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The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?

Eleanor Swift*

Hearsay reformers should be interested in how the hearsay rule works in practice. Various proposals to abandon current hearsay policy are put forth in this symposium. A study of how the rule actually works may significantly affect these proposals. If, for example, we knew that judicial rulings in the nation's trial courts already amount to de facto abolition of the hearsay rule, some reformers might argue that the law ought to be relaxed to conform to current practice, while others might conclude that we should retrench and reform the law to control this judicial behavior. Whatever the posture, more information about how the hearsay rule works in practice—who uses hearsay, what kind, how often, and with what results—should enlighten a reformer's efforts.

In this Article, I report on the results of my research into what is happening to hearsay,¹ bearing in mind that the answer is elusive. Extensive data about the behavior of trial judges toward hearsay is not available. There simply is no record of most day-to-day rulings on evidence questions. Those rulings that are recorded in pre-trial orders and in trial transcripts are not easily accessible. Hotly contested evidence rulings can be questioned on appeal, but many rulings are not contested and many cases are not appealed. Thus, published judicial opinions present only a small sample of what is happening to hearsay. Other research techniques to investigate daily courtroom be-

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1. In this Article I focus on what is happening in summary judgments, bench trials, and jury trials. I have not taken as my topic those judicial actions to which the rigors and technicalities of evidence law do not apply—for example, sentencing and probable cause hearings. Nor have I investigated the vast array of administrative proceedings in which administrative law judges treat the use of hearsay under a "reasonable reliance" standard rather than the categorical admission process of the common law.

havior, such as courtroom observation, interviews, and surveys, would provide only anecdotal information and would be costly.

The inaccessibility of trial court actions regarding hearsay is a frustrating fact of life. However, published opinions do tell us something about how the hearsay rule works in practice. They present a fair sample of the hearsay that is contested and they obviously influence the subsequent behavior of trial judges. Valuable information can be gleaned from an extensive reading of published opinions, even without making claims of statistical significance for any particular finding.

This Article is an initial effort to report on the hearsay rule at work—who tries to use hearsay, what kind, and with what success—recognizing the limitations of available data. The resulting description sheds new light on existing commentary about judicial treatment of hearsay, and on predictions about what would happen if the hearsay rule were substantially liberalized or abolished.²

I. DESCRIPTION OF THE FEDERAL COURT CASE SAMPLE

Research for this Article included a reading of all of the federal district and appellate court opinions published in the LEXIS database that deal with Federal Rules of Evidence 803(1), (2) and (4) from January 1981 to July 1991, Rule 803(3) from January 1986 to July 1991, and all reported federal appellate opinions dealing with Rule 803(6) from January 1987 to July 1991.³ Only those opinions that presented a clear decision either to admit or exclude an item of hearsay under one of the exceptions were counted.⁴

2. See, e.g., RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 520-25 (2d ed. 1982); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 800[03], at 800-16 to 800-19 & at Supp. 7 (1991 & Supp. 1991); Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 88-122 (1987); Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 498-518 (1987).

3. The term "published" opinion or case refers to publication on the LEXIS system, not just in the *Federal Reporter* or *Federal Supplement*. The search called up cases mentioning the particular Federal Rule 803 subsection within 50 words of the word "hearsay." Because the number of reported cases citing Rule 803(3) and (6) was much greater than the other exceptions, I limited my search for Rule 803(3) and (6) opinions to the more recent years, and for Rule 803(6) to appellate cases only.

4. I did not count those cases in which the court cited the Federal Rule but did not actually use the rule to decide a hearsay issue. A few cases dealt with habeas corpus petitions from state prisoners claiming Confrontation

The categories of admissible hearsay selected for study—Rule 803(1)-(4) and Rule 803(6)—present interesting contrasts. Hearsay statements governed by Rule 803(1)-(4)⁵ (present sense impressions, excited utterances, statements of state of mind, and statements made for medical purposes—the common law's *res gestae*) typically involve oral rather than written evidence, and are not usually generated in the declarant's routine out-of-court conduct. In addition, these hearsay categories are important in tort and criminal cases because they usually relate the facts that are most sharply contested.⁶

Hearsay statements governed by Rule 803(6)⁷ (business

Clause violations. I counted only those cases in which the federal court indicated its resolution of the hearsay issue decided by the state court.

5. These Rule 803 exceptions read as follows:

(1) Present sense impressions. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FED. R. EVID. 803(1)-(4).

6. Professor Park also notes the centrality of the Rule 803(1)-(4) categories and refers to them as the "transaction exceptions" which admit statements "that are part of the same general transaction or occurrence as independently admissible nonverbal conduct." Park, *supra* note 2, at 74.

7. Rule 803(6) reads as follows:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

records), on the other hand, must be written and must be the product of a "regular" out-of-court practice. They often do not report hotly disputed facts. In addition, the Rule 803(1)-(4) exceptions are strictly categorical and do not refer to "trustworthiness," whereas Rule 803(6) permits the court to consider trustworthiness as a basis for exclusion.

For purposes of comparison with the federal decisions, I also read all reported opinions involving these same hearsay exceptions in two state jurisdictions—Michigan and Florida—that had adopted a version of the Federal Rules of Evidence.⁸ The number of such opinions published from January 1981 to July 1991 in both states was small. It was therefore not possible to analyze patterns of hearsay use, but Part IV of this Article contains a discussion of these states' judicial interpretations of the Rule 803(1)-(4) exceptions in cases of alleged sexual abuse of children.

The fact that a large percentage of federal circuit court opinions (and in some circuits a majority of the opinions) are not officially published necessarily limits our ability even to describe what appellate judges, let alone trial judges, are doing with hearsay.⁹ In general, official publication means that some

8. Both states have modified the Federal Rules of Evidence in interesting ways. For example, "Michigan Rule 803(4) is narrower than Federal Rule 803(4), restricting the exception to the treatment situation by including the phrase in connection with 'treatment' after 'diagnosis' and changing the word 'pertinent' to 'necessary.'" WEINSTEIN & BERGER, *supra* note 2, ¶ 803(4)[02], at 803-154 to 803-155.

The Florida statute contains more variation. Florida Rule 803(1) restricts the admission of a statement "made under circumstances that indicate its lack of trustworthiness." FLA. STAT. ANN. § 90.803(1) (West 1979). Florida also modified its versions of Rule 803(3) and (4), but not in ways important to this Article.

It is significant that both Michigan and Florida omitted residual provisions similar to the Federal Rules 803(24) and 804(b)(5). In 1985, Florida enacted a special residual exception for statements of abused children. *See infra* note 94 and accompanying text.

9. At present, no systematic studies exist which even permit us to reliably estimate how many decisions were unpublished in each of the years since 1964. . . . In 1984, [Administrative Office] data suggest that the rate of nonpublication varied from a low of 33.6 percent in the Eighth Circuit to a high of 79.2 percent in the Third.

Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990). Michigan publishes relatively few state appellate court opinions. In 1990, for example, of 4,190 opinions, the Michigan Court of Appeals published only 348 opinions, and released another 128 opinions at the request of the parties. Telephone Interview with Carole Bryde, Deputy Clerk, Michigan Court of Appeals (Sept. 27, 1991).

legal issues, but not necessarily the hearsay issues, had precedential value under criteria that differ from circuit to circuit and from state to state.¹⁰ If unpublished opinions were studied, new insights into the hearsay rule might indeed emerge.¹¹

Parts II through IV of this Article report the major descriptive insights into the hearsay rule at work that I gained from study of the federal, Michigan, and Florida opinions. Part V reports on a small survey of state prosecutors concerning judicial competence with hearsay. Part VI analyzes how the reported trends in hearsay practice might influence our thinking about hearsay reform.

II. WHAT IS HAPPENING TO HEARSAY UNDER RULES 803(1)-(4) AND 803(6)?

Table I reports basic information from the published cases about federal district court admission of hearsay.

A. DISTRICT COURTS SEE MORE CRIMINAL CASES RAISING HEARSAY ISSUES, DO NOT JUST ROUTINELY ADMIT HEARSAY, AND ARE SELDOM REVERSED

Table I shows first that for every hearsay exception but Rule 803(4), criminal prosecutions raise more of the contested hearsay issues than do civil cases. This is true even though civil cases preponderate on the trial and appellate dockets in federal court.¹² Second, district courts certainly have not abolished the

10. While "each circuit continues to operate under its own criteria for determining whether a decision merits publication . . . the main thrust of the rules in each circuit is that only decisions with precedential value will be published." Songer, *supra* note 9, at 308. Michigan provides more precise guidelines for mandatory publication, such as those cases that establish a new rule of law, alter or modify an existing rule of law, criticize existing law, or raise legal issues affecting the public interest. MICH. CT. R. 7.215(B).

11. A study of all unpublished opinions in three federal circuits for 1986 suggests that "there are important reasons to include at least a sample of unpublished decisions in most future studies of the courts of appeals." Songer, *supra* note 9, at 313. Songer's study reports that these decisions did not uniformly affirm the decisions of the court or agency below, that the political values of the judges appeared to affect their votes in a nontrivial number of unpublished opinions, that individual judges participated in published opinions at significantly different rates, and that different circuits may attribute significance to appeals based on the status of appellants. *Id.* at 311-13.

12. Sixty percent of the appellate opinions read for this Article involved criminal prosecutions. In contrast, only 31% of all federal cases terminated on the merits during the year ending June 30, 1990 involved criminal cases. ADMINISTRATIVE OFFICE OF THE UNITED STATES, 1990 REPORT OF THE DIRECTOR: ACTIVITIES OF THE ADMINISTRATIVE OFFICE 106 (1990) [hereinafter ADMINIS-

TABLE I
GENERAL INFORMATION ON FEDERAL DISTRICT COURT
ADMISSION OF HEARSAY

Federal Rule of Evidence	Total Cases	Civil	Criminal	Total Court Admits	Trial Court Excludes	% Admits	Total Appeals	Total Errors	Total Reversible Errors
803(1)	37	16	21	24	13	65%	26	6	2
803(2)	31	10	21	22	9	71%	27	7	3
803(3)	60	19	41	30	30	50%	45	14	8
803(4)	27	18	9	16	11	59%	18	5	5
Subtotal	155	63	92	92	63	59%	116	32	18
803(6)	82	34	48	67	15	82%	82	19	7
Total	237	97	140	159	78	67%	198	51	25

hearsay rule under these five exceptions by admitting hearsay whenever it is offered. In fact, Table I shows that in the reported cases dealing with Rule 803(1)-(4), district courts have excluded the hearsay in forty-one percent of the cases.¹³

Finally, whether federal district courts admit or exclude the hearsay, appellate courts usually uphold the district courts' decision on appeal. Table I shows that twenty-six percent¹⁴ of the district courts' decisions were found erroneous but in only thirteen percent¹⁵ of the cases did the errors cause reversal. This rate of reversal corresponds with overall reversal rates for civil and criminal cases,¹⁶ but the impression is unmistakable that many federal appellate courts do not think it is their role

TRATIVE OFFICE REPORT]. These figures exclude prisoner petitions, bankruptcy cases, administrative appeals, and original proceedings, which, if included, would tip the caseload even more strongly toward civil cases. *Id.* During the same year, courts completed 11,502 civil trials as compared to 8931 criminal trials. *Id.* at 161. Other researchers have also noted that criminal cases disproportionately involve evidentiary issues. See Mark M. Dobson, *Evidence, 1987 Survey of Florida Law*, 12 NOVA L. REV. 463, 464 n.4 (1988) (During 1987, 67% of criminal appellate cases in the Florida state courts discussed evidentiary issues, while only 33% of the civil opinions did so.).

13. District courts admitted hearsay in 59% of the cases, see tbl. I, and excluded hearsay in the remaining 41% of the cases.

14. Fifty-one of 198. See *supra* tbl. I.

15. Twenty-five of 198. See *supra* tbl. I.

16. Overall, the circuit courts reversed in 13% of appeals terminated on the merits during the year ending June 30, 1990. ADMINISTRATIVE OFFICE REPORT, *supra* note 12, at 121. (Again, this figure excludes prisoner petitions, bankruptcy cases, administrative appeals, and original proceedings.) But see David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 966 n.129 (1990) (citing authorities suggesting that reversal rates for evidentiary errors in federal courts are disproportionately low).

to review district court admission and exclusion decisions carefully. The deferential "abuse of discretion" standard of review¹⁷ produces a low rate of trial court error. Sometimes, appellate courts decline to decide the question of error at all.¹⁸ And, when error is found, the harmless error doctrine reduces even further the rate of actual reversal, as the next table shows.¹⁹

B. REVERSIBLE ERROR IS MORE FREQUENT IN CIVIL THAN IN CRIMINAL CASES

Table II reports the number of errors that were found to require reversal compared with the total number of errors committed in admitting hearsay on behalf of each party. Table II shows that prosecutors are very successful in having admission of hearsay upheld. While making ten findings of error in criminal cases under Rule 803(1)-(4), appellate courts reversed only one case. And while making six findings of error under 803(6), appellate courts reversed only two cases. Overall, appellate courts reversed only three of the sixteen (19%) criminal cases.

Reversals in civil cases for the improper admission of hear-

17. Many federal circuit courts recite variations of the following litany prior to deciding evidence issues:

Before turning to appellants' specific claims, we recognize 'the long held view of this Circuit that the trial judge is in the best position to weigh competing interests in deciding whether or not to admit certain evidence. Absent an abuse of discretion, the decision of the trial judge to admit or reject evidence will not be overturned by an appellate court.'

United States v. Scarpa, 913 F.2d 993, 1015 (2d Cir. 1990) (citations omitted).

Circuit courts do, however, recognize that correct construction of the Federal Rules is a question of law to be reviewed *de novo*. United States v. Lai, 934 F.2d 1414, 1419, 1421 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 947 (1992).

18. See, e.g., United States v. Bentley, 875 F.2d 1114, 1118 (5th Cir. 1989) ("Thus, even if the admission of the records violated the hearsay rules or the confrontation clause, an issue we do not decide, such error was harmless beyond a reasonable doubt.").

19. Whether appellate courts are abusing the harmless error doctrine is an important topic that is beyond the scope of this Article. In the cases read for this Article, harmless error was often found because the declarant also testified. The hearsay item was then "merely cumulative," even if erroneously admitted. This analysis ignores the powerful impact that a prior consistent hearsay statement can have. In three Florida cases, the courts recognized the harmful effect of improperly admitting a victim's prior consistent hearsay statement when charges of sexual abuse boiled down to a credibility contest between the victim and the accused. See *Kopko v. State*, 577 So. 2d 956, 962 (Fla. Dist. Ct. App. 1991); *Lazarowicz v. State*, 561 So. 2d 392, 394 (Fla. Dist. Ct. App. 1990); *Bradley v. State*, 546 So. 2d 445, 447 (Fla. Dist. Ct. App. 1989).

TABLE II
REVERSIBLE ERRORS BY PARTY

Federal Rule of Evidence	Civil Plaintiff		Civil Defendant		Prosecutor		Criminal Defendant	
	Reversible Errors	Total Errors	Reversible Errors	Total Errors	Reversible Errors	Total Errors	Reversible Errors	Total Errors
803(1)	0	1	1	1	1	3	0	0
803(2)	0	0	2	4	0	4	0	0
803(3)	3	3	0	0	0	3	0	0
803(4)	0	0	1	2	0	0	0	0
Sub-Total	3	4	4	7	1	10	0	0
803(6)	3	4	2	6	2	6	0	0
Total	6	8	6	13	3	16	0	0

say are far more frequent.²⁰ Table II shows that of twenty-one errors found in civil cases, appellate courts reversed twelve (57%) decisions. This higher rate of reversal in civil cases contradicts the generally held view that courts strictly enforce the exclusion of hearsay in *criminal* cases.²¹ Possible explanations include judicial reluctance to expend governmental resources in new criminal trials, better preparation of criminal cases through police work, or tolerance of error in criminal cases when judges believe that the defendant is guilty.

C. IN THE PUBLISHED CASES, PLAINTIFFS AND PROSECUTORS USE MORE HEARSAY

Table III shows, for each respective party, the number of published attempts to offer hearsay under Rule 803(1)-(4), the number of successful admissions (after "correction" by the appellate court where applicable), and the resulting rate of successful hearsay use. The figures in Table III reveal a consistent level of attempted use of hearsay by plaintiffs and prosecutors across all exceptions, a lower level of attempted use by civil defendants, and with the exception of Rule 803(3), an even lower

20. Overall reversal rates in federal courts support this finding generally, but do not reveal the comparative numbers of harmful versus harmless errors. In the year ending June 30, 1990, the circuit courts reversed twice as often in civil cases than in criminal cases (eight percent of criminal appeals and 16% of civil appeals—excluding prisoner petitions, bankruptcy cases, and administrative appeals). ADMINISTRATIVE OFFICE REPORT, *supra* note 12, at 121.

21. Professor Park states that "the judicial attitude toward exclusion appears to be stricter in criminal cases." Park, *supra* note 2, at 87. Park relied on the proposition asserted by Judge Weinstein and Professor Berger that "[r]eversible error is found considerably more frequently in criminal cases where hearsay is improperly admitted against a defendant." WEINSTEIN & BERGER, *supra* note 2, ¶ 800[03], at 800-18. The published cases summarized in Table II do not support this proposition.

TABLE III
SUCCESSFUL USE OF HEARSAY BY PARTY

Federal Rule of Evidence	Civil Plaintiff			Civil Defendant			Prosecutor			Criminal Defendant		
	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits
803(1)	11	5	45%	5	3	60%	16	10	63%	5	0	0%
803(2)	7	3	43%	3	1	33%	18	13	72%	3	0	0%
803(3)	15	10	67%	4	4	100%	16	12	75%	25	6	24%
803(4)	13	7	54%	5	3	60%	8	8	100%	1	1	100%
Total	46	25	54%	17	11	65%	58	43	74%	34	7	21%

level of use by criminal defendants. What explains this? Perhaps plaintiffs and prosecutors pursue those cases in which at least some of the transactional hearsay (hearsay that follows closely on the litigated events) supports their claim. Then, they try to use this hearsay because they bear the burdens of proof in civil and criminal cases.

It is surprising, however, that civil defendants are under-represented as hearsay users even in the cases dealing with business records, as is shown in Table IV.

TABLE IV
SUCCESSFUL USE OF BUSINESS RECORDS BY PARTY

Federal Rule of Evidence	Civil Plaintiff			Civil Defendant			Prosecutor			Criminal Defendant		
	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits
803(6)	20	11	55%	14	5	36%	44	36	82%	4	1	25%

The figures in Table IV show that civil defendants were proponents of hearsay in only fourteen of the eighty-two (17%) total business records cases. This is somewhat counter-intuitive. Professors Lempert and Saltzburg have written that wealthy organizations "are likely to have access to more hearsay evidence than the individuals they oppose."²² Business records exemplify the type of hearsay that civil defendants, which are large organizations in most of the published cases, can create and utilize to their advantage.²³

Perhaps civil defendants show up less frequently in the published cases because the hearsay they offer is more clearly admissible and thus contested less frequently. There is, how-

22. LEMPERT & SALTZBURG, *supra* note 2, at 521.

23. "Where the information is recorded in files, it may have been recorded selectively by agents who elicited information by leading questions or who included only what they thought their superiors most wanted to hear, and it may include statements by individuals of doubtful credibility." *Id.* at 522.

ever, a high rate of error in civil defendants' use of business records (five errors found in fourteen attempts by civil defendants, plus two findings that admission of the evidence was "harmless" whether erroneous or not). Another possible explanation, suggested by Professor Raeder in her Comment to this Article, is that tactical trial considerations motivate civil defendants to present live witnesses whenever possible and to avoid the use of hotly disputed hearsay.²⁴

D. CERTAIN PARTIES SEEM TO HAVE MORE SUCCESS GETTING THEIR HEARSAY ADMITTED AND UPHOLD

Tables III and IV also show the rate of success in securing admission of hearsay by the respective parties. Prosecutors are the most successful: Seventy-four percent of their attempts resulted in admission under the Rule 803(1)-(4) exceptions, and eighty-two percent were successful under Rule 803(6). Criminal defendants, on the other hand, found the *exclusion* of their hearsay upheld in more than seventy-five percent of their attempts.²⁵

In civil cases, plaintiffs were successful in getting their hearsay admitted in approximately fifty-five percent of the attempts decided under both Rule 803(1)-(4) and Rule 803(6). Civil defendants were more successful under Rule 803(1)-(4)

24. See Myrna S. Raeder, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion*, 76 MINN. L. REV. 507, 509-10 (1992).

25. These figures do not include criminal acquittals since prosecutors cannot appeal such cases. In those cases we might expect to find more exclusion of prosecutors' hearsay and more admission of defendants' hearsay, thus changing the prosecutors' and defendants' success rates. Although the government can appeal certain types of final orders and certain interlocutory rulings, including suppression of evidence pursuant to 18 U.S.C. § 3731 (1988), the government cannot appeal evidentiary rulings after jeopardy has attached. See Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 53 (1990). In several reported Michigan cases, the pre-trial suppression of prosecutors' hearsay that had led to dismissal of the criminal charges was reversed on appeal. See, e.g., *People v. Edgar*, 317 N.W.2d 675, 677-78 (Mich. Ct. App. 1981). Nevertheless, the published criminal appeals are a fair sample of how courts resolve contested hearsay issues in criminal cases. Only 20% of criminal cases tried in federal court result in acquittal, so 80% of criminal trials are subject to appellate review. See ADMINISTRATIVE OFFICE REPORT, *supra* note 12, at 196. During the reported period, there were 56,519 total criminal defendants. Of these criminal defendants, 8193 obtained a dismissal and 40,452 pled guilty or nolo contendere. Of the remaining 7874 criminal defendants, judges convicted 14%, juries convicted 66%, and the remaining 20% were acquitted. *Id.* It is also claimed that most convicted defendants do appeal and do raise any possibly significant legal issue. See Stith, *supra*, at 13 n.39.

than Rule 803(6), getting hearsay admitted in sixty-five percent of their attempts under the former, but in only thirty-six percent under the latter.

There may or may not be statistical significance in the comparative success rates in these published cases, but a rough pattern does emerge. With Rule 803(1)-(4) hearsay, prosecutors are far more successful than all other parties, and civil defendants may be slightly more successful than plaintiffs.

A common sense explanation of these comparative success rates would be that prosecutors are better at securing admissible hearsay, given their resources at the crime scene and the repetitive nature of the cases they try. Plaintiffs need to use more contested hearsay than do defendants to fulfill their production burden, and more of their hearsay (indeed, about fifty percent of it) may be questionable.

A critic of the justice system might say, however, that social, political, and economic values affect judicial decision-making—even decisions about the admission of hearsay. Such a critic would hypothesize that outcomes are influenced by who is offering the hearsay. In a system where the perception of being soft on crime can be politically damaging for the court, prosecutors may get almost any hearsay admitted and are then successful on appeal. Courts may also treat civil defendants (who generally represent more established economic and societal interests) generously, while treating civil plaintiffs (underdogs seeking to change the status quo in their favor) grudgingly and with suspicion. Criminal defendants, particularly in the drug and organized crime cases that inhabit the federal courts, get nowhere with hearsay. According to these explanations, judges have not abolished the hearsay rule *de facto*, but they may be discriminating in their application of it *sub rosa*.

Some commentators suggest that judges do exhibit bias against criminal defendants when they make decisions as a matter of "judicial discretion" in other contexts.²⁶ However,

26. See J. Alexander Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 838, 864-65 (1989). Professor Tanford reports that a random sample of opinions reviewing the admissibility of prejudicial evidence demonstrates that "appellate courts systematically rule against criminal defendants when making prejudice rule decisions." *Id.* at 865. Others suggest that judicial bias may be class-based. *Id.* at 865 n.229. If so, judges could be predisposed against some civil plaintiffs.

The study of unpublished federal appellate decisions, discussed by Songer, *supra* note 9, reports that "the Eleventh Circuit was more than twice as likely as the Fourth Circuit to publish opinions in cases with underdog appellants and all of the differences were [statistically] significant." *Id.* at 313.

the trial court's decision to admit or exclude hearsay is supposed to be categorical, not discretionary. The categorical structure of the rule is intended to control the effects of judicial bias or favoritism.²⁷ So if the admission or exclusion of hearsay favors certain parties and disfavors others, this might be evidence that judges are inserting a more subjective and discretionary criterion of trustworthiness into the categorical rules.²⁸ A closer look at the Rule 803(1)-(4) cases, however, suggests another explanation for the pattern of overall rulings that operates irrespective of alleged discretionary biases of current federal judges.

E. DIFFERENCES IN THE TYPES OF HEARSAY DECLARANTS OFFERED BY THE PARTIES UNDER RULE 803(1)-(4) MAY EXPLAIN PROSECUTORS' COMPARATIVE SUCCESS

There is a certain degree of consistency in the types of contested declarants' statements offered by prosecutors, criminal defendants, and civil plaintiffs. Less consistency exists in the hearsay offered by civil defendants. Moreover, the Rule 803(1)-(4) exceptions seem to operate consistently in favor of the types of statements prosecutors offer, and against the types of statements criminal defendants and civil plaintiffs offer. This suggests an explanation for the comparative success rates of the parties that is rooted in hearsay policy.

In the cases represented in Table III, forty-five percent of the hearsay statements offered by prosecutors (twenty-six of fifty-eight) were made by crime victims, and courts admitted these statements primarily under the exceptions for excited utterances and statements made for medical purposes. Forty-three percent of the hearsay statements offered by plaintiffs (twenty of forty-six) were plaintiffs' own out-of-court statements about the accident or other injury. Eighty-eight percent of the hearsay statements offered by criminal defendants

Songer concludes that judges in the Fourth Circuit were much less likely than their counterparts on the Eleventh Circuit to attribute significance to appeals brought by lower status appellants. "Nothing in the official criteria for publication of the two circuits suggests that such a difference should exist and thus the difference is most likely attributable to value preferences of the judges." *Id.*

27. Indeed, this is one of the principal arguments favoring the categorical process of admitting hearsay over a discretionary approach. See LEMPERT & SALTZBURG, *supra* note 2, at 523.

28. For cases that reflect this trend see *infra* notes 57, 69 and accompanying text.

(thirty of thirty-four) were defendants' own out-of-court statements, expressing the defendants' innocent state of mind after the alleged crime, and even after arrest. Civil defendants offered statements made by a variety of declarants.²⁹

If we ask why prosecutors, plaintiffs, and criminal defendants offer these recurring types of declarants' statements, the answer is simple: They have access to them and they need them. Prosecutors need the statements of victims to prove the crime and the perpetrator. If the victim does not testify, the prosecutor may still use evidence of the victim's previous out-of-court statements. If the victim does testify, these hearsay statements are useful to corroborate the in-court testimony. Similarly, civil plaintiffs, particularly tort victims, need their own statements to prove the tort or other civil wrong, and to prove damages. If the plaintiff does not testify (usually because he or she is deceased), the plaintiff's own prior hearsay statement may be available. Again, the plaintiff's own hearsay is potent corroboration even if the plaintiff does testify. Criminal defendants often do not testify in their own defense, but they would like to present their own exculpatory story to the trier of fact. Thus, criminal defendants resort to statements they made outside of court, primarily using the Rule 803(3) exception for "state of mind."³⁰

Common sense may explain why these types of hearsay statements are consistently offered, but why there is something of a consistent judicial response to them in the published opinions must still be examined. Is there over-exclusion of the hearsay offered by criminal defendants and civil plaintiffs that amounts to judicial "revision" of the hearsay rule? Is there over-admission of the hearsay offered by prosecutors that amounts to judicial "abolition?"

The answers to these questions, arrived at in Parts III and IV of this Article, can be briefly stated. It does not appear that judges are revising the Federal Rules to over-exclude the hearsay statements of civil tort plaintiffs and criminal defendants;

29. Civil defendants offered statements made by their own employees in only three cases. They also offered observations made by third parties under Rule 803(1) and 803(2), and medical records that incorporated information previously related by plaintiffs under Rule 803(4).

30. One district attorney wrote in response to a written survey conducted for this Article that when defendants get this type of hearsay admitted, "this tactic helps defendant's attorneys get in defendant's defense without having to put their client on the stand." See *infra* note 97 and accompanying text (discussing how the written survey was conducted).

the decisions are justifiable textbook applications of the categorical exceptions. Expansive treatment of the exceptions does occur, however, when judges admit the hearsay statements of crime victims. The comparative utility of the Rule 803(1)-(4) exceptions for admitting the statements of crime victims versus the statements of civil tort victims is striking.

III. CURRENT HEARSAY POLICY UNDER RULES 803(1)-(4) OPERATES AGAINST "RISKY DECLARANTS"

Criminal defendants and civil plaintiffs appear to have two things in common: They seek to admit their own statements as hearsay and they do not fare well in getting them admitted. Why? Simply put, the out-of-court statements of these parties illustrate the types of circumstantial sincerity risks that the hearsay rule has always sought to exclude.³¹ One circumstantial risk of the declarant's insincerity results from the fact that such statements are typically made after the events that gave rise to the litigation. Another arises because these statements are usually self-serving; the civil plaintiff's statement attributes cause or fault; the criminal defendant's statement expresses the defendant's innocence.

In a previous article, I described the paradigm "risky declarant" who demonstrated these classic sincerity risks.³² The paradigm was a civil tort plaintiff injured in an industrial acci-

31. Professor Imwinkelried traces the history of what he calls the common law "obsession" with sincerity risks, an obsession shared by generations of evidence rule drafters. 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, 219-22 (1989). The emphasis on sincerity remains in the Federal Rules, although the Rules also stress the problem of the declarant's memory. *Id.* at 228-29.

32. Swift, *supra* note 2, at 495-98. Three paradigm declarants described in the article represent three of the principal problems addressed by the hearsay rule. My purpose was to analyze whether other rules of admission and exclusion and the rules evaluating sufficiency would exert any limits on the use of hearsay spoken by these three declarants if the hearsay rule was abolished. I also examined what effect free admission would have on the factfinder, the parties, and the adversary system. The three paradigm declarants were the:

1. Abstract declarant, presenting the problem of evaluating the reliability of a hearsay statement with only minimal information about its source;
2. Risky declarant, presenting the problem of evaluating hearsay motivated by self-serving interests; and
3. Burden-shifting declarant, presenting the problem of trial "by affidavit" or "by business record" which shifts the burden onto the opponent to impeach a wholly documentary case.

dent. The circumstances in which she spoke outside of court gave her a motive to blame the accident on the malfunctioning of the machine, rather than on herself.³³

In the recent federal cases, similar risky declarants—civil tort plaintiffs³⁴ and criminal defendants³⁵—offered self-serving out-of-court statements. These “risky” hearsay statements, which supposedly bear an unacceptable risk of insincerity, are being excluded from trials, thus showing that the hearsay rule has not been abolished. My reading of most of the cases suggests that the courts carefully applied the categorical exceptions. Thus, judges excluded the “present sense impressions” of civil plaintiffs that were not contemporaneous with the perceived event under Rule 803(1).³⁶ They excluded “excited ut-

Id. at 498-518.

In the recent federal cases discussed in this current Article, courts exclude the statements made by the abstract and risky declarants. The documentary burden-shifting declarant did not appear, but an additional type did appear—the child victim of alleged sex abuse. *See infra* part IV.

33. The paradigm case was *Land v. American Mut. Ins. Co.*, 582 F. Supp. 1484, 1485-86 (E.D. Mich. 1984). The plaintiff sued the manufacturer of the machine that she had been operating, but she died before trial from unrelated causes and thus was not available to testify about what happened to her. She made the hearsay statement eight days after the accident to an adjustor for her employer's unemployment insurance company. In granting the defendant's motion for summary judgment, the district court held that Mrs. Land's statement did not fall within any hearsay exception. *Id.* at 1486, 1489.

34. *See, e.g.*, *Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 277-283 (5th Cir. 1991) (statement by seaman afflicted with a twisted ankle attributing fall to hole in deck); *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 889-90 (9th Cir. 1991) (statement by victim of a biking accident that “the brakes failed”); *Gong v. Hirsch*, 913 F.2d 1269, 1272-74 (7th Cir. 1990) (statement by plaintiff suing for medical malpractice reporting the cause of ulcer); *Williams v. Wal-Mart Stores, Inc.*, 922 F.2d 1357, 1359-61 (8th Cir. 1990) (statement by plaintiff suing for negligence reporting details of accident); *Clemente v. Espinosa*, 749 F. Supp. 672, 680-81 (E.D. Pa. 1990) (statement by plaintiff suing for slander); *Ramrattan v. Burger King Corp.*, 656 F. Supp. 522, 530 (D. Md. 1987) (statement by plaintiff passenger in a car hit by a delivery truck reporting which vehicle ran the red light).

35. Thirty of the 38 attempts by criminal defendants to use hearsay involve their own statements. *See supra* tbls. III and IV. *See, e.g.*, *United States v. Schwartz*, 924 F.2d 410, 423-24 (2d Cir. 1991) (exculpatory conversations with informer three months after conspiracy terminated excluded under 803(3)); *United States v. Elem*, 845 F.2d 170, 174 (8th Cir. 1988) (post-arrest exculpatory statement excluded under 803(2)); *United States v. Bancroft*, No. 86-1554, 1987 U.S. App. LEXIS 12191, at *4-5 (6th Cir. Sept. 11, 1987) (defendant's letter to his wife describing the alleged crime, written two weeks after the crime, excluded under 803(1)).

36. *See Huffco Gas*, 922 F.2d at 280-81 (excluding accident report filed by plaintiff two days after the accident); *Pau*, 928 F.2d at 890 (excluding utterance made two days after the accident).

terances" by plaintiffs due to an insufficient showing of "stress" caused by a startling event.³⁷ They excluded statements of plaintiffs' state of mind as irrelevant or as impermissible statements of belief to prove a past fact remembered.³⁸ And judges excluded plaintiffs' statements to physicians as not "reasonably pertinent to diagnosis or treatment" under Rule 803(4) when the statements contained specific descriptions of cause or attributed fault.³⁹ Some trial courts viewed medical histories offered by injured plaintiffs as too self-serving (too "risky") to be reliable when offered by the plaintiff at trial, but if the statements contained historical facts about pain and treatment, the appellate courts *required* admission.⁴⁰ Plaintiffs' statements contained in medical records were admitted as admissions, whether risky or not, when offered by defendants.⁴¹

The post-crime, and usually post-arrest, exculpatory state-

37. See, e.g., *Pau*, 928 F.2d at 889-90. *But see* *Morgan v. Foretich*, 846 F.2d 941, 945 (8th Cir. 1988) (reversing exclusion of statements made by a three-year-old sexual abuse victim and providing an expansive interpretation of the Rule 803(2) excited utterance exception). *Morgan* is discussed in the text accompanying *infra* notes 63-69.

38. See *Huffco Gas*, 922 F.2d at 279 (finding plaintiff's statements of pain caused by twisted ankle not relevant to the dispute); *Mayoza v. Heinold Commodities, Inc.*, 871 F.2d 672, 675-76 (7th Cir. 1989) (excluding plaintiff's expressions of shock after being told that he held worthless investments in silver as an improper statement of "belief" to prove a fact remembered—that he had not authorized the investment).

39. See *Huffco Gas*, 922 F.2d at 277-78 (admitting plaintiff's statements that he twisted his ankle, but excluding statements regarding the specific cause of the accident—falling through a rusted-out step or slipping in some grease); *Gong v. Hirsch*, 913 F.2d 1269, 1272-74 (7th Cir. 1990) (excluding plaintiff's statement that defendant's administration of prednisone caused his ulcer); *Roberts v. Hollocher*, 664 F.2d 200, 204-05 (8th Cir. 1981) (stating that if the doctor's conclusion that plaintiff's injuries were caused by "excessive force . . . were based on Roberts' statements to the doctor, we would have none of the guarantees of proper motive and trustworthiness"); *Ramrattan v. Burger King Corp.*, 656 F. Supp. 522, 530 (D. Md. 1987) (excluding statements in hospital record as to which vehicle ran the red light and caused the accident).

40. See *Williams v. Wal-Mart Stores, Inc.*, 922 F.2d 1357, 1362-63 (8th Cir. 1990); *Wooldridge v. Bowen*, 816 F.2d 157, 159-60 (4th Cir. 1987); see also *Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 544-45 (D. Del. 1988); *Harrigan v. New Eng. Mut. Life Ins. Co.*, 693 F. Supp. 1531, 1532 (S.D.N.Y. 1988).

41. See *Navarro de Cosme v. Hospital Pavia*, 922 F.2d 926, 933 (1st Cir. 1991) (admitting notes of social worker written directly on plaintiff's medical record because the notes were recorded for the purpose of obtaining treatment); *Onujiogu v. United States*, 817 F.2d 3, 4-6 (1st Cir. 1987) (admitting hospital record as an admission that four-year-old pulled pot of hot water onto himself and mother, but ignoring issue of whether the emergency room nurse would record such a specific statement of cause as part of her regular medical practice); *Harrell v. Fibreboard*, No. 85-4604, 1989 U.S. Dist. LEXIS 14196, at *22-26 (E.D. Pa. Nov. 27, 1989) (admitting medical records under a combination

ments of criminal defendants were excluded as not being sufficiently contemporaneous with any relevant perceived event under Rule 803(1);⁴² as not proved to be made while "excited" by anything under Rule 803(2);⁴³ as not describing any relevant then existing state of mind under Rule 803(3);⁴⁴ or as attempting to use state of mind simply to prove past facts.⁴⁵ The federal courts seem to apply the "state of mind" doctrine with great care.⁴⁶ When criminal defendants made statements that reflected an innocent state of mind *before* the crime occurred, these statements were admitted under Rule 803(3).⁴⁷

of the Rule 803(6) business records exception and Rule 803(4) medical records exception).

42. *See, e.g.*, *United States v. Bancroft*, No. 86-1554, 1987 U.S. App. LEXIS 12191, at *4-5 (6th Cir. Sept. 11, 1987) (excluding letter written two weeks after the crime); *United States v. Tucker*, No. 90 CR 651, 1991 U.S. Dist. LEXIS 2790, at *5-6 (N.D. Ill. Feb. 12, 1991) (excluding the exculpatory statement made to defendant's lawyer at the time of a prior plea, that defendant did not know the gun was in the car, because the statement was not made in response to a perception of a condition).

43. *See United States v. Elem*, 845 F.2d 170, 173-74 (8th Cir. 1988) (excluding defendant's exculpatory statement to police during custody that defendant did not own the gun because the statement was not made while excited).

44. In some cases, statements of then existing state of mind were excluded as irrelevant to any disputed issue. *See, e.g.*, *United States v. Grant*, No. 90-1159, 1991 U.S. App. LEXIS 13709, at *6-11 (6th Cir. June 24, 1991) (finding taped statements concerning personal life and relation to co-defendant not exculpatory and therefore irrelevant), *cert. denied*, 111 S. Ct. 1628 (1991); *United States v. French*, 900 F.2d 1300, 1302-03 (8th Cir. 1990) (finding statement of intent to sell gun on day of arrest irrelevant because the gun was indisputably still in defendant's possession during drug sale and subsequent arrest).

In other cases, statements by defendants recalling their past state of mind of innocence were excluded as not contemporaneous with the state of mind sought to be proved. *See, e.g.*, *United States v. Schwartz*, 924 F.2d 410, 423-24 (2d Cir. 1991) (excluding defendant's statement recorded three months after conspiracy ended); *United States v. Carter*, 910 F.2d 1524, 1530 (7th Cir. 1990) (excluding defendant's statement to his mother that he had confessed one hour earlier to save his girlfriend).

45. Several cases apply "the fact remembered" exclusionary clause of 803(3) very accurately. *See, e.g.*, *United States v. Scrima*, 819 F.2d 996, 1000 (11th Cir. 1987) (holding defendant's statement to a friend that he had ample funds to invest irrelevant in proving his belief and inadmissible if offered to prove the fact remembered—that he actually had the money).

46. This was also true in the civil cases decided under Rule 803(3). When civil plaintiffs offered hearsay statements made by customers or potential customers to prove beliefs about products, or statements by employers to prove motivation for job terminations, courts made sure that the declarants' state of mind was relevant, and that their statements were not being used to prove the truth of facts believed. *See e.g.*, *Kassel v. Gannett Co. Inc.*, 875 F.2d 935, 945-46 (1st Cir. 1989); *Ocean Bio-Chem, Inc. v. Turner Network Television*, 741 F. Supp. 1546, 1551-61 (S.D. Fla. 1990).

47. *See United States v. Peak*, 856 F.2d 825, 832-34 (7th Cir.) (statement

An avowed purpose of the traditional hearsay rule has been to winnow out hearsay statements bearing unacceptable sincerity risks. The Rule 803(1)-(4) exceptions operate to exclude self-serving statements made by parties after the occurrence of the litigated events. If we assume that such statements bear unacceptable risks, the published cases show that the hearsay rule is working.

IV. ADMISSION OF STATEMENTS BY CHILD VICTIMS ARE EXPANDING THE EXCITED UTTERANCE AND MEDICAL STATEMENT EXCEPTIONS

Prosecutors are far more successful in using the hearsay statements of crime victims, also made after the occurrence of the litigated events, under the Rule 803(1)-(4) exceptions. Ninety-two percent of the statements of crime victims admitted by district courts (twenty-two of twenty-four offered) were upheld on appeal⁴⁸—one under Rule 803(1); nine of eleven under Rule 803(2),⁴⁹ three of four under Rule 803(3), and all eight under Rule 803(4). Allegedly sexually abused children made nine of the victim statements.

In these cases, federal courts used three primary techniques to expand the admission of hearsay. While this judicial behavior does not amount to abolition of the hearsay rule, it does expand the categories of admission beyond the more traditional view of hearsay risks still imposed in civil tort cases and threatens to subvert what remains of the categorical structure of the Federal Rules.⁵⁰

made to defendant's brother, also a co-defendant, during planning stages of the crime), *cert. denied*, 488 U.S. 969 (1988); *United States v. Dempsey*, No. 89 CR 666, 1990 U.S. Dist. LEXIS 15181, at *2-3 (N.D. Ill. Sept 17, 1990) (taped statement on phone to informant).

48. The 24 cases in which prosecutors offered hearsay statements by crime victims represent a subset of the study's 58 cases in which prosecutors offered hearsay under the Rule 803(1)-(4) exceptions. *See supra* tbl. III.

49. In *United States v. Ellis*, the court held that the statements were harmless, if erroneously admitted. 935 F.2d 385, 392-93 (1st Cir.) (statements of child victim describing past assaults made to mother over a period of several hours), *cert. denied*, 112 S. Ct. 201 (1991). In *United States v. Sherlock*, the court held that the statements were inadmissible, but that the error was harmless. 865 F.2d 1069, 1083 (9th Cir. 1989) (statements by victims of sexual assault one hour or more after the attack, and after victims had already told several other people about it).

50. Professor Jonakait has demonstrated that judicial interpretation of the residual exceptions to admit grand jury testimony not only stretches the boundaries of the specific exceptions but threatens to override the categorical

First, courts have made explicit new interpretations of the terms of the categorical exceptions to respond to recurring fact patterns that generate useful, and often necessary, hearsay for the prosecution.⁵¹ Second, courts have liberally applied the standard categorical terms to justify wider admission of victims' statements. This is a process driven by the imperatives of the adversary system and the doctrinal dynamic of the broad and ambiguous terms used in the Federal Rules. As parties make creative arguments, judges will creatively apply these flexible terms to a large number of varied fact situations. The initial restrictive meanings of the terms may be lost. The process resembles erosion more than outright abolition of the hearsay rule.⁵²

Finally, discretionary judicial admission of "trustworthy" hearsay—explicitly rejected by the Advisory Committee for the overall structure of the Rules⁵³—is appearing in cases decided under Rule 803(1)-(4). Judges make what sounds like their own assessment of the credibility of the hearsay declarant. They then justify admission of the hearsay under categorical exceptions that do not include a trustworthiness test, asserting that "circumstantial guarantees of trustworthiness" surround the out-of-court statement.⁵⁴ This is a radical departure from traditional hearsay policy. Courts correctly refuse to consider factors related to the declarant's untrustworthiness to *exclude* hearsay that falls within a categorical exception.⁵⁵ Thus, im-

structure. "As a result, the fundamental hearsay framework adopted in the Federal Rules of Evidence is being subverted." Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 433 (1986).

51. Interpretation usually includes a discussion of the doctrinal terms and a restatement of their meaning, often resulting in a judicial gloss added to the exception. For an example, see *infra* text accompanying note 76, discussing the "same household" test applied in child sexual abuse cases. This type of rule interpretation is usually controlled by appellate courts under the *de novo* or plenary standard of review accorded to questions of law.

52. Appellate courts review these fact-contingent applications of doctrine with great deference. The United States Supreme Court held in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), that these "fact-specific" rulings should be reviewed under the "abuse of discretion" test. *Id.* at 2460.

53. FED. R. EVID. art. VIII advisory committee's note (Introductory Note: The Hearsay Problem).

54. For a discussion of these cases, see *infra* note 57, text accompanying note 68, and note 69.

55. See *United States v. Moore*, 791 F.2d 566, 573-74 (7th Cir. 1986). *But see* *Overton v. State*, 429 So. 2d 722, 723 (Fla. Dist. Ct. App. 1983) (using lack of trustworthiness to exclude under 803(2) by importing the test of 803(1)); Solo-

portation of the trustworthiness factor into exceptions where it is not mentioned is a doctrinal dynamic that functions in one direction: for admission, but not for exclusion. As judges import this discretionary trustworthiness factor into more and more exceptions, the categorical structure of the hearsay rule is subverted.⁵⁶ These three judicial techniques are illustrated in the published cases involving the exceptions for excited utterances and for statements made for medical purposes.⁵⁷

A. EXCITED UTTERANCES

The victim statements admitted in the published cases as excited utterances under Rule 803(2) are typically made after the alleged crime, identify the perpetrator, and are spoken to the police, neighbors or, when children are involved, parents. The ultimate question posed in applying the exception is

mon v. Shuell, 457 N.W.2d 669, 680-82 (Mich. 1990) (importing the trustworthiness test of 803(6) into 803(8) in order to justify exclusion).

56. Evaluations of trustworthiness are, obviously, highly fact-contingent judgments. If the trial court makes an evaluation of credibility/trustworthiness, it is reviewed under the "abuse of discretion" standard, the most deferential standard. But it is appellate courts, not just trial courts, that are importing the trustworthiness factor into admission decisions. For examples of such appellate court decisions see *infra* note 57, text accompanying note 68, and note 69.

57. The techniques also appeared in cases involving statements of observers of litigated events offered under Rule 803(1). In *United States v. Parker*, 936 F.2d 950 (7th Cir. 1991), the court justified admission by reinterpreting Rule 803(1) to add the gloss of "substantial contemporaneity" to the doctrinal requirement of "immediately thereafter." *Id.* at 954. In addition, the *Parker* court invoked the trustworthiness factor, finding its conclusion about contemporaneity "buttressed by the intrinsic reliability of the statements" even though the categorical exception makes no reference to trustworthiness. *Id.* In *First State Bank of Denton v. Maryland Casualty Co.*, 918 F.2d 38 (5th Cir. 1990), the court took a further step toward integrating the trustworthiness factor into the categorical structure by referring to the Rule 803(24) catch-all exception to admit the hearsay item, "even assuming it did not meet the precise contours of rule 803(1)." *Id.* at 42.

The only consistent technique used to expand admission of the documentary records in criminal cases was the courts' application of Rule 803(6) over the arguably pertinent public records exception of Rule 803(8). In several cases, the prosecutor offered police, Federal Bureau of Investigation, and other law enforcement records under Rule 803(6). Under the reasoning of *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), these records should have been excluded as public records used by the prosecution under Rule 803(8)(B) or (C). *Id.* at 66-68. In *United States v. Hayes*, 861 F.2d 1225 (10th Cir. 1988), the only case in which this problem of overlap was mentioned, the court held that the reasoning of *Oates* did not apply when the author of the report testifies, thus eliminating the Confrontation Clause problem. *Id.* at 1229-30. In the other Rule 803(6) cases, it is doubtful that the author testified, thus leaving the overlap problem unsolved.

whether the statement is "a spontaneous reaction to the [startling] occurrence or event and not the result of reflective thought."⁵⁸

In addressing statements made by adult victims of violent crimes, courts narrowly apply the doctrinal requirement that the declarant be "under the stress of excitement." They reason that pain reduces the capacity to fabricate,⁵⁹ and they look for evidence of the kind of stress that minimizes the declarant's time and opportunity to reflect consciously on what happened.⁶⁰

In cases involving victims of non-violent crimes, the courts substantially reduce the physical stress requirement. At least in the reported cases, however, the time elapsed between startling event and statement was also much shorter, a matter of a few minutes.⁶¹ This may have increased the courts' confidence that the declarants' statements were not the product of reflection. We cannot be sure, however, because there is little doctrinal analysis in these cases; in their opinions, the appellate courts rely on the trial courts' factual finding that the categorical condition of stress was satisfied.⁶²

When the crime victim is a child who makes an out-of-court statement about sexual abuse, courts have responded by

58. CHARLES MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 297, at 854-55 (3d ed. 1984).

59. See *Smith v. Fairman*, 862 F.2d 630, 636 (7th Cir. 1988), *cert. denied*, 490 U.S. 1008 (1989).

60. See *United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990) (statement by severely beaten victim who was "very nervous" and who spoke approximately five hours after the attack, just after his sister screamed when he entered the emergency room); *Jones v. Greer*, 627 F. Supp. 1481, 1492 (C.D. Ill. 1986) (statement by victim of gunshot wound to police fifteen minutes after attack). In *Smith v. Fairman*, the court approved admission of declarant's statement made shortly after he was punched in the face, but disapproved admission of a second statement made to police after the declarant "had time to reflect on the events . . . and organize them." 862 F.2d at 636.

61. See *United States v. Reich*, No. 85-1993, 1987 U.S. App. LEXIS 5289, at *6-7 (6th Cir. Apr. 22, 1987) (victim's statement, regarding defendant impersonating a federal employee, made to neighbor "at the time of the defendant's startling request" when victim appeared "very upset and nervous"); *United States v. Bailey*, No. 87-1023, 1987 U.S. App. LEXIS 15727, at *26-29 (1st Cir. Dec. 3, 1987) (juror's statement, regarding defendant's proposition to change her vote, made to neighbor within three minutes of the incident when juror appeared "nervous [and] upset").

62. Two other appellate opinions explicitly relied on the discretionary nature of the trial court's ruling to uphold the finding of adequate stress. See *United States v. Lawrence*, 699 F.2d 697, 703-04 (5th Cir.), *cert. denied*, 461 U.S. 935 (1983); *United States v. Golden*, 671 F.2d 369, 371 (10th Cir.), *cert. denied*, 456 U.S. 919 (1982).

using the three techniques discussed above to expand the excited utterance exception. A civil case that relies on precedent from federal criminal cases involving child victims best illustrates the court's use of a new interpretation of categorical terms, of a liberal application of the terms to the facts, and of the trustworthiness factor in an exception that makes no reference to trustworthiness at all. In *Morgan v. Foretich*,⁶³ the child victim's mother sued the child's father for damages on behalf of her daughter. The district judge excluded all of the hearsay statements about the father's abuse that Morgan's daughter Hilary had made to her mother. The court excluded the statements under Rule 803(2) primarily because the child was incompetent as a witness at the time she made the statements. As a result, the defendant secured a jury verdict in his favor. Morgan appealed and obtained a reversal by the Fourth Circuit on the basis of several evidence rulings.⁶⁴

First, to justify admission of Hilary's statements as excited utterances, the Fourth Circuit relied on a new doctrinal test introduced in criminal cases.⁶⁵ This new test allows the categorical requirement of being "under stress" to cover a child who does not report the startling events for hours or days. Under this new doctrinal gloss on the categorical term, the lapse of time is not measured from the event itself but rather from the time of the "first real opportunity" to report the events to a care-taker, usually a relative. The *Morgan* court adopted this "first real opportunity" test of spontaneity on grounds that children's lack of understanding of abusive events, and the fear and guilt they experience, cause them to delay reporting.⁶⁶ Of course, this justification addresses only the sincerity risks, not the increased memory risks that also result from delay, a problem overlooked in the opinion.

Second, the Fourth Circuit applied the new categorical requirement of "first opportunity" to the facts surrounding Hilary's statements in a liberal way, inasmuch as the child waited several hours after being reunited with the mother to speak with her. This additional delay in reporting, fatal to most "excited utterances," was justified by Hilary's tender years and her nearly hysterical condition. It is "virtually inconceivable," the

63. 846 F.2d 941 (4th Cir. 1988).

64. *Id.* at 945-47.

65. See *United States v. Iron Shell*, 633 F.2d 77, 85-86 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *United States v. Nick*, 604 F.2d 1199, 1202 (9th Cir. 1979).

66. *Morgan*, 846 F.2d at 947.

Morgan court held, that the child, less than four years old, would have the desire to lie required to fabricate her story.⁶⁷

Finally, the *Morgan* court also invoked the discretionary trustworthiness factor by relying on the circumstantial guarantees of the trustworthiness of Hilary's statements that had nothing to do with whether the statements were excited utterances. Hilary's method of speaking—touching herself and use of vocabulary—and her physical condition “lead to the conclusion that . . . [the statements] are trustworthy and should have been admitted into evidence.”⁶⁸ By so explicitly relying on other “guarantees” of trustworthiness to admit Hilary's statements under a categorical exception, the court's opinion erodes the categorical limits of the current hearsay rule. When this pro-admission technique is combined with new interpretations and liberal applications of the exceptions, one can see how the imperatives of the prosecutor's need for evidence and the doctrinal dynamic of the Federal Rules contribute to this erosion.⁶⁹

67. *Id.* at 948. Several state cases also illustrate the liberal application of the doctrinal requirement of stress in cases involving children. In *People v. White*, 555 N.E.2d 1241 (Ill. App. Ct. 1990), *aff'd sub nom.* *White v. Illinois*, 112 S. Ct. 736 (1992), the child victim underwent two periods of questioning by a babysitter and her mother before making a statement to the police, 45 minutes after the event. The trial court held that the statement was spontaneous. *Id.* at 1250. The appellate court relied on a generalization that “it is unlikely that a child of tender years will have any reason to fabricate stories of sexual abuse.” *Id.* at 1249. See also *State v. Plant*, 461 N.W.2d 253, 264 (Neb. 1990) (upholding admission of an “excited utterance” made by a four-year-old two days after the alleged events and after police questioning).

68. *Morgan*, 846 F.2d at 948.

69. Prosecutors' use of statements made by accomplices or undercover agents that implicate the criminal defendant also stretch the doctrinal limits of excited utterances under Rule 803(2). In *United States v. Vazquez*, 857 F.2d 857 (1st Cir. 1988), the declarant was an accomplice being questioned in a United States customs office after cocaine had been found in his luggage. The alleged “startling event” was a statement by his colleague, also being questioned in the same room, “I don't know you.” *Id.* at 859. The declarant, according to the testimony of the customs officer, responded angrily “[y]ou know me. . . I'm going to get all the blame and you guys are going to get out.” *Id.* In *United States v. Obayagbona*, 627 F. Supp. 329 (E.D.N.Y. 1985), the declarant was an undercover police officer who described a drug delivery almost fifteen minutes after receiving the contraband and a few minutes after making the arrest. *Id.* at 334. The court describes the “successful arrest” and “pent-up tension of his performance” as the necessary startling event. *Id.* at 339. Under this approach, every police statement made after a “somewhat chaotic arrest” would qualify as an excited utterance. This would result in the de facto abolition of the hearsay rule.

In a Minnesota state case (not counted in this survey because the state evidence ruling was not approved by a federal court), the declarant, an accomplice to murder, returned to his apartment 90 minutes after the crime and told

B. STATEMENTS MADE FOR MEDICAL PURPOSES

Most statements offered by prosecutors under Rule 803(4) involved statements made by child victims of sexual abuse. When the child victim's statements identified the abuser—a clear attribution of guilt that would be impermissible under the exception as it is applied in the typical civil personal injury case⁷⁰—courts found ways to admit the identifications as being reasonably pertinent to diagnosis or treatment.⁷¹

The Eighth Circuit, the locus of many federal prosecutions for child abuse, has developed a new interpretation of Rule 803(4) under its doctrine of "same household" to justify admission of child identifications of the alleged abuser.⁷² This doctrine is premised on the theory that the nature and extent of the child's psychological problem will depend upon the identity of the abuser and thus may be essential ("reasonably perti-

his neighbor that "Scott" (the defendant) got carried away. The evidence of stress was that he looked "unnerved" and threw or slid a cup in frustration. *State v. Berrisford*, 361 N.W.2d 846, 850 (Minn. 1985). It is doubtful that this declarant lacked the time or opportunity to reflect on the event or organize his thoughts.

One federal and one state reviewing court introduced the discretionary trustworthiness factor to justify admission when the categorical limits of Rule 803(2) were strained. *See United States v. Vasquez*, 857 F.2d at 864 (finding that declarant's statement "has sufficiently substantial guarantees of trustworthiness to allow its admission as an exception to the hearsay rule"); *State v. Berrisford*, 361 N.W.2d at 850 ("This basis of trustworthiness allows the admission of the statements in the discretion of the trial court as excited utterance exceptions to the hearsay rule. The corroborating evidence also provides circumstantial guarantees of trustworthiness."). It bears repeating that the categorical structure of admission/exclusion decisions is undermined if the more discretionary term "general trustworthiness" is equated to "stress."

70. *See supra* note 39 and accompanying text.

71. In contrast to statements by child victims, courts hold statements by adult victims to a stricter standard. *See, e.g., United States v. Iron Thunder*, 714 F.2d 765, 773 (8th Cir. 1983) (admitting adult victim's description of rape only because it "did not point to the persons responsible for her condition").

72. Several cases raising hearsay issues under Rule 803(4) involve federal prosecutions for crimes committed on Native American lands. *See United States v. Provost*, 875 F.2d 172, 177 (8th Cir.), *cert. denied*, 493 U.S. 859 (1989); *United States v. Spotted War Bonnet*, 882 F.2d 1360, 1363-64 (8th Cir. 1989), *vacated and remanded*, 110 S. Ct. 3267 (1990), *affirmed on remand*, 933 F.2d 1471 (1991), *cert. denied*, 112 S. Ct. 1187 (1992); *United States v. Shaw*, 824 F.2d 601, 608-09 (8th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988); *United States v. Renville*, 779 F.2d 430, 435-39 (8th Cir. 1985).

Two habeas corpus cases upheld the admission of statements under a similar "same household" test when applying state hearsay rules and the Confrontation Clause. *See Gregory v. State of North Carolina*, 900 F.2d 705, 706 (4th Cir.), *cert. denied*, 111 S. Ct. 211 (1990); *Nelson v. Farrey*, 874 F.2d 1222, 1224-26 (7th Cir. 1989), *cert. denied*, 493 U.S. 1042 (1990).

ment") to treatment under Rule 803(4).⁷³ This interpretation has opened the door, at least in child abuse cases, to accusatory statements against members of the victim's household made months after the alleged abuse⁷⁴ under conditions of direct and insistent questioning,⁷⁵ and has even been broadened to include identification of relatives who do not share the "same household" with the child.⁷⁶

Other courts have also broadly applied the requirement that the statement be for "medical diagnosis or treatment." Justice Lewis Powell (sitting by designation and concurring in *Morgan v. Foretich*) noted the absence of any finding by the district court that the child victim believed that her discussions with a doctor had a "treatment" or "helping" purpose.⁷⁷ Justice Powell acknowledged the loss of trustworthiness resulting from the expanded application of Rule 803(4) to statements made to physicians consulted only as expert witnesses. He reasoned that in such circumstances the professional objectivity of the doctor is reduced and the veracity of the declarant's statements is less certain.⁷⁸ Thus, he argued for application of the Rule 403 balancing test where no real treatment motive existed.

The most expansive new interpretation or liberal application of Rule 803(4) appears in the recent opinion of the United States Supreme Court in *White v. Illinois*.⁷⁹ There, Justice Rehnquist upheld admission of a statement of identification made by a child sex abuse victim to an examining nurse and doctor as being "made in the course of receiving medical care."⁸⁰ This reading of the exception appears to eliminate any

73. See *Renville*, 779 F.2d at 436-37.

74. See *Shaw*, 824 F.2d at 608-09 (statement made to doctor one year after the initial report).

75. See *Spotted War Bonnet*, 882 F.2d at 1366-67 (Lay, C.J., dissenting) (alleging a government social worker employed manipulative interview tactics).

76. See *Provost*, 875 F.2d at 176-77 (expanding same household doctrine to include "same immediate family" in the case of the victim's half brother who did not share the same household but "at times" resided at victim's house).

77. *Morgan v. Foretich*, 846 F.2d 941, 952 (4th Cir. 1988) (Powell, J., concurring).

78. *Id.* In *United States v. Renville*, 779 F.2d 430, 435-39 (8th Cir. 1985), the court emphasized that the motive to speak truthfully about the perpetrator's identity depends on the physician making clear that the identity is important to the diagnosis and treatment. *Id.* at 438. See also *Nelson v. Farrey*, 874 F.2d 1222, 1224-25 (7th Cir. 1989) (testifying therapist had seen the child victim for 59 treatment and evaluation sessions), *cert. denied*, 493 U.S. 1042 (1990).

79. 112 S. Ct. 736 (1992).

80. *Id.* at 742.

requirement of treatment motive, and makes no mention of any treatment-related purpose of the identification itself.

These expansive readings of Rules 803(2) and 803(4), combined with the liberal use of the Rule 803(24) catch-all exception, create the sense that much of what a child victim says outside of court about being sexually abused will be admitted in federal trials. When the child victim does not also testify at trial, the criminal defendant is burdened with impeaching a case built on victim hearsay.⁸¹ In criminal cases, when no showing is made that the child is unable to testify, fairness issues rise to the constitutional level.⁸² Cases involving child victim hearsay fully bear out the prediction of Professors Lempert and Saltzburg that liberalization of the hearsay rule will make the prosecutor's task easier.⁸³

C. THE ADMISSION OF CHILD VICTIM STATEMENTS IN MICHIGAN AND FLORIDA

Many of the published cases decided under the Rule 803(2) and 803(4) exceptions in Michigan involved the statements of child victims of alleged sexual abuse.⁸⁴ The Michigan Supreme Court has issued landmark opinions carefully interpreting each

81. The child witness thus creates a new type of burden-shifting declarant. See *supra* note 32. Presentation of hearsay always reduces the risks for the proponent and imposes more risks on the opponent. See Swift, *supra* note 2, at 514-16. Specifically, young children who could not withstand the courtroom tests of oath and competency may "testify" as hearsay declarants. *Id.* at 515. See also *Morgan*, 846 F.2d at 948-50.

82. The United States Supreme Court addressed the question whether a child's unavailability is required by the Confrontation Clause in *White v. Illinois*, 112 S. Ct. 736 (1992). The Court held that the Confrontation Clause did not require the prosecution to produce the four-year-old child victim of a sexual assault at trial or find the victim unavailable before the child's out-of-court statements could be admitted under the spontaneous declaration exception or medical examination exception. *Id.* at 742-43. When not required to justify the use of hearsay with the declarant's unavailability, the prosecution is free to employ all the tactical advantages of choosing hearsay over the live witness. It is unfortunate that the Confrontation Clause is not being read to limit such adversarial advantage-taking by the government. See, Eileen A. Scallen, *Constitutional Dimension of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992).

83. LEMPERT & SALTZBURG, *supra* note 2, at 522.

84. From January 1981 to July 1991, the Michigan Appellate Courts and Supreme Court made 39 published rulings under Michigan's Rule 803(2) exception. Thirty-eight of these rulings were made in criminal prosecutions; of these, 17 concerned statements of child victims reporting sexual abuse.

From January 1981 to July 1991, the Michigan courts made 21 published rulings under the Rule 803(4) exception. Eleven involved criminal cases, and of these, 10 involved child victim statements.

of these exceptions. In *People v. Kreiner*,⁸⁵ the court required the laying of a specific foundation under Rule 803(2) regarding the amount of time between the alleged sexual trauma and the child's report.⁸⁶ In *People v. LaLone*,⁸⁷ the court held that a child's statement identifying the perpetrator to a psychologist was not relevant to diagnosis or treatment and therefore should not have been admitted under Rule 803(4).⁸⁸ The court rejected the "same household" rule adopted in earlier appellate opinions, stating that the drafters of the rule did not intend that the naming of an assailant be considered a description of the general character of the cause or external source of injury,⁸⁹ and that action to protect the child from the abuser was not part of medical treatment.⁹⁰ The court stated that any broadening of the doctrinal terms to admit specific statements of fault should be accomplished through legislative amendment.⁹¹

Similarly, many cases decided by the Florida courts under Rules 803(2) and 803(4) involve statements by child victims.⁹² The Florida courts have taken a very restrictive view of Rule 803(2), declining to admit child statements made even as little

85. 329 N.W.2d 716 (Mich. 1982) (per curiam).

86. *Id.* at 720. The court rejected Michigan's common law "tender years" exception (which permitted excusable delay in reporting) as not surviving the adoption of Rule 803(2). In cases subsequent to *Kreiner*, the Michigan courts have rejected child statements as not "excited" when made after long delays, or after prior opportunities to report, or in response to questioning. *See, e.g.*, *People v. Straight*, 424 N.W.2d 257, 258-261 (Mich. 1988); *People v. McConnell*, 358 N.W.2d 895, 896 (Mich. 1984).

87. 437 N.W.2d 611 (Mich. 1989).

88. *Id.* at 613-16.

89. *Id.* at 614. The court also reasoned that statements made in the course of psychological treatment were less reliable than those made for medical treatment. *Id.* at 613.

90. *Id.* at 614-15.

91. *Id.* at 616. The Michigan appellate courts have followed *LaLone* in excluding statements of identification, but have expressed reluctance in so doing. One court held that an identification was pertinent to medical care in order to protect the victim from sexually transmitted diseases. *See People v. Meeboer*, 449 N.W.2d 124, 127 (Mich. Ct. App. 1989), *appeal granted, in part*, 461 N.W.2d 484 (Mich. 1990). In other cases, the error in admitting an identification was held harmless. *See, e.g.*, *People v. Hackney*, 455 N.W.2d 358, 363-65 (Mich. Ct. App. 1990).

92. All 15 rulings published from January 1981 to July 1991 under Florida's equivalent of 803(2) were in criminal cases. Of the 15, six involved child victim statements.

Of 16 rulings published from January 1981 to July 1991 under Florida's equivalent to 803(4), 13 were in criminal cases. Of the 13, eight involved child victim statements.

as one hour after the alleged abuse. Although noting the special circumstances that generate delays in child abuse cases, the Florida Supreme Court has held that the limits of its version of 803(2) could not be stretched to accommodate delayed reports.⁹³ Part of the reason for the court's rigor in applying Rule 803(2) may be that in 1985 the Florida legislature adopted a special residual exception, Rule 803(23). Under this exception, statements of children under the age of eleven that describe child or sexual abuse may be admitted after the trial court makes a finding of "reliability."⁹⁴

Until 1991, Florida courts had also consistently rejected the use of Rule 803(4) to admit statements identifying the perpetrator, even in cases of child abuse.⁹⁵ In one very recent case,

93. *State v. Jano*, 524 So. 2d 660, 662-63 (Fla. 1988). In only one published case did a statement made one hour after the alleged abuse qualify as an excited utterance; the victim-declarant in that case was suffering from vaginal bleeding. *Jackson v. State*, 419 So. 2d 394, 395-96 (Fla. Dist. Ct. App. 1982).

94. Florida's Evidence Code provides:

(23) Hearsay exception; statement of child victim.

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

FLA. STAT. ANN. § 90.803(23) (West 1992).

95. See, e.g., *Kopko v. State*, 577 So. 2d 956, 960 n.8 (Fla. Dist. Ct. App. 1991) (per curiam). Courts occasionally mitigated the rigorous application of the exception with harmless error rulings, but have refused to adopt broadly the "same household" exception or other expansive interpretation in the published cases. One court has even held that a report of rape, with no identification, was not pertinent to a pregnancy examination. *Bradley v. State*, 546 So. 2d 445, 447 (Fla. Dist. Ct. App. 1989).

however, a Florida appellate court adopted the "same household" rule, permitting the admission of identifications made by abused children during medical treatment when the abuse took place within the home.⁹⁶

V. STATE DISTRICT ATTORNEY SURVEY RESULTS:
SOME VIEWS OF JUDICIAL COMPETENCE
WITH HEARSAY

I conducted a brief and modest survey of 169 state district prosecutors on the question of judicial competence with hearsay.⁹⁷ The purpose of the survey was to gain insight into whether trial judges are abolishing the hearsay rule in practice, and to test the survey method for its usefulness in the future.

In brief, the prosecutors reported their perception that state court trial judges significantly misunderstand the hearsay rule and fail to apply it correctly.⁹⁸ This perception was shared equally between those who practice in federal rules and non-federal rules jurisdictions.⁹⁹ Interestingly, there was no consensus that judges are "abolishing" the hearsay rule by over-admitting hearsay. The prosecutors were split fairly evenly between those who believe that when judges err they over-admit, and those who believe that judges over-exclude; indeed, a slightly higher percentage of the respondents cited error of over-exclusion.¹⁰⁰ This result may be affected by partisanship, but some of the cited judicial mistakes worked in favor of the state and against the defense. At the least, the survey indicates that trial judges do not simply admit anything and everything out of frustration with the hearsay rule.

The survey also asked the prosecutors to cite particular problems of over-admission that could amount to abuse of the rule. Sixty-one percent of those answering (thirty of forty-

96. See *Flanagan v. State*, 586 So. 2d 1085, 1093 (Fla. Dist. Ct. App. 1991) (en banc).

97. These prosecutors provided a convenient sample for the simple reason that they had attended a National College of District Attorneys' Career Prosecutor Course in the summer of 1991 and the address list was made available to me through the help of Professor Ed Imwinkelried, who lectured at the course.

98. I received 68 responses to the survey. Forty-six (68%) responded that in their view trial judges do not understand the hearsay rule and fail to apply it correctly either "frequently" or "about 50/50."

99. Twenty-two of the 46 district attorneys who responded "frequently" or "about 50/50" practiced in federal rules jurisdictions.

100. Fifty-two percent (33 of 64) responded that judges tend to over-exclude when they do not apply the hearsay rule correctly.

nine) stated that the criminal defendant's own statements, usually self-serving, made to the police upon arrest or to others, were widely admitted when offered by defense counsel in abuse of the hearsay rule. Some respondents mentioned that judges perceived these statements as admissions, even though offered on behalf of the defendant. Others thought that trial courts exhibit a general leniency with regard to hearsay offered by defendants. Some prosecutors indicated their belief that judges are lenient with the defendant when they believe that the defendant is innocent or that the state's case is extremely strong.

In federal court, by contrast, leniency does not appear to extend to defendants' self-exonerating statements. As discussed earlier, federal courts frequently and rigorously apply Rule 803(3) to exclude self-serving statements made outside of court by criminal defendants.¹⁰¹ A study of United States attorneys would be needed to test their perceptions of federal trial court leniency toward defendants against these published cases.

VI. THE EFFECTS OF HEARSAY PRACTICE ON HEARSAY REFORM

Several findings from this study are useful for hearsay reformers. First, civil plaintiffs have difficulty using their own "risky" hearsay statements. Second, civil defendants appear to use contested hearsay less frequently than plaintiffs. Third, criminal defendants cannot secure admission of their own self-exonerating statements, at least in federal court. Finally, prosecutors are successful hearsay users, particularly when offering statements of crime victims.

The abolition of the hearsay rule in civil cases advocated by some reformers would permit plaintiffs to use their own "risky" statements at trial. Likewise, under the notice-based liberalization of the rule proposed by Professor Park, the self-serving statements of unavailable plaintiffs (tort plaintiffs who die before trial) would be admitted.¹⁰² The only other restriction on admission that Professor Park envisions would be a required showing that the plaintiff-declarant had first-hand knowledge of the events spoken about.¹⁰³

It is certainly reasonable to assume that fact-finders can as-

101. See *supra* note 44 and accompanying text.

102. Park, *supra* note 2, at 119-22.

103. *Id.* at 121. Professor Park noted that Rule 403 should not be used to winnow out such statements on the basis of hearsay risks. *Id.* at 122. See also Swift, *supra* note 2, at 501-02, 509.

sess the reliability of these risky declarants.¹⁰⁴ What follows from this study of the published cases, however, is that abolition and notice-based liberalization of the hearsay rules would affect the civil parties differently. A deceased plaintiff's own statement, excluded under the current rule, would suffice to make a *prima facie* case,¹⁰⁵ or would at least be helpful corroboration. If it is true that civil defendants use contested hearsay in fewer cases than do plaintiffs, then liberalizing the rule would have more immediate benefits to the whole class of plaintiffs.¹⁰⁶ Professor Park acknowledges that liberalization could benefit "underdog" litigants,¹⁰⁷ but more extensive study of such differential effects is needed.

The frequent unsuccessful attempts by criminal defendants to use their own post-arrest statements illustrate what would happen if the admissibility of hearsay was governed by a general test of probative value versus prejudice—the test once advocated by Judge Weinstein and rejected by the Federal Rules Advisory Committee.¹⁰⁸ Judges would be faced with the unappealing task of determining the credibility of criminal defendants as part of the process of admitting evidence. To decide that the accused's post-crime assertion of an innocent state of mind is not trustworthy, thus not probative, and thus not admissible, smacks of a prejudgment of guilt. The result might be, of course, the wide-scale admission of criminal defendant statements, similar to what state prosecutors currently perceive to be the practice in state courts. But judges, as a group, may already be suspicious of the criminal defendant;¹⁰⁹ to encourage wide latitude in excluding statements on grounds of untrustworthiness might be undesirable. The use of trustworthiness to admit hearsay, however, surfaces in the successful use by prosecutors of the Rule 803(1)-(4) exceptions. The discretionary trustworthiness factor is imported into exceptions where its use

104. See Swift, *supra* note 2, at 509.

105. See Rock v. Huffco Gas, 922 F.2d 272, 283 (5th Cir. 1991) (affirming summary judgment for defendant because plaintiff's hearsay statements excluded); Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 889-90 (9th Cir. 1991) (same).

106. Professors Lempert and Saltzburg also predicted that abolition would "change the balance" on the burden of proof, making it "easier to introduce the evidence necessary to establish a *prima facie* case." LEMPERT & SALTZBURG, *supra* note 2, at 522.

107. Park, *supra* note 2, at 65.

108. See Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338-39 (1961).

109. See *supra* note 26.

is not literally sanctioned,¹¹⁰ and thus it erodes the categorical limits. Moreover, as has been pointed out,¹¹¹ the catch-all exceptions are in danger of becoming just that—useful to catch and admit all of the hearsay excluded at the margins of the categorical exceptions.

If we extrapolate from these admittedly limited observations, a radical change in how the hearsay rule works may be well under way. The rule is not being abolished *de facto*, but hearsay practice may be at an important turning point. The categorical structure of the admission/exclusion decision may be giving way to a more flexible process that openly acknowledges the trustworthiness factor. Further study is needed to test the validity of this hypothesis, but several possible repercussions for hearsay reform are already clear.

First, to the extent that the transformation of the categorical structure is under way, it may be impossible to control. As stated earlier, appellate courts do not see themselves as being in the business of policing trials for evidentiary errors. The use of “circumstantial guarantees of trustworthiness” triggers the most deferential standard of review, and the appellate courts themselves are using this phrase to justify findings of harmless error at the margins of the exceptions.¹¹²

Although the trustworthiness standard may strike some as sound hearsay policy, it does deprive the litigants of whatever degree of predictability the categorical approach provided, and it seems to favor the hearsay used by some parties more than others. Moreover, the trustworthiness issue that judges import into the categories operates in only one direction—in favor of admission—whereas the trustworthiness standard that was drafted into certain exceptions permits exclusion if judges make a finding of *untrustworthiness*. Admission, not exclusion, thus becomes the dynamic force in current judicial decision-making about hearsay.

Finally, hearsay reformers should pay special attention to the types of declarants and the types of cases that put intense

110. See *supra* note 57, text accompanying note 68, and note 69.

111. See Jonakait, *supra* note 50, at 461-62; Raeder, *supra* note 24, at 514-17 (commentary to this Article).

112. It will be interesting to see how courts apply the constitutionalized test of “trustworthiness” under the Confrontation Clause, as explicated in *Idaho v. Wright*, 110 S. Ct. 3139, 3149-51 (1990). See, e.g., *United States v. Spotted War Bonnet*, 933 F.2d 1471, 1473-74 (8th Cir. 1991) (majority sidesteps “trustworthiness” test because declarants also testified and were cross-examined at trial), *cert. denied*, 112 S. Ct. 1187 (1992).

pressure on the categorical structure of the hearsay rule. This study found that the cases involving child victims presented repetitive hearsay issues, litigated over and over in each jurisdiction by essentially the same proponent, the prosecutor. The results indicate that arguments of need are a powerful force in the dynamic of hearsay doctrine. There are three observed responses to this type of intense pressure. First, the categorical exceptions themselves are transformed through new judicial interpretations and increasingly liberal applications, as has happened in federal court under Rules 803(2) and (4). Second, as is also happening, problematic hearsay spills over into the generic catch-all exceptions and is admitted. Finally, the specific balance between the prosecution's interest in admitting child victim hearsay and the defense's interest in exclusion is addressed in specific residual exceptions, such as Florida's Rule 803(23), aimed directly at the problem. Recognizing the alternatives permits reformers to consider where to aim their efforts.

This study of how the hearsay rule works in practice has identified important trends that can now be used to inform judges of the changes they are working, and to illuminate the process of reform.

