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

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Commentary: A Response to Professor Swift

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

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Professor Swift's work is extremely valuable for its insights into how judges actually apply the hearsay rules when evaluating categorical exceptions. Too often we make assumptions without examining their factual underpinnings. Professor Swift pierces the mist of commonly held beliefs to report that while Rules 803(1)-(4) and 803(6) of the Federal Rules of Evidence are generally being interpreted rigorously in federal court to exclude statements made by risky declarants, judges are liberally admitting statements of crime victims, particularly children, when offered by federal prosecutors. In addition, judges sometimes rely on trustworthiness to admit evidence pursuant to exceptions which have no discretionary criteria. Prosecutors are the most prolific as well as the most successful hearsay users. Criminal defendants, and to a lesser extent civil plaintiffs, appear to be the hearsay losers, while civil defendants seem hardly to be playing the game at all.[1] This Comment focuses on some of Professor Swift's findings and their place in the larger hearsay picture.

I. WHY ARE CIVIL DEFENDANTS UNDER-REPRESENTED?

Professor Swift's study—identifying that civil defendants

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1. *See* Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 481 tbls. III and IV (1992).

are substantially under-represented as users of Rule 803(1)-(4) hearsay and trail both prosecutors and civil plaintiffs in offers of Rule 803(6) hearsay—may provide important lessons about trial lawyers' evaluation of hearsay and how hearsay reform will affect trial practice. Professor Swift's discovery mirrors a trend I noted in a study of cases involving the Rule 803(24) and 804(b)(5) catchall hearsay exceptions.[2] Civil defendants' under-representation is partially a function of the burden of proof which encourages the introduction of evidence by civil plaintiffs and prosecutors. However, civil defendants made substantially fewer offers of Rule 803(1)-(4) hearsay than any other party, including criminal defendants, in both Professor Swift's study[3] and my ongoing catchall study.[4] Moreover, while intuitively civil defendants, which include corporations, would appear to

2. My study entailed a search on Westlaw from January 1, 1975 to July 1, 1991 for criminal and civil cases referencing Federal Rules 803(24) or 804(b)(5)—the hearsay catchall exceptions. District court cases which resulted in appellate decisions were eliminated. I included in the study catchall references which were cited as alternative reasons for admission, even though it might be argued that such references are superfluous. It is my opinion that such references make it easier for a judge to admit the evidence without having to make hard decisions concerning admissibility and therefore are significant.

The results of the study will be discussed throughout this Comment and are summarized below for reference.

	Number of cases where the party offered catchall evidence	Percent of offers	Number of cases where the party was successful	Success rate
Prosecutors	171	42%	138	81%
Civil Plaintiffs	113	28%	49	43%
Criminal Defendants	75	18%	11	15%
Civil Defendants	49	12%	24	49%
Total	408	100%	222	54%

These statistics cannot be considered definitive, given the small number of cases in some categories and the fact that the cases studied only include hearsay rulings which are available on Westlaw. The number of cases represented and the statistics derived from them, however, establish relative patterns of usage and success which provide insight into catchall exception interpretation.

For an earlier study of criminal cases applying the Rule 803(24) and 804(b)(5) hearsay catchall exceptions, see Myrna S. Raeder, *Confronting the Catch-Alls*, 6 A.B.A. SEC. CRIM. JUST. 31 (1991).

3. *See* Swift, *supra* note 1, at 481 tbl. III.

4. In the catchall study, civil defendants offered hearsay in only 49 cases. In comparison, prosecutors offered hearsay in 171 cases, over three times more

have more access to business records than any other party, only criminal defendants made fewer offers of Rule 803(6) hearsay.[5]

There is no reason to suppose that hearsay is generally more helpful to criminal defendants than to civil defendants, particularly since some civil suits could be brought as criminal actions. It is also unlikely that the relative absence of civil defendants as hearsay users is based upon their failure to appeal from adverse verdicts; civil defendants usually have both the resources and the financial motivation to appeal. Nor can all civil defense hearsay so clearly fit into an exception that it simply is not objected to at trial. Indeed, Professor Swift noted that when civil defendants introduce business records, they are less successful than civil plaintiffs in getting the records admitted.[6]

The most probable reason for the disparity is that parties who do not have to use hearsay would rather not do so. Since civil defendants often have control over the major witnesses who favor their position and can ensure that they testify, they do not need to rely on hearsay. Discovery permits civil parties to learn virtually all of the information which will be proffered at trial. Therefore, the civil defendant can effectively determine which live witnesses will obviate the need to offer hearsay.

In contrast, criminal defendants may need to offer more hearsay than civil defendants because they have fewer financial resources and because witnesses in criminal cases may be unavailable as a result of asserting their Fifth Amendment privilege. In other words, for all of the reasons underlying the hearsay rule, defendants who can would rather present live testimony. While it might be risky to subject some civil defense witnesses to cross-examination, counsel may be fearful that jurors will discount any favorable hearsay if they expect to hear live testimony.

Similarly, civil defense counsel do not want to justify losing a case because of a hearsay dispute, when the point could have been established by a witness who has personal knowledge of the event. The comparatively few appeals concerning exclusion of defense hearsay in civil cases is understandable if such hearsay is usually not critical. Moreover, when the hearsay dispute

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often than civil defendants. Criminal defendants offered hearsay in 75 cases, about 50% more often than civil defendants. *See supra* note 2.

5. *See* Swift, *supra* note 1, at 481 tbl. IV.

6. *Id.*

is significant, it is likely to be resolved prior to trial because many judges require the attorneys to raise objections concerning documents, depositions, and exhibits, as well as other significant evidentiary issues, well before the jury is sworn. Therefore, defense counsel who are faced with adverse rulings on pivotal issues may be settling those cases rather than betting the client's company on disputed hearsay questions.

The low incidence of civil defense hearsay is a fact that must be considered whenever significant liberalization of the hearsay rule is suggested in the civil arena. If civil defendants resist offering hearsay unless they have no other alternative, it is doubtful that the mere relaxation of the hearsay ban will encourage them to drastically increase their reliance on hearsay. Therefore, as Professor Swift notes, the real winner of any liberalization of the hearsay rule in the civil context will be civil plaintiffs.[7]

II. WHY ARE PROSECUTORS OVER-REPRESENTED?

Undoubtedly, the high burden of proof in criminal cases is partially responsible for the prolific use of hearsay exceptions by prosecutors. The need to demonstrate proof beyond a reasonable doubt encourages prosecutors to introduce every shred of relevant evidence.

Factors other than the high burden of proof, however, may be equally important to the prosecutor's high use of hearsay exceptions. First, the absence of effective discovery in federal criminal cases affects prosecutors as well as defense counsel. Discovery aids the effective preparation of cases. Given high case loads, prosecutors often do not learn about statements until the day of the trial, a time when it is too late to obtain additional live witnesses. Second, the defendant's Fifth Amendment privilege against self-incrimination similarly hinders the prosecutor's ability to predict the defense case accurately. Therefore, hearsay may be easier to produce than live testimony in response to a newly raised defense theory. Third, even if prosecutors may have more resources than criminal defendants, this hardly suggests that their resources are unlimited. Thus, prosecutors may prefer hearsay to locating and preparing additional witnesses. Fourth, despite the threat of subpoenas, some witnesses do not want to testify or may tire of repeatedly appearing in court only to be rescheduled. Finally,

7. *Id.* at 502-03.

prosecutors may affirmatively choose to offer hearsay when the declarant is less appealing than the in-court witness, as in the case where a police officer testifies to an informer's statements. If the hearsay rule is relaxed, these forces will continue to exert pressure on prosecutors to present even more hearsay, which will be tested only by the Confrontation Clause.

III. WHY ARE CRIMINAL DEFENDANTS LOSING THE HEARSAY BATTLE?

Professor Swift's conclusion that criminal defendants have less success than any other party in admitting hearsay, while prosecutors fare best,[8] repeats the pattern which also exists in cases using the catchall hearsay exceptions. Prosecutors were successful in federal appellate and district courts in eighty-one percent of their attempts to use catchall hearsay, compared to criminal defendants who were successful in only fifteen percent of their attempts.[9] At the appellate level, prosecutors had a sixty-three percent success rate, even subtracting the appellate cases favoring prosecutors which held that the error was harmless or that no error existed.[10] Such results cannot be explained by the inability of prosecutors to appeal from acquittals. There simply are not that many acquittals in federal court, the rate is at best in the twenty percent range.[11] Because a large number of the criminal cases which result in convictions are appealed,[12] it is likely that the cases available on Westlaw are representative of disputes about contested catchall hearsay.

It is possible that trial judges are admitting defense hear-

8. *Id.* at 482-83.

9. Of 171 attempts to introduce catchall hearsay, prosecutors were successful in 138 (81%) cases—118 appellate cases and 20 district court cases. Of 75 attempts to introduce catchall hearsay, criminal defendants were successful in 11 (15%) cases—appellate courts admitted the catchall hearsay (and reversed the district courts' decision to exclude the hearsay) in six cases, district courts admitted the catchall hearsay offered by the criminal defendants in five cases. *See supra* note 2.

10. Of the 171 appellate and district court cases in which prosecutors offered catchall hearsay, *see supra* note 2, 142 cases represent appellate court decisions. Of the 142 appellate court decisions, prosecutors were successful in 118 cases. Of the 118 successful cases, the court admitted the hearsay holding that the error was harmless or that no error existed in 29 cases. The remaining 89 successful cases constitute 63% of the total 142 appellate court cases.

11. *See* U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1989, at 498 tbl. 5.21 (Timothy J. Flanangan & Kathleen Maguire eds., 1989) (listing past statistics).

12. *See id.* at 527 tbl. 5.52.

say, but defendants are convicted despite such evidence, resulting in appeals which do not reflect their true success rate. Such over-admission of defense hearsay, however, would likely be discussed in a way not currently reflected by the ubiquitous harmless error analyses undertaken by appellate courts. Furthermore, district court decisions in the catchall context also reflect a substantial disparity between the success rate of prosecutors and defense counsel.[13] At best, criminal defendants may be effectively introducing inconsequential hearsay. Ultimately, however, one must wonder why prosecutors fare so much better than civil plaintiffs when introducing hearsay, as well as why civil defendants are much more successful than criminal defendants, results mirrored in the catchall cases.[14]

Professor Swift explains the plight of criminal defendants by referring to their reliance on risky declarants.[15] While her introduction of the risky declarant is a genuine contribution to hearsay analysis, the catchall results do not clearly support this interpretation. Admittedly, defendants attempted to introduce their own statements or those of potentially biased witnesses, but so did prosecutors—and with better success.[16] Nor does the risky declarant analysis explain why courts often admit statements by the defendant's cohorts or accomplices which are introduced by prosecutors under the catchall exceptions, but usually exclude such statements as untrustworthy when offered by the defense.[17] As Professor Swift points out, courts also admitted statements of children in sexual abuse cases, de-

13. *See* Raeder, *supra* note 2, at 31.

14. Civil plaintiffs using catchall hearsay were successful in 49 of 113 (43%) attempts. Civil defendants using catchall hearsay were successful in 24 of 49 (49%) attempts. *See supra* note 2. Success in civil cases includes district court admissions, appellate affirmances of admitted catchall hearsay, and appellate reversals of excluded catchall hearsay.

15. *See* Swift, *supra* note 1, at 486-90; *see also* Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 508-13 (1987).

16. *Compare* United States v. Chapman, 866 F.2d 1326, 1329-32 (11th Cir.) (upholding admission of hearsay of disaffected spouse offered by prosecutor), *cert. denied*, 493 U.S. 932 (1989) *with* United States v. Fredericks, 599 F.2d 262, 264-66 (8th Cir. 1979) (upholding exclusion of hearsay uttered by defendant's brother's girlfriend which was offered by the defense).

17. *Compare* United States v. Doerr, 886 F.2d 944, 953, 956 (7th Cir. 1989) (upholding admission of an accomplice's grand jury testimony offered by prosecutors after accomplice refused to testify despite grant of immunity) *and* United States v. Workman, 860 F.2d 140, 143-44 (4th Cir. 1988) (upholding admission of taped statement of deceased codefendant offered by prosecutor), *cert. denied*, 489 U.S. 1078 (1989) *with* United States v. Colson, 662 F.2d 1389, 1392 (11th Cir. 1981) (upholding exclusion of evidence of taped conversation

spite the children being risky declarants.[18]

Professor Swift's alternative hypothesis that discretionary rulings in criminal cases usually benefit the prosecutor deserves consideration, with the caveat that rulings will favor the defense when a judge believes that the defendant is innocent or that the prosecution's evidence is overwhelming.[19] This premise is supported by her finding that judges were more willing to reverse in civil cases than in criminal cases,[20] which was also true in the catchall context. Arguably, the Confrontation Clause should resolve any doubt against admitting prosecutorial hearsay in favor of exclusion, while the defendant's right to due process should resolve any doubt against admitting defense hearsay in favor of admission. However, district court judges generally do not appear to give criminal defendants the benefit of such doubts, and appellate judges often appear to be less concerned about criminal defendants than civil litigants. Thus, any relaxation of the hearsay rule in the criminal context will permit defendants to introduce more of their hearsay, but is also likely to result in prosecutors deluging the trial with hearsay, subject only to shrinking constitutional constraints.[21] Even to the extent constitutionally permitted, such wholesale use of hearsay would change the way criminal trials look and might lower public acceptance of verdicts.[22]

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between police and twice convicted felon concerning attempts to procure false testimony against the defendant offered by defense).

In 27 catchall cases in which prosecutors offered accomplice evidence, they were successful in 20 (74%) cases. In comparison, in 19 catchall cases in which criminal defendants offered accomplice evidence, they were successful in only three (16%) cases. *See supra* note 2 (providing background on the study). Most accomplice hearsay offered by prosecutors were argued alternatively as Rule 801(d)(2)(E) co-conspirator statements, or as Rule 804(b)(3) statements against interest.

18. *See* Swift, *supra* note 1, at 490.

19. *Id.* at 483.

20. *Id.* at 479-80.

21. *See generally* Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 88-104 (1987) (advocating that rules excluding hearsay in civil cases should be curtailed while rules excluding hearsay in criminal cases should not be curtailed because they serve the additional function of shielding the accused from misuse of government power).

22. *Compare* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1372-75 (1985) (arguing that hearsay rules promote the stability of verdicts because the rules protect the public's immediate and continuing acceptance of jury verdicts) *with* Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057, 1062-72 (1986) (arguing that Pro-

IV. HAS THE HEARSAY RULE BEEN ABOLISHED BY JUDICIAL DISCRETION?

I question whether the hearsay rule still functions as an effective barrier to out-of-court statements which do not fit the traditional exceptions. By providing pieces of the puzzle which must be integrated into the larger hearsay picture, Professor Swift's findings actually support, rather than challenge, my belief. The categorical hearsay exceptions currently appear to act as a security blanket; a judge's careful analysis of these hearsay exceptions is often an academic exercise which masks the erosion of the hearsay ban under the guise of the discretionary catchall exceptions. Under the present structure of the Federal Rules of Evidence, it makes sense for judges to interpret the specific exceptions as written. Given the highly discretionary approach to hearsay employed in the catchall exceptions, there is no need to distort the specific exceptions. In other words, the catchall exceptions always provide a safety valve when tough decisions must be made.

Since the enactment of the Federal Rules of Evidence, there have been more than 400 decisions which discuss admission under the catchall exceptions,[23] a number which is clearly high given that the exception was intended to cover the "exceptional" case.[24] Fifty-four percent of the hearsay offered under the catchall exceptions is being admitted.[25] If criminal cases alone are considered, sixty-one percent of catchall hearsay is being admitted.[26] Moreover, since the enactment of the Federal Rules of Evidence, slightly more than 100 cases cited the catchall exceptions as an alternative to Rule 803(6)-(10), of which approximately seventy were references to Rule 803(6).[27] Roughly eighty cases cited the catchall exceptions as an alter-

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fessor Nesson's thesis that hearsay rules protect the stability of verdicts is flawed).

23. *See supra* note 2.

24. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066.

25. Of 408 cases available on Westlaw involving catchall hearsay, the offering party was successful in 222 (54%) cases. *See supra* note 2.

26. One hundred forty-nine of 246 (61%) criminal cases were successful. *See supra* note 2.

27. This is based on a Westlaw search from January 1975 through August 1991 for federal cases citing the catchall exception 803(24) or 804(b)(5) and the specific exception 803(6)-(10). District court cases which resulted in appellate court decisions were eliminated.

native to Rule 803(1)-(4).[28] In criminal cases, the catchall exceptions were cited about sixty times in decisions as an alternative to declarations against penal interest, and more than twenty times as alternatives to both former testimony and co-conspirators statements.[29] The current pressure points in the criminal justice system are reflected by eleven child abuse cases citing the catchall exceptions[30] and the numerous "war on drugs" cases which provide about thirty percent of the criminal catchall citations since 1985.[31] These latter statistics reflect citations, not admissions, and may simply demonstrate caution on the part of litigators who are attempting to be overly inclusive when arguing the admission of hearsay. However, the citation of the catchall exceptions implies that in a fair number of cases it is considered risky to cite only a traditional hearsay exception, arguably because it is doubtful that the hearsay fits comfortably into the categorical criteria. At a minimum, such citation indicates that litigators in the hearsay trenches view the catchall exceptions seriously and believe that judges are willing to apply them.

Undoubtedly, the mere existence of the catchall exceptions encourages litigants to introduce hearsay that is problematic under the traditional exceptions. Highly dubious business records have become grist for the catchall exceptions.[32] While the absolute number of cases admitting evidence clearly violating 803(6) is small, more decisions admit hearsay referring to both 803(6) and 803(24) to avoid answering hard questions about whether the hearsay fits into the traditional rule at all. Similarly, Rule 803(24) is being used to avoid the ban on prosecutorial records found in 803(6).[33]

The catchall exceptions also mask the introduction of other types of hearsay which defy admission under the specific excep-

28. The same methodology employed in *supra* note 27 was used to identify criminal and civil cases citing the catchall exceptions as an alternative to Rule 803(1)-(4).

29. The same methodology employed in *supra* note 27 was used to identify criminal cases citing the catchall exceptions as an alternative to Rules 804(b)(3), 804(b)(1), and 801(d)(2)(E).

30. These cases were derived from the study described in *supra* note 2.

31. Drug cases were located by a Westlaw search for criminal cases referencing "drug!, heroin, cocaine, or marijuana" from January 1985 through August 1991 and comparing this number to the total number of criminal catchall cases during the same time frame.

32. *See* Raeder, *supra* note 2, at 33.

33. *See, e.g.*, United States v. Simmons, 773 F.2d 1455, 1458-59; (4th Cir. 1985); cf. Swift, *supra* note 1, at 492 n.57.

tion categories. Prosecutors attempted to introduce grand jury testimony in thirty-seven cases pursuant to the 804(b)(5) catchall exception.[34] In twenty-nine of these cases, the court admitted the hearsay.[35] Another hidden catchall category encompasses written and oral statements made to law enforcement officials which are prior consistent or inconsistent statements not fitting the Rule 801 criteria.[36] A growing number of cases appear to include statements to law enforcement officials by declarants not present at trial.[37] Such declarants have ranged from accomplices to spouses, victims, and truly disinterested individuals.[38]

Professor Swift found patterns indicating consistency of application by judges in interpreting the categorical exceptions. Even within the hidden catchall categories, however, admissibility of any particular catchall statement is quite difficult to predict. Such erosion of the hearsay rule is probably the worst of all worlds for litigators who must decide which cases to try by evaluating the potentially admissible evidence. Trials occur when one party believes that the evidence supports a very different result than that offered by opposing counsel. In determining whether to settle, litigators analyze their own evidence as well as that of their opponent. The catchall exceptions blind-side litigators from rationally making such decisions. While the notice provision of the catchall exceptions should alert the litigator that the rules of the game have changed, notice is sometimes forgiven due to the exigencies of trial practice.[39] Therefore, the catchall exceptions frustrate the certainty

34. *See supra* note 2 (discussing the study of catchall hearsay).

35. It is possible that Idaho v. Wright, 110 S. Ct. 3139 (1990), will reduce the admission of grand jury testimony based on the Confrontation Clause. *Id.* at 3147-48 (holding catchall hearsay evidence violates the Confrontation Clause unless it contains "particularized guarantees of trustworthiness" based on circumstances that surround the making of the statement). *See* United States v. Gomez-Lemos, 939 F.2d 326, 327, 332 (6th Cir. 1991) (holding that the admission of grand jury testimony violated the Confrontation Clause because *Wright* prohibited corroboration from being used to determine reliability).

36. *See* Raeder, *supra* note 2, at 33.

37. *Id.* at 37.

38. *Id.*

39. *See, e.g.*, United States v. Doe, 860 F.2d 488, 492 (1st Cir. 1988) (notice impractical and opponent did not contemporaneously object to lack of pre-trial notice or request a continuance), *cert. denied*, 490 U.S. 1049 (1989); *see also* United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978) ("requirement of fairness to an adversary contained in the advance notice requirement of Rule 803(24) and Rule 804(b)(5) [is] satisfied when . . . the proponent of the evidence is without fault in failing to notify his adversary prior to trial and the

that litigators depend upon in analyzing whether to try or settle a case.

The catchall exceptions permit the total erosion of the hearsay rule by judicial discretion, a result originally suggested when the Federal Rules were first drafted, but quickly rejected.[40] As currently interpreted, hearsay may be admitted under the catchall exceptions whenever a party has a good argument that the statements being introduced have equivalent circumstantial guarantees of trustworthiness.[41] Professor Swift even found that trustworthiness is being used to support the admission of otherwise inadmissible hearsay pursuant to categorical exceptions.[42] Obviously, not every catchall reference or exhortation to trustworthiness results in the admission of evidence. However, the perpetual citation of the catchall exceptions has taken its toll, and the appellate decisions are not offering an effective stopgap, in part, because they review the admission of such hearsay for abuse of discretion and harmless error.

More disturbing, the abuse of discretion standard has infected the review of evidentiary issues concerning questions of law which should be determined de novo.[43] Both Professor Swift's findings and my catchall review[44] confirm that most trial court decisions will be upheld on appeal, regardless of

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trial judge has offered sufficient time, by means of granting a continuance, for the party against whom the evidence is to be offered to prepare to meet and contest its admission").

40. *See* Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925, 926-27 (forthcoming April 1992).

41. *See* Raeder, *supra* note 2, at 37-39; Raeder, *supra* note 40, at 935-37.

42. *See* Swift, *supra* note 1, at 491.

43. *See, e.g.*, United States v. Cherry, 938 F.2d. 748, 757 (7th Cir. 1991) (holding court did not abuse its discretion by admitting testimony about statements relayed by patient to doctor about the circumstances of her rape); Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, 1149 (10th Cir.) (stating that appellate court will not disturb trial courts' conduct at trial proceedings, including rulings on motions and objections, unless it appears from the record that the trial court abused its discretion), *cert. denied*, 439 U.S. 862 (1978); *see also*, Stull v. Fuqua Indus., Inc., 906 F.2d 1271, 1274 (8th Cir. 1990) (finding that district court acted within its discretion when it excluded hospital record under 803(4)); Miller v. Keating, 754 F.2d 507, 512 (3d Cir. 1985) (finding that district court did not abuse its discretion when it admitted a statement under the excited utterance exception of 803(2)); United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980) (finding that district court did not abuse its discretion when it admitted doctor's testimony under 803(4)), *cert. denied*, 450 U.S. 1001 (1981).

44. *See* Swift, *supra* note 1, at 478-79; Raeder, *supra* note 2, at 31.

which party cites the hearsay exception or which exception they cite. Thus, even without the catchall exceptions, a party who convinces the trial court to adopt its position on any given exception has a significant chance of being upheld on appeal. One reason this occurs is because appellate courts seem to have more difficulty holding that district court judges abused their discretion than holding that they made errors of law. Although this reflects the reality that appellate judges do not review discretionary decisions de novo, but simply determine whether the trial court's action exceeded its bounds, another factor must be considered. Finding an abuse of discretion is an indictment of the trial judge's behavior which is absent from an abstract pronouncement that the judge misapplied the law. Judges do not want to chastise their colleagues and are not currently required to do so.

Indeed, the Supreme Court has not encouraged judges to engage in rigorous appellate review, even for issues subject to the de novo standard. Instead, it recently blurred the difference between de novo, clearly erroneous, and abuse of discretion standards in a procedural context, noting that a "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."[45] Thus, we should not be surprised that courts often do not distinguish the nature of review for Confrontation Clause challenges or evidentiary issues which raise questions of law from that of discretionary evidentiary rulings.

The harmless error doctrine further deters careful appellate review by erecting another hurdle which must be overcome in order to win a reversal. Professor Swift reported that slightly more cases were saved by harmless error than reversed.[46] Are all such errors really harmless? Harmless error should be an oxymoron in the catchall context where the evidence is supposed to be the most probative on the issue, yet that does not stop its frequent invocation. Judge Posner has analogized the expansive code of constitutional criminal procedure to "the grapes of Tantalus, since the equally expansive harmless error rule in most cases prevents a criminal defendant from obtaining any benefit from the code."[47] Similarly,

45. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990).

46. *See* Swift, *supra* note 1, at 478 tbl. I.

47. United States v. Pallais, 921 F.2d 684, 691 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 134 (1991).

harmless error coupled with the ever expanding catchall exceptions have hastened the demise of the hearsay ban. Hearsay reformers need to consider the reality of what judges are currently doing in order to determine whether further change is desirable, the nature of such change, and the likely winners and losers in the new hearsay regime.