17:7, at 555 (4th ed. 2013–2014) (supporting the proposition that government officials tend to utilize conventional methods of investigation); 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:92, at 838 (3d ed. 2007); Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 926 (2009) (acknowledging that government investigations typically use trustworthy methodologies).

160. Ellis v. Int'l Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984).

161. *See* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 926 (2009) (explaining judges may assume that an investigator has well accepted means of analyzing data).

162. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579(1993).

163. *See id.* at 588 ("[A] rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules . . . .").

Court conceded that the *Frye* test had been the "dominant" test in the United States.[164] However, as a matter of statutory construction, the Court held that *Frye* had not survived the enactment of the Federal Rules of Evidence.[165] The Court turned to Rule 402. At that time—prior to the 2011 restyling—Rule 402 read, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."[166] The Court interpreted Rule 402 as superseding the uncodified exclusionary rules.[167] The Court could not find any language in Article VII, including Rule 702, which could reasonably bear the interpretation that it codified a general acceptance test.[168]

Second, the Court derived a new empirical validation test from the text of Rule 702.[169] That statute refers to "scientific . . . knowledge."[170] The dispositive issue was the definition of that expression. The Court first addressed the meaning of the noun "knowledge."[171] The Court stated that Congress's use of "the word 'knowledge' connotes more than subjective belief or unsupported speculation."[172] The Court then turned to the adjective "scientific."[173] The Court adopted a methodological definition of the term:

> "[Science] represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement" .... [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.[174]

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164. *Id.* at 585.

165. *Id.* at 587.

166. *Id.*

167. *Id.* at 587–88. The Court quoted the late Professor Edward Cleary, the Reporter for the Advisory Committee that drafted the Rules, to the effect that "[i]n principle, under the Federal Rules no common law of evidence remains." *Id.* at 588 (internal quotation marks omitted).

168. *See id.* ("Nothing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility.").

169. *Id.* at 589.

170. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993).

171. *Id.* at 590.

172. *Id.*

173. *Id.*

174. *Id.*

The Court then provided a non-exhaustive list of factors that trial judges should consider in deciding whether proffered expert testimony qualifies as reliable, admissible "scientific . . . knowledge" under Rule 702:

- Whether the theory or technique can be tested empirically.[175] If the proposition cannot be tested in that fashion, it may belong to the domain of philosophy or religion, but it cannot constitute a science.
- Whether the theory or technique has in fact been tested empirically.[176] It is not enough that the hypothesis is plausible.[177] It must be proven by controlled laboratory experimentation or systematic field observation.[178]
- "[W]hether the theory or technique has been subjected to peer review and publication."[179] When the proposition has been subjected to such review, presumably other experts have had the opportunity to detect and expose weaknesses in the empirical reasoning and data.[180]
- The known or potential error rate for the theory or technique.[181]
- "[T]he existence and maintenance of standards" governing the technique's operation.[182] If there are such standards, then other experts can duplicate the experiment to determine whether they can replicate the original results.
- Whether the theory or technique enjoys general acceptance "can yet have a bearing on the inquiry."[183] General acceptance is no longer the litmus test.[184] However, as in the case of the peer review factor, the judge may consider general acceptance as relevant circumstantial evidence.[185] When the theory or technique has been in circulation for years and has garnered widespread acceptance, other experts have probably had occasion to review the supporting data and found it to be satisfactory.[186]

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175. *See id.* at 593 ("[T]his methodology is what distinguishes science from other fields of human inquiry.").

176. *Id.* (indicating that another key factor is whether a testable theory or technique has actually been tested).

177. *See id.*

178. *Id.* (explaining that the methods of controlled laboratory experimentation and systematic field observation are the types of methods that constitute scientific empirical testing).

179. *Id.*

180. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594 (1993).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 595.

185. Edward J. Imwinkelried, *The* Daubert *Decision:* Frye *Is Dead, Long Live the Federal Rules of Evidence*, 29 TRIAL, Sept. 1993, at 60, 63–64.

186. *Id.*

Daubert's empirical validation standard differs fundamentally from both the *Frye* standard for the admissibility of expert testimony, and the trustworthiness standard for the admissibility of hearsay testimony.[187] The empirical validation is obviously a major departure from the preceding general acceptance test.[188] A popular scientific theory could lack adequate empirical support while, despite its novelty, a newly minted theory might have such support.

In addition, in several respects the empirical validation standard determining the reliability of testimony under Rule 702 differs from the trustworthiness standard codified in Rule 803 and in particular, in Rule 803(8).[189] To begin with, the nature of the tests differs. As we have seen, in trustworthiness analysis in the hearsay doctrine, one of the central foci is the subjective truthfulness of the declarant.[190] The Advisory Committee Note to Rule 803(8) expressly states that in evaluating the trustworthiness of a finding, the trial judge ought to consider the declarant's subjective motivation.[191] However, the *Daubert* Court stated in no uncertain terms that to qualify for admission under Rule 702, an opinion must be based on "more than subjective belief . . . ."[192] Under *Daubert*, the witness should be able to point to objective indicia of the reliability of the opinion.[193] Furthermore, the factors determining hearsay trustworthiness differ from the factors determining the reliability of an expert opinion. A comparison of the factors listed in the Advisory Committee Note to Rule 803(8)(A)(iii) with the factors that *Daubert* directs judges to consider in assessing an expert opinion's reliability[194] reveals that there is virtually no overlap

187. *Id.*

188. *See* Thomas J. McCarthy & John M. Powers, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 927 (2009) ("[M]any of the factors relevant to evaluating the reliability of expert opinions under Rule 702 are notably different than the considerations relevant to the 'trustworthiness' safeguard built into Rule 803(8)(C) for public records.").

189. *See* Jon Y. Ikegami, Note, *Objection: Hearsay—Why Hearsay-Like Thinking Is a Flawed Proxy for Scientific Validity in the* Daubert *"Gatekeeper" Standard*, 73 S. CAL. L. REV. 705, 706 (2000) ("In particular, this reliability standard is intended to be separate and distinct from other, more traditional methods of assessing evidentiary reliability, such as those found in hearsay doctrines . . . .").

190. *See id.* at 710–11 (analyzing how judges assess if declarant is telling the truth).

191. *See* FED. R. EVID. 803(8) advisory committee's note.

192. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993).

193. *See* Thomas J. McCarthy & John M. Powers, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 938 (2009) (providing some evidence of the indicia that the witness should be able to utilize).

194. *See id.* at 936–37 tbl.1 (comparing considerations relevant to the untrustworthiness determination under Federal Rule of Evidence 803(8)(C) and the *Daubert* reliability factors under Federal Rule of Evidence 702).

between the two lists.[195] The trustworthiness factor of the declarant's subjective motivation differs in kind from the reliability factor of empirical data establishing a technique's error rate.[196]

Prior to the *Daubert* decision, a trial judge in a typical case could construe Rule 803(8)(A)(iii) as eliminating the need for a separate showing satisfying Rule 702 so long as there was a reasonable inference of the government investigator's subjective truthfulness.[197] There was no need to insist on a further showing satisfying *Frye,* because the trial judge could sensibly assume that the investigator had employed a well-recognized methodology.[198] However, *Daubert* requires a radically different admissibility analysis.[199] Even if the judge may assume that the investigator has relied on a generally accepted technique or theory, standing alone, that does not satisfy *Daubert*'s empirical validity test.[200] Likewise, even a powerful inference of the investigator's subjective truthfulness provides no assurance of reliability in the sense in which *Daubert* uses the term.[201] Simply stated, Rule 803(8) "trustworthiness" does not equate with *Daubert* reliability.[202]

If the courts continue to construe Rule 803(8)(A)(iii) as relieving the proponent of the obligation to satisfy Rule 702, the end result will be the admission of opinions that, gauged by the *Daubert* standard, are unreliable. If the proponent wants to expose the jury to an opinion but fears that the opinion cannot pass muster under *Daubert*,[203] the proponent will have a powerful incentive to offer the opinion in hearsay form under Rule 803(8)(A)(iii).[204] Quoting Judge Weinstein, the *Daubert* Court cautioned

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195. FED. R. EVID. 803(8) advisory committee's note.

196. *See* Thomas J. McCarthy & John M. Powers, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 936 (2009) (comparing the trustworthiness factor of the declarant's subjective motivation with the *Daubert* reliability factor dealing with error rate).

197. *Daubert*, 509 U.S. at 589.

198. *See id.* at 593 ("We are confident that federal judges possess the capacity to undertake this review.").

199. *Id.* at 589.

200. *Id.* at 592–93.

201. *Id.* at 590–91 n.9 ("In a case involving scientific evidence, evidentiary reliability will be based upon scientific validity."); Jon Y. Ikegami, Note, *Objection: Hearsay—Why Hearsay-Like Thinking Is a Flawed Proxy for Scientific Validity in the* Daubert *"Gatekeeper" Standard*, 73 S. CAL. L. REV. 705, 709–10 (2000).

202. *Daubert*, 509 U.S. at 590.

203. *See* DAVID F. BINDER, HEARSAY HANDBOOK § 17:7, at 558 (4th ed. 2013–2014) (indicating that the proponent will endeavor to do indirectly what he or she could not do directly).

204. *See* Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 435 (2002) (illustrating that the proponent will have incentive to offer an opinion

that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."[205] In the overwhelming majority of contemporary trials, one or both of the parties attempt to submit expert opinions to the trier of fact.[206] Thus, adhering to the currently popular interpretation of Rule 803(8)(A)(iii) poses a substantial risk to the integrity of the fact-finding process.

B. *The Impact of the 1993 Amendments to Federal Rule of Civil Procedure 26: Instituting Mandatory Pre-Discovery Disclosure for Expert Witnesses*

It is difficult to obtain discovery from government agencies.[207] Many government agencies have promulgated "housekeeping" regulations that limit service of compulsory process on their employees.[208] Such regulations not only specify who may be served and where they must be served, but the regulations may also announce that the agency need not comply with the process if the agency deems compliance unduly burdensome.[209] If the agency refuses to comply, the party desiring discovery must seek judicial review under the Administrative Procedure Act.[210] In addition, the government has unique doctrines such as the

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in hearsay form if they cannot pass under *Daubert*); Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 943 (2009) ("Placing this burden on the party least likely to meet it opens the door to the introduction of expert opinions in public records that could never have passed the gate-keeping scrutiny of *Daubert*.").

205. *Daubert*, 509 U.S. at 595 (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound, It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

206. *See* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1119 (1991) (reporting that in a study of 529 civil jury trials funded by the Rand Corporation, researchers discovered that "[e]xperts testified in 86% of" the trials; that figure represents the percentage of cases in which the expert opinions were testified to by live witnesses; assuming that there were other cases in which opinions were submitted in hearsay form such as government reports, it seems to safe to assert that nine of 10 trials involve expert opinions).

207. *See* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 938 (2009) ("[T]hird-party discovery from public officials or agencies is often limited or prohibited altogether . . . .").

208. *See* 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 1.3.4, at 52–53 (2nd ed. 2010) ("[T]here is authority that a federal agency employee has an absolute right to refuse to obey a subpoena if the agency in question has adopted 'housekeeping' regulations governing how agency information is to be disclosed.").

209. *See* Spence v. NCI Info. Sys., Inc., 530 F. Supp. 2d 739, 743 n.8 (D.Md. 2008) ("[U]ndue burden is a factor of relevance in determining whether or not to comply with a request for testimony.").

210. *See* United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., 474 F. Supp. 2d 75, 79–80 n.5 (D.D.C. 2007) ("[T]he party may then seek judicial review of the agency decision via an Administrative Procedure Act action."); Ho v. United States, 374 F. Supp. 2d 82, 83 (D.D.C. 2005) (asserting that the party seeking discovery can seek review under the Act); Chen v. Ho, 368 F. Supp.

deliberative process privilege, which is invoked to block discovery.[211]

However, at least prior to 1993 the proponent and opponent of the admission of an expert opinion stood on equal footing. The playing field was level because if either party desired information in the possession of the government, they had to surmount the same hurdles. Just as 1993 was a watershed year for the law of expert testimony, it was an epochal year for discovery law. In that year, Federal Rule of Civil Procedure 26 was amended to require certain mandatory pre-discovery disclosures.[212] In particular, the amendments required the proponent of an expert witness to provide the opponent with a detailed report previewing the witness's testimony.[213] The report must be comprehensive and must contain the following:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.[214]

For several reasons, the original 1993 amendment was quite controversial.[215] Philosophically, the amendment struck some as a departure from the adversary mode of litigation; while the adversary

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2d 97, 99 (D.D.C. 2005) (specifying an instance where agency resistance to a subpoena was reviewed under the Act).

211. Edward J. Imwinkelried, *The Government's Increasing Reliance on—and Abuse of—the Deliberative Process Evidentiary Privilege: "The Last Will Be First"*, 83 MISS. L.J. 509 (2014); *see* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IOWA L. REV. 845, 845 (1990) ("The general deliberative privilege is relatively new to the list of evidentiary privileges that the federal executive may assert in the course of judicial proceedings.").

212. *See* EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, PRETRIAL DISCOVERY: STRATEGY & TACTICS § 5.2, at 5–6 (2013).

213. *Id.* § 5.4; *see* FED. R. CIV. R. 26 advisory committee's note ("Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony . . . must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor.").

214. FED. R. CIV. P. 26(a)(2)(B).

215. *See* DONNA STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26, at 1 (1996) (discussing the controversy created by the 1993 amendment).

previously had to seek discovery from a litigant, the amendment required the litigant to provide disclosures absent a request from the adversary.[216] Further, the practical effect of the rule was to require the expert's proponent to frontload the expert expenses in the litigation.[217] Previously, a proponent had an opportunity to evaluate the merit of the case before deciding whether to proceed and invest resources in hiring and preparing experts.[218] The amendment forced litigators to make those decisions much earlier in the litigation.[219] Given these controversies, the original amendment permitted judicial districts to opt out of the amendment.[220] Many judicial districts elected to do so.[221]

However, the opt-out provision had undesirable consequences,[222] leading to a Balkanization of the federal discovery practice.[223] Just as differences in discovery practice previously prompted forum shopping between state and federal courts, the opt-out provision led federal judicial districts to develop varying discovery practices, which resulted in litigant forum shopping between federal judicial districts.[224] To make federal discovery practice more uniform and eliminate the incentive for forum shopping, the opt-out provision was deleted from Rule 26 in 2000.[225]

These procedural developments compounded the problems created by

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216. *See id.* at 2–3 (providing a summary of the first three subsections of Rule 26(2), which require a party to provide certain information to the other side prior to any discovery request).

217. According to one federal practitioner, "40[%] to 50[%] of the costs of litigation now are incurred in the first three months of the case, compared to 20[%] to 30[%] for the same period under the previous rules." Jill Schachner Chanen, *States Considering Discovery Reform*, 81 A.B.A. J., Apr. 1995, at 20, 22.

218. *See id.* (assessing that a by-product of the rule change is that lawyers and clients must rush to evaluate their cases earlier than usual).

219. *See id.* ("[L]awyers and clients are being forced to evaluate their cases sooner . . . .").

220. DONNA STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26, at 1 (1996).

221. *See id.* (reporting that responses over time by various courts showed a spilt on whether to implement Rule 26 or whether to opt out).

222. *See generally* Janet Napolitano, *Showing Your Cards: Litigating in a Mandatory Disclosure Jurisdiction*, 20 LITIG., Winter 1994, at 26, 29–30 (discussing the effects of the new rules for a litigant in Arizona).

223. *See* Randall Samborn, *Districts' Discovery Rules Differ: A Year After Reforms in Federal Rules, 'Balkanization' of Courts Has Occurred*, NAT'L L.J., Nov. 14, 1994, at A1 ("But their shotgun approach scattered diversity and confusion over a landscape previously known for its uniformity and tranquility.").

224. *See generally* Ron Coleman, *Civil Disclosure: Skepticism Runs Rampant as the Federal Courts' Experiment with Discovery Reform Hits the Two-Year Mark*, 81 A.B.A. J., Oct. 1995, at 76, 79 (identifying forum shopping as the worst result of the rule change).

225. FED. R. CIV. P. 26 advisory committee's note.

the 1993 *Daubert* decision.[226] Given *Daubert*, if the proponent of the opinion feared that the opinion could not satisfy the empirical validation test, the proponent would be tempted to offer the opinion in hearsay form to evade *Daubert*.[227] Given the amendment to Federal Rule of Civil Procedure 26, the proponent has another motivation to forego live testimony and present the opinion in hearsay form.[228] By their terms, the mandatory disclosure requirements of Rule 26 apply only when the proponent contemplates calling an expert at trial to testify to the opinion.[229] The proponent can evade the requirements by the simple tactic of proffering the opinion in hearsay form. The combined effect of these two 1993 developments—the imposition of pre-discovery disclosure requirements for expert witnesses and the *Daubert* decision—is that a reinterpretation of Rule 803(8)(A)(iii) is warranted, if not imperative.[230]

III. THE POSSIBLE FORMS OF A REINTERPRETATION OF RULE 803(8)(A)(iii)

Assume arguendo that when the Federal Rules took effect, it was defensible to construe Rule 803(8)(A)(iii) as trumping Rule 702: If a finding proffered by a proponent satisfied the former rule, there was no need to make a separate showing that the finding complied with Rule 702.[231] As Part II demonstrated, even on that assumption, subsequent developments now warrant a reinterpretation[232] of Rule 803(8)(A)(iii).[233]

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226. *See* Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 414–15 (2002) (questioning whether Rule 803(8) defeats Rule 702 and the *Daubert* decision).

227. *See* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 941 (2009) (noting that Rule 803(8)(C) allows a proponent offering an opinion to circumvent *Daubert*'s burden that would otherwise possibly block the opinion being offered).

228. *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993) (recognizing that Rule 703 allows proponents to get otherwise inadmissible statements through the judge's discretion).

229. FED. R. CIV. P. 26.

230. *See generally* Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 432 (2002) ("A dual system of different burdens of proof for two rules that both address reliability when applied to the same question—the admissibility of factual findings in public records—is not feasible.").

231. *See id.* at 414 ("In other words, does Rule 803(8) trump Rule 702 and *Daubert*, or do Rule 702 and *Daubert* trump Rule 803(8)?").

232. *Compare* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) (advocating for courts to abandon looking for the legislators' intent behind statutes and to adopt a more straightforward approach to statutory interpretation by looking only at the words within the statute), *with* William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481 (1987) (setting "forth a cautious model of dynamic statutory

The question is what form the re-reinterpretation should take. There are several possibilities.

A. *Possibility #1: Shifting the Burden of Proof on Trustworthiness Under Rule 803(8)(B) to the Proponent*

In most cases, a judge can examine the face of a report and glean whether a particular entry constitutes a factual finding under Rule 803(8)(A)(iii).[234] If the judge classifies the entry as a finding, the proponent is likely to cite the assertion in the Advisory Committee Note accompanying Rule 803(8) that the provision "assumes admissibility in the first instance."[235] The Supreme Court itself quoted that assertion in *Beech*.[236] That assertion has persuaded most authorities that findings are presumptively trustworthy enough to be admissible.[237] Accordingly, the prevailing view is that the litigant opposing the introduction of the finding has the burden of proof on the issue of trustworthiness.[238] An amendment to Rule 803(8)(B), effective December 1, 2014, clarified that the opponent has the burden. However, in many jurisdictions with evidence codes patterned after the Federal Rules, the rule has yet to be amended.

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interpretation").

233. *See* Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 436 (2002) (implying that Rule 803(8) needs to be reinterpreted to create a consistent and less cumbersome system).

234. 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:86, at 772 (3d ed. 2007); *see also* Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 416 (2002) (suggesting that fact finding must include such questions as what, how, why, and who caused this situation).

235. FED. R. EVID. 803(8) advisory committee's note.

236. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 (1988).

237. DAVID F. BINDER, HEARSAY HANDBOOK § 17:7, at 546 (4th ed. 2013–2014) (citing United States v. Sepulveda, 392 F. App'x 529 (9th Cir. 2010)); 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:8, at 418 (7th ed. 2012) (citing Beavers v. Northrop Worldwide Aircraft Servs., Inc., 821 S.W.2d 669, 674–75 (Tex. App.—Amarillo 1991, writ denied)); Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 420 (2002); David R. Kott et al., *The Admissibility of Opinions Contained in Public Records*, 13 EXPERT EVIDENCE REP. (BNA) 456, 457 (Sept. 9, 2013).

238. DAVID F. BINDER, HEARSAY HANDBOOK § 17:7, at 546 (4th ed. 2013–2014) (citing Keith v. Volpe, 858 F.2d 467, 481 (9th Cir. 1988)); 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:8, at 418 (7th ed. 2012) (citing Beavers v. Northrop Worldwide Aircraft Servs., Inc., 821 S.W.2d 669, 674–75 (Tex. App.—Amarillo 1991, writ denied)); 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:9, at 837–38 (3d ed. 2007); 5 WEINSTEIN'S FEDERAL EVIDENCE § 803.10[2], at 803-100-01 (J. McLaughlin ed. 2d ed, rev. 2012); David R. Kott et al., *The Admissibility of Opinions Contained in Public Records*, 13 EXPERT EVIDENCE REP. (BNA) 456, 457 (Sept. 9, 2013).

Although the conventional wisdom is that the statute allocates the burden of proof to the opponent, the original text of the statute does not explicitly state this as a requirement.[239] Unlike the Advisory Committee Note, the statutory text was formally approved by Congress and possesses the force of law.[240] While the Advisory Committee Note contemplates an assumption of admissibility and a consequent assignment of the burden to the opponent, the original statutory language does not mention that assumption.[241] In a jurisdiction retaining the original statutory language, a court might reinterpret Rule 803(8)(A)(iii) and (B) by shifting the burden on the issue of trustworthiness to the proponent.

However, that reinterpretation would not remedy the *Daubert* problem.[242] Part II.A. explained the difference between trustworthiness under Rule 803(8) and reliability under Rule 702. While the trustworthiness provision in Rule 803(8)(B) requires the judge to engage in a hearsay analysis with special attention to the declarant's subjective motivation, the reliability analysis under *Daubert* and Rule 702 tasks the judge with evaluating the objective indicia of the validity of the expert's theory or technique.[243] To be sure, shifting the burden under Rule 803(8) to the proponent may incidentally—or, more precisely, accidentally—lead to the exclusion of unreliable expert opinions.[244] A finding could be both untrustworthy in a hearsay sense and unreliable in a *Daubert* sense. If so, the allocation of the burden to the proponent will occasionally result in the exclusion of the unreliable opinion—not because it runs afoul of Rule 702 but instead, because the proponent cannot establish hearsay trustworthiness.[245] This proposed reinterpretation does not give the trial judge any tools to directly address the problem of unreliable expert

239. FED. R. EVID. 803(8)(A)(iii).

240. *Id.*

241. *Compare id.* R. 803 advisory committee's note ("Justification for the exception is the assumption that a public official will perform his duty properly."), *with id.* R. 803(8)(A)(iii) (specifying when a public record is not excluded under the rule against hearsay and making no mention of who carries the burden of proof).

242. *See generally* Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 414 (2002) (stating that there is a problem with reconciling *Daubert* in light of Rule 803(8)).

243. *See* David R. Kott et al., *The Admissibility of Opinions Contained in Public Records*, 13 EXPERT EVIDENCE REP. (BNA) 456, 459 (Sept. 9, 2013) (describing the gatekeeper function of the trial court under Rule 803(8)).

244. Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 435 (2002) (showing support for keeping the burden on the objecting party as opposed to shifting the burden to the proponent).

245. *Id.* at 414 ("*Daubert* issues may be raised in an attack on a report's trustworthiness under Rule 803(8).").

opinions.[246]

B. *Possibility #2: Folding* Daubert*'s Reliability Factors into the Trustworthiness Analysis Under Rule 803(8)(B)*

While the first possibility is a procedural reform, some commentators have suggested a more substantive reform.[247] This substantive reform offers the possibility of a reinterpretation merging or folding the *Daubert* factors into the trustworthiness analysis under Rule 803(8)(B).[248] Incorporating the *Daubert* factors into the trustworthiness analysis would arguably eliminate the need for a separate reliability analysis under Rule 702.[249]

However, this reinterpretation would be unsatisfactory. Part II.A. demonstrated that the factors relevant to the trustworthiness analysis under 803(8)(B) differ in kind from the reliability factors identified in *Daubert*.[250] In the vernacular, they are apples and oranges. This proposal would lead to either unpredictable or doctrinaire decision making.

Assume that the trial judge makes a good faith effort to evaluate and balance all the factors listed in *Daubert* as well as the Advisory Committee Note to Rule 803(8).[251] Suppose that in his or her analysis, the judge found that the wording of a government safety investigator's report portrayed a bias against the respondent business but that the investigator had employed a generally accepted methodology with only a one-percent error rate. How can the judge balance those countervailing factors in a principled fashion? The factors are incommensurable; one relates to the investigator's subjective motivation, while the other concerns the objective reliability of the methodology. Unless one arbitrarily assigns a numerical

246. *See generally* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 936 (2009) (noting that under *Daubert* the judge is tasked with making sure that expert testimony is reliable).

247. *See generally id.* at 941 (offering a new substantive approach to reconciling the two opposing doctrines by effectively merging the two into one workable doctrine that is still based on trustworthiness).

248. *See id.* ("While Rule 702 involves consideration of a number of reliability factors that are distinct from those trustworthiness factors typically associated with Rule 803(8)([B]), the two inquiries are similar in nature and should be melded into a single trustworthiness inquiry.").

249. *Id.* at 940 ("The first and most basic approach . . . is to rely solely on a Rule 803(8)([B]) trustworthiness analysis. . . . [This approach] is a convenient shortcut for determining the admissibility of public records . . . .").

250. *See supra* Part II.A.

251. Factors from the Note include: "(1) the timeliness of the investigation . . . (2) the special skill or experience of the official . . . (3) whether a hearing was held and the level at which conducted . . . (4) possible motivation problems . . . ." FED. R. EVID. 803 advisory committee's note (citations omitted).

value to the magnitude of the risk of the investigator's bias, the judge cannot compare the factors on a common scale. The judge's ruling will be impressionistic and unpredictable.

Alternatively, assume that in the evaluation, the judge relies on a doctrinal bias and holds that reliability in a 702 sense is more important than trustworthiness in an 803(8)(B) sense or that conversely, 803 trustworthiness ought to be prioritized over 702 reliability.[252] Rather than respecting and giving effect to both statutes, as a practical matter, the judge will be disregarding one of the statutes. Hence, like Possibility #1, this potential reinterpretation is flawed.

C. *Possibility #3: Requiring the Proponent to Lay a Separate Rule 702 Foundation*

1. The Case for This Possible Reinterpretation

In a 1978 decision, the Third Circuit suggested a compromise position:[253] the proponent is obliged to lay a normal Rule 702 foundation for the finding if, and only if, the opponent "come[s] forward with some evidence which would impugn its trustworthiness" under Rule 803(8).[254] Although this proposal is rather clever and intriguing, it is difficult to justify this position as a matter of statutory construction. There is nothing in the text of either Rule 702 or Rule 803 that even hints to a relationship between the two statutes.[255] Likewise, the Advisory Committee Notes to the rules are devoid of any suggestion of such a linkage.[256]

In contrast, in a 1998 decision, *Desrosiers*,[257] the Court of Appeals for the Ninth Circuit went further and announced a general requirement for a Rule 702 foundation.[258] The court declared that "the district court's 'gatekeeper' role [under Rule 702] is not abrogated simply because the

252. *Id.* R. 702, 803.

253. Melville v. Am. Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978); *see* 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:8, at 401 n.37 (7th ed. 2012) ("[T]he proviso to Rule 803(8)(C) permits exclusion of such reports if evidence of lack of trustworthiness is introduced."); Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 944–45 (2009) (describing *Melville* as an early leading case to embrace reconciling Rules 803(8)(C) and 702 by "requir[ing] the opponent of the public record evidence to show some indicia of untrustworthiness before entertaining any Rule 702 challenge").

254. *Melville*, 584 F.2d at 1316.

255. FED. R. EVID. 702, 803.

256. *Id.* R. 702 advisory committee's note; *id.* R. 803 advisory committee's note.

257. Desrosiers v. Flight Int'l of Fla., Inc., 156 F.3d 952 (9th Cir. 1998).

258. *See id.* at 961–62.

evidence falls under Rule [803(8)(A)(iii)]."[259] The only weakness in *Desrosiers* is that the court does not present a fully developed statutory construction analysis to support its position.[260]

However, there is a strong statutory construction argument to support the court's position. In the modern, textualist era of statutory construction,[261] any interpretive argument should begin with a review of the text—the language of the statute being construed. The public record exception is found in Rule 803, Exceptions to the Rule Against Hearsay.[262] Rule 803 states "[t]he following are not excluded by the rule against hearsay . . . ."[263] The only thing the text says is that if a hearsay statement falls within one of the enumerated provisions, such as 803(8), the statement is "not excludable by the rule against hearsay."[264] The text itself neither states nor implies that the statement is exempt from objections under other evidentiary rules such as Rule 702.[265]

In addition to considering the relevant text to be construed, the courts consider the context with other parts of the same statutory scheme.[266]

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259. *Id.* at 962; *see also* DAVID F. BINDER, HEARSAY HANDBOOK § 17:6, at 553 (4th ed. 2013–2014) (the trial judge excluded "significant parts of the JAG report because of the questionable credentials of the investigator"); 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:8, at 400 n.36 (7th ed. 2012) ("Lt. Hamilton did not attend aviation accident reconstruction school until after completing the JAG report"); Harvey Brown, Daubert *Objections to Public Records: Who Bears the Burden of Proof?*, 39 HOUS. L. REV. 413, 428–29 (2002) ("The court concluded that the report was not trustworthy because the objecting party presented sufficient evidence from which the court could conclude that the author was not qualified.").

260. *See* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 950 (2009) (criticizing the Desrosiers court for failing to explain its methodology or rationale for its opinion).

261. *See* Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 271 (1993) (emphasizing statutory text's preeminence as an interpretive aid by moderate textualists).

262. FED. R. EVID. 803(8).

263. *Id.*

264. *Id.*

265. *Id.*

266. *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 549 (6th Cir. 2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989))); *see also* Alli v. Decker, 650 F.3d 1007, 1012 (3d Cir. 2011) (noting that the statute text must be evaluated in the structure of the statute as a whole); Uddin v. Mayorkas, 862 F. Supp. 2d 391, 402 (E.D. Pa. 2012) ("If the plain language fails to express Congress's intent unequivocally, however, [the court] will examine the surrounding words and provision in their context." (quoting Allen *ex rel.* Martin v. LaSalle Bank, N.A., 629 F.3d 364, 367 (3d Cir. 2011))); Loving v. I.R.S., 917 F. Supp. 2d 67, 75 (D.D.C. 2013) (suggesting that statutory language must not be interpreted in a vacuum with no regard to the overall statutory scheme); Uddin v. Mayorkas, 862 F. Supp. 2d 391, 402 (E.D. Pa. 2012) ("If the plain language fails to express congress's intent unequivocally, however, [the court] will examine the surrounding words and

Like the text, the context may have the force of law. The wording of other parts of the legislation can shed light on the meaning of the text being interpreted. When the drafters wanted to make it clear that the satisfaction of one rule precluded the exclusion of an item of evidence under other rules, the drafters found appropriately forceful language to indicate such.[267] By way of example, consider Rule 609(a), governing conviction impeachment.[268] Rule 609(a)(2) authorizes the cross-examiner to impeach a witness with a conviction for a crime whose elements require "proving . . . a dishonest act or false statement."[269] That language refers to a very small category of offenses such as perjury and criminal fraud.[270] If the crime in question falls within that narrow category, the conviction is not only admissible under Rule 609, but also invulnerable to discretionary exclusion under Rule 403.[271] To manifest that intent, the drafters stated that evidence of such convictions "must" be admitted.[272] Neither the prefatory language in Rule 803 nor the specific wording of Rule 803(8) includes such categorical, mandatory language.[273]

Finally, after parsing the text and context, the court may weigh extrinsic legislative history material. While such material lacks the force of law, it can sometimes provide valuable insight into the drafters' intent. The Advisory Committee Notes are extrinsic material that may be considered by the court. Although Congress did not enact the Notes into law, the Notes accompanied the draft rules at every stage of the Congressional deliberations over the rules. Understandably, the Supreme Court has attached great weight to the Notes.[274] Admittedly, the Advisory

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provisions in their context." (quoting Allen *ex rel.* Martin v. LaSalle Bank, N.A., 629 F.3d 364, 367 (3d Cir. 2011))).

267. Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 275 (1993) (referring to explicit language that abrogates judicial decisions and statutory provisions conflicting with the Model Code of Evidence).

268. FED. R. EVID. 609.

269. *Id.* at R. 609(a)(2).

270. *Id.* at R. 609 advisory committee's note.

271. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 525–26 (1989) ("Rule 609(a) . . . bars exercise of judicial discretion pursuant to Rule 403.").

272. FED. R. EVID. 609(a).

273. *See* State Dep't. of State Hosp. v. Super. Ct., 163 Cal. Rptr. 3d 770, 783 (Cal. Ct. App. 2013) ("A statute cannot be interpreted to impose a mandatory duty unless the mandatory nature of the duty is . . . 'phrased in explicit and forceful language,'" (quoting Guzman v. Ctny. of Monterey, 95 Cal. Rptr. 3d 183, 910 (2009), *superseded by* 317 P.3d 1183 (Cal. 2014))).

274. *See* Williamson v. United States, 512 U.S. 594 614–15 (1994) (Kennedy, J., concurring) (stating that the Court has "referred often to those Notes in interpreting the Rules of Evidence"); Andrew E. Taslitz, Daubert*'s Guide to the Federal Rules of Evidence: A Not-So-Plain-Meaning Jurisprudence*, 32 HARV. J. ON LEGIS. 3, 72 (1995) (examining Justice Kennedy's critique of the majority for

Committee Note to Rule 803(8) contains the language, "assumes admissibility in the first instance."[275] However, the introductory language at the beginning of the Note states that the hearsay exceptions in Rule 803 "are phrased in terms of non[-]application of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration."[276] While discussing Rule 803(8) in *Beech*, the Court noted that other provisions of the Rules could serve as "additional means of scrutinizing and, where appropriate, exclude[e] evaluative reports or portions of them."[277] If anything, the case for requiring a Rule 702 foundation is stronger than the Ninth Circuit made it out to be in *Desrosiers*.[278]

2. The Counterargument That This Reinterpretation Will Impose a Heavy, Unfair Burden on the Proponent

Before accepting the case for requiring a separate showing satisfying Rule 702, one must consider an obvious counterargument.[279] An advocate of the current interpretation of Rule 803(8)(A)(iii) might contend that imposing that requirement will force the proponent of an investigative finding to shoulder a heavy, unfair burden.[280] An advocate may add that doing so will frustrate the purpose of the official record exception and compel the proponent to call the government investigator as a witness whenever the investigator's finding amounts to an expert opinion. As a general proposition, we want our public officials to devote the bulk of their time to discharging their official duties rather than absenting themselves from the office to testify in court.

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ignoring the Court's established practice of referring to Advisory Committee Notes when Rules are silent on the issue to be decided).

275. FED. R. EVID. 803(8) advisory committee's note.

276. *Id.*

277. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 168 (1988); *see* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 947 (2008–2009) ("[T]he admissibility of public records are subject to scrutiny under *all* relevant Federal Rules of Evidence, not simply Rule 803.").

278. *See* Desrosiers v. Flight Int'l of Fla. Inc., 156 F.3d 952, 960 (9th Cir. 1998) (determining the admission of certain testimony ought to be evaluated under Rule 702), *cert. dismissed*, 525 U.S. 1062 (1998).

279. FED. R. EVID. 702.

280. *Id.* R. 803(A)(iii); *see* Thomas J. McCarthy & John M. Power, *Two Decades After* Beech*: Confusion over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 937–38 (2009) (explaining the difference between the separate burdens imposed by both rules).

a. The Admissibility of the Evidence

To understand why the counterargument is overstated, one must consider exactly what the proponent must prove in order to lay a Rule 702 foundation.[281] Under Rule 702, the proponent must show that (1) the author of the finding qualified as an expert;[282] (2) the expert used a reliable methodology;[283] and (3) the author properly applied the methodology in the instant case.[284] Once the procedural setting is understood, it becomes clear that the proponent may not need to submit any live testimony to satisfy these foundational requirements.

Initially, consider the first and second elements. The universal view is that Rule 104(a), concerning preliminary fact finding by courts,[285] governs the first element;[286] and in *Daubert* the Court explicitly stated that Rule 104(a) governs the second element.[287] The procedural point is significant because of the wording of Rule 104(a), which states, "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."[288]

At first blush, the last sentence of the rule, which dispenses with the need to comply with the technical exclusionary rules, may appear heretical—an evidence provision stating that it is unnecessary to comply with the exclusionary rules of evidence.[289] However, upon further consideration, the sentence makes perfect sense. As the Advisory Committee Note to Rule 104(a) explains, the conventional wisdom is that the common law courts likely developed the exclusionary rules such as hearsay to compensate for the lay jury's supposedly limited ability to

281. FED. R. EVID. 702.

282. *Id.*

283. *Id.* R. 702(c).

284. *Id.* R. 702(d).

285. *See generally* 1 MCCORMICK, EVIDENCE § 53 (7th ed. 2013) (discussing preliminary fact finding).

286. Edward J. Imwinkelried, *Determining Preliminary Facts Under Federal Rule 104*, 45 AM. JUR. TRIALS 1, 81–82 (1992); *see* FED. R. EVID. 104(a) (requiring the court to "decide any preliminary question about whether a witness is qualified").

287. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–93 (1993).

288. FED. R. EVID. 104(a); *see* Summers v. Dretke, 431 F.3d 861, 875 (5th Cir. 2005) ("[T]he Constitution does not prevent a state court from considering possibly inadmissible evidence to determine the admissibility of other evidence."); *see also* United States v. Moya-Matute, 559 F. Supp. 2d 1189, 1192 (D.N.M.) (declaring that under Rule 104(a), courts may consider hearsay evidence when deciding a motion to suppress), *amended by* 735 F. Supp. 2d 1306 (D.N.M. 2008).

289. *See* FED. R. EVID. 104(a) (providing that the trial judge is "not bound by evidence rules, except those on privilege" when determining a witness's qualification as an expert of whether certain evidence is admissible).

critically evaluate testimony.[290] However, when Rule 104(a) applies, the judge—not the jury—makes the decision.[291] Indeed, the judge could make the ruling on a motion in limine before a jury has been impaneled. If the reason for the exclusionary rule is a doubt about the jury's competence but the jury is not the decision-maker, it makes little sense to apply the exclusionary rule. In the words of the Advisory Committee, "Sound sense backs the view that [the exclusionary rules] should not [apply here], and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."[292] Hence, rather than calling the government investigator to establish her status as an expert, the proponent may introduce the investigator's affidavit outlining her credentials. Similarly, instead of calling live witnesses to prove the empirical validity of the expert's methodology, the proponent may use an academic's affidavit to authenticate a learned treatise describing the empirical data and reasoning supporting the methodology. Using this technique, the proponent can exploit the resources of expert texts and the Internet to lay the requisite foundation.

Rule 104(a) is not the only tool the proponent can use to eliminate the need for live testimony on the first two foundational elements. The proponent may also resort to judicial notice under Federal Rule of Evidence 201.[293] Courts can take judicial notice of administrative records and reports,[294] and courts frequently allow proponents to use judicial notice to validate the scientific theory or technique underlying an expert's opinion.[295] When a litigant requests judicial notice, the litigant must

290. *Id.* R. 104 advisory committee's note; *see also* Bourjaily v. United States, 483 U.S. 171, 179 n.2 (1987) ("The Advisory Committee Notes show that the Rule was not adopted in a fit of absentmindedness.").

291. FED. R. EVID. 104(a).

292. *Id.* R. 104 advisory committee's note (quoting 1 MCCORMICK, EVIDENCE § 53 n.8 (7th ed. 2013)).

293. *See id.* R. 201 (governing "judicial notice of an adjudicative fact").

294. *See id.* R. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because . . . [it] can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); Merced Irrigation Dist. v. Cnty. of Mariposa, 941 F. Supp. 2d 1237, 1262 (E.D. Cal. 2013) (stating that if there is no dispute over authenticity or accuracy, administrative records and reports "are appropriate subjects of judicial notice"); *see also* No Cost Conference, Inc. v. Windstream Commc'ns, Inc., 940 F. Supp. 2d 1285, 1295 (S.D. Cal. 2013) ("[C]ourts may take judicial notice of some public records, including the 'records and reports of administrative bodies.'" (citing United States v. Ritchie, 342 F.3d 903, 909 (9th Cir. 2003))).

295. *See* 1 PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE 3 (5th ed. 2012) (observing that courts may judicially notice the validity of a scientific principle once that principle has been sufficiently established).

provide the judge with supporting material.[296] However, such material "need not be admissible in evidence" because "[w]ith scientific evidence, such sources are typically legal and scientific publications."[297] Hence, like Rule 104(a), Rule 201 can enable the proponent to dispense with live testimony.[298]

How is proof that the government investigator properly applied the methodology in the instant case, the third element of the foundation, established? To establish this element, the proponent can invoke the presumption that public officials properly discharge their duties.[299] Some jurisdictions have codified the presumption. For instance, the California Evidence Code Section 664 reads, "It is presumed that official duty has been regularly performed."[300] However, even absent a statute, at common law the courts—including the United States Supreme Court—recognized the presumption,[301] and Rule 301 authorizes federal courts to apply common law presumptions.[302]

In short, if the proponent capitalizes on Rules 104(a), 201, and 301, the proponent will likely lay an admissibility foundation that satisfies Rule 702 without calling a single witness to the stand.

b. The Weight of the Evidence

At this point, the reader might be troubled by a related question that has thus far been ignored. Admissibility is only half the battle for the proponent. While Rules 104(a), 201, and 301 may eliminate the need for the proponent to present live testimony to lay the admissibility foundation, the proponent may want to present live testimony to persuade the jury to attach greater weight to the investigative finding. Of course, the proponent is free to do so, although, as Part II.B. of this Article noted, it can be difficult to serve process on government witnesses and compel them to give live testimony.[303] As a practical matter, in open court before the jury the typical proponent is now content to introduce the report without live, foundational testimony.[304] The copy of the report is self-

296. FED. R. EVID. 201(c)(2).

297. 1 PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE 7–8 (5th ed. 2012).

298. FED. R. EVID. 201(c).

299. 1 MCCORMICK, EVIDENCE § 343, at 438–39 (5th ed. 1999).

300. CAL. EVID. CODE § 664 (West 2014).

301. *See* 1 MCCORMICK, EVIDENCE § 343, at 438–39 (5th ed. 1999) (collecting case information).

302. FED. R. EVID. 301.

303. *See supra* Part II.B.

304. *See* 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE

authenticating under Federal Rule of Evidence 902(4) so long as a proper attesting certificate is attached to the copy.[305]

But if that is the end result, then what have we gained? As currently interpreted, Rule 803(8) allows the proponent to introduce the investigative finding without live, sponsoring testimony;[306] under the proposed reinterpretation of the rule, the proponent may do the same thing in many cases if the proponent takes advantage of Rules 104(a), 201, and 301. Has this analysis been much ado about nothing? Quite the contrary. Under the present interpretation of Rule 803(8), the finding introduced may be unreliable "junk" science; however, because of the current construction of Rule 803(8), the finding will never be subjected to meaningful *Daubert* scrutiny.[307] A suspect opinion can be admitted without any screening for reliability. In sharp contrast, under the reinterpretation of Rule 803(8), the finding will reach the jury only if the finding passes muster under *Daubert*.[308] Procedural law does not demand that the proponent present live testimony to establish that the opinion satisfies *Daubert* and Rule 702; but the proponent will have to employ the tools sanctioned by Rules 104, 201, and 301 to eliminate the need for live foundational testimony. The bottom line is that the legal system gains a vital substantive assurance that the jury will not be exposed to spurious expert testimony that could prompt a wrongful verdict.

IV. CONCLUSION

When the Federal Rules of Evidence took effect in 1975, the statutory scheme included both Rule 702 concerning expert testimony and a provision similar to the current restyled Rule 803(8) codifying the official record hearsay exception.[309] Between 1975 and 1993, it was arguably defensible for the courts to construe the latter statute as meaning that if the proponent demonstrated that an expert opinion in a public report was

§ 803.10[2] (2d ed. 2014) ("[T]he proponent is usually not required to establish [public record] admissibility through foundation testimony.").

305. FED. R. EVID. 902(4)(B).

306. *See* 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.10[2] (2d ed. 2014) (confirming that if public records meet Rule 902(4), there is no need to require authenticating testimony).

307. *See generally* 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.10[2] n.15 (2d ed. 2014) (listing cases in which foundation was not required for the introduction of various public records).

308. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

309. *See* Hines v. Brandon Steel Decks, Inc., 886 F.2d 299, 299–303 (11th Cir. 1989) (explaining the historical application of both rules).

sufficiently trustworthy, there was no need for the proponent to make a separate showing that the opinion satisfied Rule 702.[310] During this period, the overwhelming majority of courts followed the *Frye* general acceptance test for the admissibility of expert testimony, and the courts correctly assumed that the typical government investigator would employ generally accepted methodologies.[311] Moreover, the proponent did not have any artificial incentives to proffer the written report rather than call the investigator to give live testimony and afford the jury a fuller opportunity to assess the investigator's credibility. There is a widely held belief among litigators that jurors discount hearsay testimony when there is no evident reason explaining the proponent's failure to call the declarant as a witness.[312]

However, in 1993, Milton's scythe of Time overtook that interpretation of Rule 803(8)(A)(iii).[313] In that year a significant amendment to Federal Rule of Civil Procedure 26 took effect.[314] The amendment prescribes pre-discovery disclosure requirements for expert evidence. However, the amendment applies only if the proponent of the evidence intends to call a live witness to testify at trial. Thus, the proponent could evade the disclosure requirements by opting to proffer the expert opinion in hearsay form.[315]

Another 1993 development, the Supreme Court's *Daubert* decision, intensified that motivation.[316] In *Daubert*, the Court held that the enactment of the Federal Rules had impliedly superseded the traditional general acceptance test for the admissibility of expert testimony.[317] The Court replaced the traditional standard with a new empirical validation test derived from the expression "scientific . . . knowledge" in the text of Rule 702.[318] The new test places a premium on objective indicia of the reliability of the expert's theory or technique. The *Daubert* Court demanded more than the expert's "subjective belief,"[319] and in

310. *See id.* at 304 (discussing the trustworthiness factor of Rule 803(8)).

311. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (creating and defining the *Frye* test).

312. *See* Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 7 (2012–2013) ("[The jury] discount[s] the hearsay evidence in the absence of a benign explanation for receiving it.").

313. JOHN MILTON, PARADISE LOST bk. X, at l. 606 (London, S. Simmons 1669).

314. FED. R. CIV. P. 26.

315. *Id.*

316. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

317. *Id.* at 590.

318. *Id.*

319. *Id.*

subsequent cases in the same line of authority the Court affirmed that even the sincere *ipse dixit* of a qualified expert is an inadequate foundation.[320] The test not only departed from the *Frye* test; more importantly, it differed fundamentally from the standard for trustworthiness under Rule 803(8).[321] The hearsay trustworthiness standard focuses on considerations, notably the declarant's subjective truthfulness, that have little relevance to the *Daubert* Court's conception of reliability under Rule 702.[322] The rub is that a showing of trustworthiness under Rule 803(8) no longer guarantees reliability under Rule 702. Worse still, if the proponent of an expert finding in a public record fears that the finding does not pass muster under *Daubert*, the proponent now has an overpowering disincentive to call the government investigator as a witness. The current interpretation of Rule 803(8)(A)(iii) permits the proponent to introduce the finding in hearsay form even when the opinion amounts to junk science under *Daubert*.[323]

The reinterpretation of a statute is not a task that the courts should undertake lightly. To justify an interpretation, courts must find changed circumstances that radically alter the operation of the statute. The developments in 1993 have had that impact on Rule 803(8). Prior to 1993, the interpretation of that statute was congruent with the standards for expert opinion that the courts enforced under Rule 702. That is no longer true today. The 1993 watershed has transformed the dominant interpretation of Rule 803(8)(A)(iii) into an effective technique for flouting *Daubert* and tempting the jury to rely on spurious expertise. If the courts are to take Rule 702 and *Daubert* seriously, they should reinterpret Rule 803(8)(A)(iii).

320. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."); *see also* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 157 (1999) (reaffirming that neither *Daubert* nor the Federal Rules of Evidence demand that a court admit opinion evidence connected to existing data solely by the expert's *ipse dixit* (quoting *Joiner*, 522 U.S. at 146)).

321. *Daubert*, 509 U.S. at 579.

322. *Id.*

323. *Id.*