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# The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured

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# THE EFFECT OF THE CATCHALLS ON CRIMINAL DEFENDANTS: LITTLE RED RIDING HOOD MEETS THE HEARSAY WOLF AND IS DEVOURED

*Myrna S. Raeder**

Asking whether "evidence law matters" ultimately depends upon a variety of considerations, not the least of which is whether evidentiary rules should be written without regard to any disparate effect they may have on the parties. While some rules immediately come to mind as reflecting policy choices which favor one party or another,[1] seemingly neutral rules can also produce winners and losers. This Essay focuses on the unintended effect that the catchall hearsay exceptions, Federal Rules of Evidence 803(24) and 804(b)(5), have had on criminal defendants. The thesis of this Essay is that ordinary run-of-the-mill hearsay, even if reliable,[2] should not be routinely admitted against criminal defendants pursuant to the catchalls. Several revisions to the catchalls are proposed which would remedy their overuse by prosecutors.

## I. THE PATH TO GRANDMOTHER'S HOUSE

### *A. Finding the Path*

The catchalls were quite controversial when originally enacted but reflected an underlying philosophy about the broad admissibility of hearsay which existed from the inception of the rulemaking process. Indeed, the original drafters of the Federal Rules would have permitted all hear-

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1. *See, e.g.*, FED. R. EVID. 404(a) (allowing accused in criminal trial to offer evidence of his or her character but only allowing prosecution to rebut such evidence); FED. R. EVID. 412 (preventing admission of reputation or opinion evidence of past sexual behavior of rape victim); FED. R. EVID. 609(a)(1) (restricting use of evidence of prior conviction to attack credibility of accused unless probative value outweighs prejudicial impact).

2. Throughout this Essay the terms "reliable" and "trustworthy" are used interchangeably. Both refer to the inherent quality of the hearsay, which is determined from the "totality of circumstances that surround the making of the statement and render the declarant particularly worthy of belief," without reference to any outside corroboration by other evidence at trial. Idaho v. Wright, 110 S. Ct. 3139, 3149 (1990).

say "if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available,"[3] or if there were "strong assurances of accuracy and the declarant is unavailable as a witness."[4] Hearsay exceptions were listed solely by way of illustration and not limitation. Practicing attorneys viewed this discretionary approach to hearsay as too radical, giving judges almost unlimited power to determine hearsay issues.[5]

While this hearsay methodology was quickly rejected by the drafters, the desire for flexibility and the growth of hearsay law resulted in the drafting of proposed hearsay exceptions in Rules 803(24) and 804(b)(6), whose identical language permitted judges to admit statements "not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."[6] Judge Friendly described proposed Rule 803(24) as "the Chancellor's foot with a vengeance."[7] Congress had great difficulty with this version of the residual clauses. The House of Representatives deleted these provisions from the Rules proposed by the Supreme Court because they injected too much uncertainty into evidence law.[8] The Senate bill included a narrower version, and the Conference Committee reached a compromise that was intended to restrict the scope of the exceptions and require notice for their use.

The debate in Congress concerning the catchalls pitted those who believed that the catchalls would engulf the hearsay rule, abandon the values underlying it, encourage forum shopping and result in unpredict-

3. Proposed Fed. R. Evid. 8-03(a), 46 F.R.D. 345 (1969), *reprinted in* JAMES F. BAILEY, III & OSCAR M. TRELLES, II, 2 THE FEDERAL RULES OF EVIDENCE LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, Doc. 5, at 173 (1980).

4. Proposed Fed. R. Evid. 8-04(a), 46 F.R.D. 377 (1969), *reprinted in* 2 BAILEY & TRELLES, *supra* note 3, Doc. 5, at 205.

5. *See, e.g.*, Roger C. Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057, 1060 n.11 (1986).

6. Revised Draft of Proposed Rules of Evidence For the United States Courts and Magistrates, 51 F.R.D. 315, 422, 439 (1971), *reprinted in* 2 BAILEY & TRELLES, *supra* note 3, Doc. 6, at 108, 125. Proposed Rules 803(24) and 804(b)(6) provide: "Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." Revised Draft of Proposed Rules of Evidence For the United States Courts and Magistrates, 51 F.R.D. at 315, 422, 439.

7. *Proposed Rules of Evidence: Hearings Before the Subcomm. of Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 264 (1973) (statement of Henry J. Friendly, Chief Judge, United States Court of Appeals for the Second Circuit), *reprinted in* 3 BAILEY & TRELLES, *supra* note 3, Doc. 11, at 239, 264.

8. SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, PROPOSED CHANGES TO H.R. 5463, 93D CONG., 1ST SESS. 30, 32 (Comm. Print June 28, 1973), *reprinted in* 3 BAILEY & TRELLES, *supra* note 3, Doc. 12, at 174, 176.

able outcomes against those who viewed the catchalls as necessary to prevent judges from distorting the specific hearsay exceptions when faced with reliable statements that were not otherwise admissible. While Rule 102 required that the rules be construed to secure fairness and to promote the growth and development of evidence law, with the goal of ascertaining truth, Congress believed that an escape clause was necessary to provide for exceptional circumstances and was consistent with the power already exercised by federal judges at common law.

Little thought was given during the Congressional Hearings to the potential problems that such provisions would pose in criminal cases. Indeed, the prepared testimony of a representative of the Department of Justice, while favoring the catchalls, indicated that such flexibility was "probably much more important for civil litigation than for criminal cases."[9] The sole voice protesting the use of such exceptions against criminal defendants was that of Professor Paul Rothstein, who testified that the Rule should provide greater solicitude for the criminal accused's right to confrontation than the Constitution demanded; he urged that "extreme caution and reluctance be used" in admitting such hearsay against criminal defendants.[10] Professor Rothstein also suggested prohibiting the catchalls from being used against the accused in a criminal case.[11]

The legislative history clearly reflects that the residual clauses were not designed as a back door through which run-of-the-mill hearsay would enter trials. The Advisory Committee note states that the exceptions in Rules 803(24) and 804(b)(5) "do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations."[12] The Senate Committee Report referenced "certain exceptional circumstances" justifying admission under the catchalls, such as those found in *Dallas County v. Commercial Union Assurance Co.*,[13] a civil case which admitted a copy of a local newspaper

9. *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 105, 114 (1974) [hereinafter *Senate Hearings*] (statement of W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 14, at 114.

10. *Senate Hearings*, *supra* note 9, at 273 (testimony of Paul F. Rothstein, Professor of Law, Georgetown University Law Center), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 14, at 123. Professor Rothstein's prepared statement included two of his law review articles that discussed this issue. *See id.* at 234-35, 266-67.

11. *Id.* at 273.

12. FED. R. EVID. 803(24) advisory committee's note, *reprinted in* 2 BAILEY & TRELLES, *supra* note 3, Doc. 6, at 123.

13. 286 F.2d 388 (5th Cir. 1961).

published over fifty years earlier,[14] and the only case which had been cited in the Advisory Committee's note.[15] The Senate Committee Report indicated that it had narrowed the scope of the Supreme Court version of the residual clauses to avoid emasculating the hearsay rule and clearly stated its views about their limited applicability: "It is intended that the residual hearsay exceptions will be used very rarely and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions . . . ."[16] The Conference Report did not repeat the rationale underlying the Rule, but noted that it was adopting the Senate amendment which was narrower than the provision rejected by the House, with the addition of a notice requirement.[17]

### *B. Straying from the Path*

From their inception, the catchalls established the same criteria for admission of evidence against criminal defendants as for any other party. The only criminal case mentioned in the legislative history is *United States v. Barbati*,[18] which is cited in the Senate Report[19] without any discussion. *Barbati* was a decision by Judge Weinstein[20] concerning the identification of a defendant who passed a counterfeit bill to a barmaid. At trial the barmaid could not identify the defendant but testified that she had pointed him out to the police in the bar shortly after the offense. A police officer identified the defendant as the person who the barmaid pointed out. Two things should be noted about *Barbati*: (1) the hearsay at issue was separately codified in the Federal Rules as prior identification, an exception which was recognized in a number of states at the time

14. S. REP. NO. 1277, 93d Cong., 2d Sess. 19 (1974), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 19.

15. FED. R. EVID. 803(24) advisory committee's note, *reprinted in* 2 BAILEY & TRELLES, *supra* note 3, Doc. 6, at 123.

16. S. REP. NO. 1277, *supra* note 14, at 20, *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 20.

17. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 11 (1974), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 16, at 11.

18. 284 F. Supp. 409 (E.D.N.Y. 1968).

19. S. REP. NO. 1277, *supra* note 14, at 19, *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 19.

20. Judge Weinstein advocated a discretionary approach to hearsay admission balancing probative force against prejudice. *See* Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338 (1961).

*Barbati* was decided;[21] and (2) the declarant testified at trial.[22]

Interestingly, a computerized search for federal cases citing *Barbati* and *Dallas County* prior to the enactment of the Federal Rules of Evidence revealed only one criminal case of the forty-eight cases located which referred to *Dallas County* in dicta as supporting the admission of hearsay in criminal proceedings.[23] Perusing these cases for citations to other decisions revealed only five criminal cases arguably on point. One concerned prior identifications made by a witness at a grand jury and at a former trial which were inconsistent with his trial testimony.[24] Another reversed the district court's admission of prior inconsistent statements as substantive evidence.[25] The third did not rely on any expansive hearsay theory, but eloquently stated the rationale for enacting the catchalls in dicta:

> We are loath to reduce the corpus of hearsay rules to a strait-jacketing, hypertechnical body of semantical slogans to be mechanically invoked regardless of the reliability of the proffered evidence. Instead, "we should indeed welcome," as Judge Learned Hand once wrote, "any efforts that help disentangle [sic] us from the archaisms that still impede our pursuit of truth."[26]

The fourth case was one in which the defense, rather than the prosecu-

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21. *See, e.g.*, CAL. EVID. CODE § 1238 (West 1966); HAWAII EVID. CODE § 802.1 (1985); MONTANA R. EVID. 801; OHIO EVID. RULE 801 (1980); Gilbert v. California, 388 U.S. 263, 272 n.3 (1967).

22. *Barbati*, 284 F. Supp. at 409.

23. La Porte v. United States, 300 F.2d 878, 881-82 (9th Cir. 1962). The court in *La Porte* admitted a Selective Service Form 153 under 28 U.S.C. § 1733 and as an official record. The supervisor who testified had no independent recollection of the case but described the office procedure concerning the form's creation. The only case citing *Barbati* prior to 1976 was Chubbs v. City of New York, 324 F. Supp. 1183 (E.D.N.Y. 1971), also a Weinstein decision. Chubbs, who had been convicted of first degree sodomy and burglary and second degree assault, brought a habeas corpus challenge to the testimony of a police officer who testified about the victim's identification of Chubbs. The court dismissed the habeas corpus petition, holding that it did not raise a constitutional issue. *Id.* at 1187, 1194.

24. United States v. De Sisto, 329 F.2d 929, 933 (2d Cir. 1964). In United States v. Nuccio, 373 F.2d 168, 172 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967), the Second Circuit refused to extend *De Sisto* to require the admission of inconsistent statements of a witness made at a trial of other defendants as substantive evidence.

25. United States v. Schwartz, 390 F.2d 1, 3-4 (3d Cir. 1968). The district court had relied on *De Sisto* in admitting the evidence. The appellate court did not decide whether it would follow *De Sisto* because it found that the statement lacked the guarantees of trustworthiness that had been found in the *De Sisto* case. *Schwartz*, 390 F.2d at 5-6.

26. United States v. Castellana, 349 F.2d 264, 276 (2d Cir. 1965) (quoting United States v. Allied Stevedoring Corp., 241 F.2d 925, 934 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957)). The *Castellana* court found that the statement at issue, which was made in deposition testimony, either met the co-conspirators exception or was harmless error. *Id.* at 275-77.

tion, introduced evidence which would have met the criteria of the proposed former testimony exception.[27]

The final case was the only one that raised confrontation concerns. In *United States v. Kearney*[28] a statement was made by a dying officer to a detective approximately twelve hours after he was shot, and one hour after awakening from the anaesthetic administered in his first of two operations. The statement consisted of a description of his assailant and of what happened. The officer died during the second operation. The court stated that it need not decide if this was either an excited utterance, as labeled by the trial judge, or a dying declaration because it could not find error in the trial judge's decision that the evidence was "fundamentally reliable."[29] The court in *Kearney* considered the statement to be in the "penumbra" of both exceptions. In an extended footnote, the court discussed how the statement related to both exceptions and would have been admitted as such by some courts.[30] It is likely that the introduction of the statements would have been harmless error, if any error at all under traditional hearsay analysis.

As the preceding discussion shows, the drafters had no reason to believe that the catchalls would have any significance in criminal cases, let alone in cases in which the declarant did not testify. This premise is reinforced by examining then-existing Confrontation Clause[31] analysis in connection with the decision not to codify confrontation law in the evidence rules. In 1975 the explosion of Confrontation Clause cases in the Supreme Court was barely in its infancy. The Court had only hinted that the clause would permit the use of critical hearsay of nontestifying declarants who had not been subjected to cross-examination in circumstances other than those exemplified by such rarities as dying declarations.[32] For example *Douglas v. Alabama*[33] and *Pointer v. Texas*[34] could be interpreted as forbidding admission of any statement

27. United States v. Brown, 411 F.2d 1134, 1137 (10th Cir. 1969) (holding that trial court's refusal to admit evidence was prejudicial error).

28. 420 F.2d 170, 174-75 (D.C. Cir. 1969).

29. *Id.* at 175.

30. *Id.* at 175 n.11. In relation to a different asserted error, the court indicated that as to the issue of the assailant's identity, "the possibility of mistaken identity is strongly negatived—if indeed it is not eliminated beyond reasonable doubt—by the scientific evidence." *Id.* at 174. There was also an eyewitness who testified and the statements were used as corroboration.

31. "In all criminal prosecutions the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." U.S. CONST. amend VI.

32. Mattox v. United States, 156 U.S. 237, 243-44 (1895).

33. 380 U.S. 415 (1965).

34. 380 U.S. 400 (1965).

that is not subject to cross-examination at trial.[35] The focus in *California v. Green*[36] was directed to out-of-court statements of the witness, some of which were given in a preliminary hearing. Only *Dutton v. Evans*[37] pertained to hearsay of a declarant who did not testify at trial. Yet the rationale of that plurality decision was so confusing that *Idaho v. Wright*[38] recently confirmed what commentators had long argued—that the case ultimately rested on harmless error.

Congress declined to import constitutional requirements into the evidence rules because to the extent the rules conflicted with the Constitution they would be invalid. This philosophy was specifically described as follows: "[T]he basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise."[39]

Given the state of confrontation law in 1975, however, few recognized the threat to criminal defendants implicit in an expansive interpretation of the catchalls. Confrontation was clearly an ongoing congressional concern in relation to other proposed rules, including Rules 804(b)(2)[40] and 804(b)(4),[41] yet it was only at the very moment before voting on the entire set of Rules that any outcry was made about the potential of the catchall enacted as Rule 804(b)(5) to adversely impact criminal defendants. When the Conference Report was presented to

35. In New Mexico v. Earnest, 477 U.S. 648, 649 (1986), four Justices noted that "to the extent that *Douglas v. Alabama* interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a co-defendant's out-of-court statement, the case is no longer good law." *See also Pointer*, 380 U.S. at 403-05 (fundamental right of confrontation includes right of cross-examination).

36. 399 U.S. 149, 153 (1970).

37. 400 U.S. 74, 77 (1970).

38. 110 S. Ct. 3139, 3150-51 (1990).

39. *See* S. REP. NO. 1277, *supra* note 14, at 22 (commentary concerning statements against penal interest), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 22.

40. *See* RULES OF EVIDENCE: HEARINGS BEFORE THE SPECIAL SUBCOMM. ON REFORM OF FEDERAL CRIMINAL LAWS OF THE COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 93d Cong., 1st Sess. 513, 541 (Mar. 15, 1973) (dialogue between Mr. Hungate and Mr. Cleary), *reprinted in* 3 BAILEY & TRELLES, *supra* note 3, Doc. 11, at 541. Ultimately this rule, which would have permitted statements of recent perception of unavailable declarants, was not adopted.

41. Proposed Fed. R. Evid. 8-04(b)(4), 46 F.R.D. 377 (1969), *reprinted in* 3 BAILEY & TRELLES, *supra* note 3, Doc. 5, at 206. The House version of declarations against interest which was ultimately enacted as Federal Rule of Evidence 803(b)(3) would have codified its understanding of Bruton v. United States, 391 U.S. 123 (1968). The Senate deleted the provision.

the House, Representative Holtzman protested that proposed Rule 804(b)(5):

> [B]asically abolishes the rules against hearsay and leaves it to the discretion of every judge to let in any kind of hearsay that he wants. This is true for criminal as well as civil cases.
>
> One of the basic assumptions in our system of jurisprudence is that the defendant in criminal trials has the right to confront his accuser. To abolish all prohibitions against hearsay really abridges our concept of a fair trial, aside from creating some Sixth Amendment problems.[42]

Her concerns were echoed by Representatives Eckhardt and Danielson.[43] Representative Dennis responded for the Conference Committee by stating that "I prefer to leave this 'catchall' provision out, but I do think it is not really as bad as has been made out here; and certainly in a criminal case if there is anything unconstitutional about it it cannot be done, of course."[44] He continued by asserting that "I am supporting it as a reasonable compromise which really does not add a whole lot"[45] because common law courts already could and occasionally did graft new exceptions onto the hearsay rule. Ms. Holtzman was not satisfied, and asked whether police reports could be admitted under the catchall without any officer testifying, although specifically excluded elsewhere.[46] Mr. Dennis answered that "I cannot see how anybody could suggest that introducing such a report is possible."[47]

Representative Mayne then gave an impassioned plea that two years of congressional review and seven years of work by the Advisory Committee would be wasted if the report was voted down. He contended that due to changes in membership of the Judiciary Committee, "this very complicated subject would have to be taken up from scratch by new members having no familiarity with it."[48] The combination of downplaying any significance of the catchalls in criminal prosecutions and threatening that the Rules might never be enacted led to their approval in the House.[49] Ultimately, if the only function of the catchalls was to provide a rarely used safety valve, primarily in civil cases, there was no reason to derail the enactment of the Rules to impose criteria limiting

42. 120 CONG. REC. 40,892 (1974).
43. *Id.* at 40,893-94.
44. *Id.* at 40,894.
45. *Id.*
46. *Id.* at 40,895.
47. *Id.*
48. *Id.*
49. *Id.* at 40,896-97 (by a vote of 363 to 32, with 39 not voting).

their use against criminal defendants, particularly when such hearsay would likely be rejected anyway as impinging on confrontation values.

Given this legislative history and the then-existing confrontation case law, only a doomsayer would have prophesied how successful prosecutors would later become in convicting defendants by introducing statements of absent declarants pursuant to the judge's discretion to admit trustworthy hearsay. It is ironic that when the catchalls were enacted no one even thought to raise the specter of Sir Walter Raleigh being sent to his death based on the affidavit of an alleged co-conspirator who recanted his torture-procured testimony, and on the testimony of a pilot relating the opinion of a Portuguese gentleman.[50]

## II. THE HEARSAY WOLF

### *A. The Hearsay Wolf Arrives Dressed in Sheep's Clothing*

The past sixteen years have underscored the naiveté of permitting lawyers to argue that judges should use their discretion to admit "trustworthy" hearsay without providing any significant restrictions in the catchall language. Although Congress praised the restraint that common law judges had shown in developing hearsay policy, in reality lawyers and judges were citing *Dallas County v. Commercial Union Assurance Co.*[51] regularly as support for expansive evidentiary interpretations, with at least ten of the nearly fifty decisions directed at otherwise inadmissible hearsay. It was only natural that codifying the catchalls would lead to their ever-increasing popularity. From their enactment in 1975 to July 1991, more than 400 decisions have considered the admissibility of hearsay pursuant to the catchalls,[52] or roughly eight times the entire number of cases that cited *Dallas County* in a comparable timeframe. In a complete turnaround, however, approximately sixty percent of the catchall cases are criminal, in contrast to the negligible references to expansive hearsay interpretation in criminal proceedings prior to 1975.[53] In fact,

50. *See, e.g.*, 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 333-36 (London, MacMillan 1883); Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 99-101 (1972).

51. 286 F.2d 388 (5th Cir. 1961).

52. Cases are included in the study if the catchall is used as the basis of the decision as well as if the catchall is cited as an alternative reason justifying the decision. The catchall study is on file with the author. *See* Myrna S. Raeder, *Confronting the Catch-Alls*, 6 CRIM. JUST. 31, 31 (1991) [hereinafter Raeder, *Catch-Alls*]; Myrna S. Raeder, *Comments Concerning Professor Swift's Paper: Has the Hearsay Rule Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. (forthcoming 1992) (manuscript at 8, on file with author) [hereinafter Raeder, *Comments*].

53. Raeder, *Comments*, *supra* note 52 (manuscript at 2 n.2, on file with author).

more than forty percent of all hearsay sought to be introduced under the catchalls is proffered by prosecutors.[54]

While the catchalls affect both civil and criminal litigation, their use as a prosecutorial weapon in the war against crime, a role never envisioned, raises a number of concerns. Of the roughly 250 catchall criminal cases, almost seventy percent are attempts by prosecutors to admit hearsay whose admission is doubtful under the specific exceptions.[55] Not only are prosecutors prolific catchall users, but they are quite successful in persuading judges to admit such hearsay in district courts and then having the admission upheld on appeal. Close to eighty-one percent of the prosecutor's catchall hearsay is ultimately admitted.[56] Appellate review of catchall hearsay for abuse of discretion and harmless error ultimately diminishes the likelihood that criminal defendants can obtain reversals of their convictions. Approximately twenty-five percent of the appellate cases which affirmed catchall criminal convictions referred to harmless error.[57] An even more troubling concern is the asymmetry of success rates between prosecutors and defendants trying to use the catchalls. Criminal defendants succeed only in fifteen percent of their attempts to affirmatively use the catchalls.[58] Even if one were to subtract appeals won by prosecutors in cases which refer to harmless error, there is still an overall sixty-four percent prosecutorial success rate in district and appellate courts.[59]

### *B. The Hearsay Wolf Knocks on Grandmother's Door*

It is difficult to imagine that the trustworthiness of prosecutorial hearsay is so far superior to that of defense hearsay to warrant such different results. It is unlikely that the inability of prosecutors to appeal from acquittals accounts for this discrepancy, given the low percentage of acquittals and the significant disparity of success between prosecutors and defendants in district court.[60] Moreover, prosecutors can appeal from adverse pretrial evidentiary rulings.[61] Nor is it probable that de-

54. *Id.* (manuscript at 2 n.2, on file with author).

55. Raeder, *Catch-Alls*, *supra* note 52, at 31.

56. Raeder, *Comments*, *supra* note 52 (manuscript at 4, on file with author).

57. Of 118 appellate cases in which the prosecutor's use of catchall hearsay was affirmed, 29 contained a reference to harmless error. Raeder, *Comments*, *supra* note 52 (manuscript at 4, on file with author).

58. Raeder, *Comments*, *supra* note 52 (manuscript at 4, on file with author); *see* Raeder, *Catch-Alls*, *supra* note 52, at 31.

59. Raeder, *Comments*, *supra* note 52 (manuscript at 4-5, on file with author).

60. *Id.* (manuscript at 5, on file with author).

61. 28 U.S.C. § 3731 (1988); *see* United States v. Mokol, 939 F.2d 436, 437 (7th Cir. 1991) (interlocutory appeal by government from adverse catchall ruling).

fense catchall hearsay is often admitted, but does not surface on appeal, since the ever present discussion of defense evidence in harmless error analyses would reveal such admissions.

As I have argued in another article, the catchalls undermine the structure of the hearsay rules, resulting in a discretionary approach to hearsay to the detriment of fixed rules.[62] Their existence permits judges and lawyers to be sloppy because difficult hearsay questions do not have to be carefully analyzed if the catchall provides a ready escape clause. There is even a tendency to cite the catchalls for simple hearsay problems because their criteria may be easier to satisfy than those of specific hearsay exceptions. Moreover, the expansive nature of catchall offers has not been curbed at the appellate level because of the combined effect of harmless error and abuse of discretion on reversals.

The lack of predictability in catchall application is debilitating to litigators who must evaluate whether or not to settle the case. In the criminal arena, the discretionary aspect of the catchalls is particularly troubling. It has been posited that discretionary rulings rarely benefit criminal defendants.[63] If this is true, the present catchalls preordain that most prosecutorial hearsay will be admitted simply because Federal Rules 803(24) and 804(b)(5) have few restrictions other than trustworthiness, despite the intent to limit the catchalls to exceptional cases.[64]

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62. Raeder, *Comments*, *supra* note 52 (manuscript at 7-12, on file with author).

63. *See* Eleanor Swift, *Has the Hearsay Rule Been Abolished De Facto By Judicial Decision*, 76 MINN. L. REV. (forthcoming 1992); J. Alexander Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 865 (1989).

64. Federal Rule of Evidence 803(24) provides that the following documents are not excluded by the hearsay rule even though the declarant is available as a witness:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24).

Federal Rule of Evidence 804(b)(5) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception

The catchalls do not require findings of fact, nor clear and convincing evidence of trustworthiness or necessity. The materiality requirement is synonymous with relevance, which is required for all evidence. Serving the "interests of justice" has been construed as affirming the discretionary nature of the judge's decision to admit catchall statements.[65] Even the meaning of "equivalent circumstantial guarantees of trustworthiness" has remained elusive, since the twenty-seven categorical exceptions used for comparison have widely varying rationales for justifying the admission of hearsay.

The catchall notice provision has not provided a sufficient opportunity to challenge the hearsay evidence because of the flexible approach taken by many courts that have permitted notice at trial.[66] In addition, notice is an illusive protection in criminal cases because the defense is not entitled to depose witnesses. Thus, the declarant as well as the prosecutor's potential witnesses can refuse to talk to the defense.

The only restriction that may have stemmed the catchall tide is the requirement that the statement be more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable means. The Senate intended this "to insure that only statements which have high probative value and necessity"[67] would be admitted. However, this provision has rarely been viewed as imposing any additional condition on the catchalls. This is best demonstrated by the large number of decisions finding the admission of catchall hearsay to be harmless error.[68] If catchall evidence is only cumulative, it should never have been admitted in the first place. All catchall errors which do not result in reversals merely confirm that the exceptions have become a dumping ground for the discretionary admission of ordinary reliable hearsay.

Today the catchalls routinely permit "near misses" to be introduced against criminal defendants.[69] A "near miss" just falls short of a recog-

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unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5).

65. Raeder, *Catch-Alls*, *supra* note 52, at 32.

66. *See, e.g.*, United States v. Doe, 860 F.2d 488, 492 (1st Cir. 1988) (not receiving notice before trial does not constitute grounds for denying hearsay evidence when defendant does not object), *cert. denied*, 490 U.S. 1049 (1989). See also Raeder, *Catch-Alls*, *supra* note 52, at 34-36, for a more detailed discussion of this problem.

67. S. REP. NO. 1277, *supra* note 14, at 18, *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 19.

68. Raeder, *Catch-alls*, *supra* note 52, at 32-33.

69. *See id.* (discussing near-miss theory popularized in Zenith Radio Corp. v. Matsushita

nized hearsay exception, and may encompass a category of hearsay that was rejected from inclusion as an exception. Thus, if the catchalls did not exist, grand jury testimony of an unavailable witness could not be introduced.[70] Testimony of child witnesses that are not excited utterances or statements for medical diagnosis or treatment would be inadmissible. Quasi-business records that cannot meet the foundation required by Rule 803(6) would not be permitted. Official records that violate Rule 803(8)(B) because they reflect the observations of law enforcement personnel would not have an alternative route to admission. Prior consistent and inconsistent statements not meeting the criteria of Rule 801 would not be admitted substantively. Yet current catchall interpretation gives the judge discretion to admit hearsay evidence under all of these hidden categories.[71]

Do so many more categories of reliable hearsay exist today than previously which warrant admission? Or have the catchalls turned what were once considered police and prosecutorial investigative tools into evidence?[72] In other words, are law enforcement personnel now obtaining and recording more statements than before or are prosecutors merely attempting, often successfully, to introduce more of these statements? Certainly the evidence rules encourage prosecutors to routinely dispatch witnesses to the grand jury, since prior inconsistent statements are only admitted substantively if given under oath in some proceeding. Thus, the logical way to protect against a turncoat witness also creates an opportunity under the catchall when the declarant becomes unavailable. One commentator suggests that the reason prosecutors must turn to the catchalls is because the specific exceptions reflect the historical suspicion of government-created hearsay.[73]

Pressure points in the criminal justice system appear to drive prosecutors to the catchalls, with drug cases providing approximately one-third of the criminal catchall citations in the last five years. Child abuse cases have recently become more prevalent in federal court, raising

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Elec. Indus. Co., 505 F. Supp. 1190, 1262-64 (E.D. Pa. 1980), *rev'd sub nom. In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986)).

70. Raeder, *Catch-Alls*, *supra* note 52, at 33; *see* 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, 445 (1985).

71. *See* Raeder, *Catch-Alls*, *supra* note 52, at 33.

72. See Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 94-104 (1987), for an insightful analysis of the difficulties which would arise if the hearsay rule were abolished in criminal cases, including encouraging abuse of governmental power.

73. Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485, 495 (1987).

catchall issues concerning frightened, inarticulate witnesses as well as children who do not testify at all.[74] A number of state catchall cases regarding child witnesses are also being reviewed in federal court on constitutional grounds in habeas corpus actions.

Quasi-business and official records often appear to be offered pursuant to the catchalls because of sloppy trial preparation or as an end-run against the ban on statements made by law enforcement personnel found in Rule 803(8).[75] Statements to law enforcement officials by a variety of declarants are proffered for several reasons. First, too few people have a sense of responsibility about being a good citizen that includes participation in trials that do not directly affect them. Second, our criminal justice system often severely inconveniences witnesses, discouraging those who do not want to make numerous futile appearances. Third, due to the restricted discovery in criminal cases, prosecutors do not always prepare their cases until shortly before trial, at a time when it may be too late to do additional investigation or obtain a witness. Finally, prosecutors sometimes prefer presenting the hearsay of unsympathetic declarants, such as informers and accomplices, through the testimony of credible police officers.

One might also ask what effect the catchalls have on the number of criminal trials. Even without the catchalls, the Sentencing Guidelines[76] have undoubtedly resulted in more cases being tried,[77] because a defendant's sentence is not likely to be substantially lower if a plea is entered

74. *See, e.g.*, United States v. Ellis, 935 F.2d 385, 394-95 (1st Cir.), *cert. denied*, 112 S. Ct. 210 (1991) (holding admissible social worker's testimony relating child's statements concerning play with anatomically correct dolls pursuant to Rule 803(24) where court found child too young to testify); United States v. St. John, 851 F.2d 1096, 1098-99 (8th Cir. 1988) (holding admissible statements made by child to social worker and clinical psychologist pursuant to Rule 803(24) where child's testimony at trial was hindered by his age, developmental problems and inability to verbalize the delicate nature of the offense); United States v. Azure, 801 F.2d 336, 342 (8th Cir. 1986) (questioning admissibility of out-of-court statement by child to social worker under catchall exceptions).

75. Federal Rule of Evidence 803(8) provides that the following documents are not excluded by the hearsay rule even though the declarant is available as a witness:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8).

76. 18 U.S.C. § 3553 (1988 & Supp. 1991).

77. *See, e.g.*, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1989, tbl. 5.21, at 498 (Timothy Flanagan & Kathleen Maguire eds., 1990).

unless the prosecutor reduces the charges in a way that materially affects the maximum penalty that the defendant can receive. As a result, prosecutors may be forced to try more troublesome cases, which would have been disposed of by generous plea bargains in prior years. Such cases place additional pressure on prosecutors to resort to the catchalls. Prosecutors who use the catchalls are simply taking advantage of the evidence rules to meet their high burden of proof. The existence of the catchalls, however, encourages them to take risks and the discretionary character of the rulings gives them a significant advantage over criminal defendants.

While the Confrontation Clause is still the ultimate barrier to trial by untested hearsay, such protection is much less expansive than at the time the Federal Rules were drafted. This is not to imply that all hearsay will survive a Confrontation Clause challenge. *Lee v. Illinois*[78] and *Idaho v. Wright*[79] demonstrate that some life still lingers in confrontation jurisprudence. But, if the catchalls did not exist, courts would never reach the confrontation question because the evidence simply would not be admissible under any evidentiary theory. Moreover, in cases where the declarant testifies, the catchall trumps because the Confrontation Clause is not ordinarily implicated.[80] Therefore, when asked if the catchalls matter, the answer for criminal defendants is yes—with a vengeance.

## III. SHOULD LITTLE RED RIDING HOOD BE SAVED?

Merely uncovering the continued prosecutorial use of the catchalls is not enough. The real question is: should we care? What values, if any, are threatened by the overuse of the catchalls against criminal defendants? Does the nation's preoccupation with crime, drugs and child abuse justify the unforeseen expansion of the catchalls to ensure that society is better protected than it would be without them? Certainly, the admission of most so-called "trustworthy" hearsay does make it easier for the prosecution to convict defendants by providing the fact finders with additional relevant evidence as well as corroboration for existing evidence. Indeed, if one believes the storytelling model of jury decision-

78. 476 U.S. 530 (1986).

79. 110 S. Ct. 3139 (1990).

80. *See* United States v. Owens, 484 U.S. 554, 559 (1988) (Steven, J., concurring) (witness's out-of-court identification of accused admissible and does not violate Confrontation Clause where witness cannot recall identification at trial); *cf.* Maryland v. Craig, 110 S. Ct. 3157, 3167 (1990) (permitting testimony of child via closed circuit television upon specific finding that child's testimony in courtroom in presence of defendant would result in child suffering serious emotional distress such that child could not reasonably communicate).

making,[81] such hearsay may act as the glue that cements together the prosecutor's theory of the case. If so, the government's case is considerably strengthened by the admission of reliable hearsay, which considered by itself might not be regarded as critical. Even speculative gossip can sound believable; otherwise why would someone repeat it? Similarly, "trustworthy" hearsay is likely to be deemed credible, unless shown otherwise.

Ultimately, the rationale favoring catchall admission focuses on necessity. By loosely interpreting the catchalls, courts produce more guilty verdicts that are saved on appeal because cases are not reversed unless trial courts abuse their discretion, and the resulting error is not harmless. On appeal, gauging the prejudice to the defendant is particularly daunting because one can never know whether the absence of the catchall information would have negated the theory of the case adopted by the jury.

### *A. Should the Hearsay Wolf Be Tamed?*

Hearsay theory, Confrontation Clause analysis and other process concerns must be evaluated in determining the proper response to the overuse of the catchalls by prosecutors. Whether one views the hearsay rule as the child of the adversary system or the child of the jury system, it is an exclusionary rule setting boundaries on what jurors can consider. The dangers posed by the inability to evaluate the sincerity, perception, memory and narration of the out-of-court declarant underly the hearsay rule. The justifications for not liberalizing the hearsay rule in criminal cases include concerns about: (1) distortion of testimony; (2) providing a tactical advantage to the prosecutors in criminal actions, who are likely to have more access to hearsay; (3) providing a tactical advantage to prosecutors because hearsay makes it easier to establish a prima facie case; (4) distrust of judges; and (5) systemic effects resulting in less first-hand testimonial accounts, which may threaten the integrity of the trial process.[82] The dangers of fabrication and perjury are particularly troubling when the declarant is unavailable.[83]

Professor Swift's analysis of the problems associated with abolishing the hearsay rule raises similar concerns.[84] She identifies the following

81. *See, e.g.*, Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 396-406 (1991); *see generally* Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986).

82. RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 520-25 (2d ed. 1982).

83. Park, *supra* note 72, at 73-74.

84. *See* Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495 (1987) [hereinaf-

problems: (1) jurors will have fewer facts about the testimonial qualities of declarants who are not identified;[85] (2) more cases will be submitted to the jury that require hard choices between conflicting inferences concerning statements made by "risky" self-interested declarants;[86] and (3) the hearsay proponent will obtain a tactical advantage by not being required to provide a witness who is knowledgeable about the contents of documents, while adding a burden to the opponent to discredit the document.[87] Even if one can adequately evaluate hearsay not fitting into the categorical exceptions, its admission should be suspect because the advantage is shifted to the prosecutor who is provided with additional evidence to help meet the burden of production and persuasion.

Undoubtedly, some will argue that we should trust the common sense of jurors more than we do, and claim that judges are no better suited to determine trustworthiness than jurors. The hearsay rule admittedly is rooted in a distrust of jurors. In contrast, the catchalls manifest a total belief in the ability of jurors to sort the wheat from the chaff so long as the judge considers it trustworthy. What does trustworthiness mean? Many of the exceptions assume that the circumstances surrounding the statement ensure that the statement was reliable when made. Yet cross-examination of declarants concerning such statements could reveal their feet of clay. Indeed, changing psychological and religious beliefs undermine some of the assumptions supporting some exceptions. Is a person more likely to be correct when excited? Is someone who is dying always motivated to be truthful?

The manner in which courts determine catchall trustworthiness is currently in flux. Many courts have relied on corroboration to support admission of such catchall categories as grand jury testimony.[88] The Court in *Idaho v. Wright*,[89] however, recently held that for confrontation purposes trustworthiness must be determined by the totality of the circumstances surrounding the making of the statement that render the declarant's statement particularly worthy of belief. Thus, physical or other confirming evidence from witnesses is not to be considered in the constitutional trustworthiness analysis. It is unclear whether courts will uniformly adopt this standard for determining the evidentiary admissibility of catchall hearsay. If they do not, however, the catchall trustworthiness

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ter Swift, *Abolishing Hearsay*]; Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339 (1987).

85. Swift, *Abolishing Hearsay*, *supra* note 84, at 499.

86. *Id.* at 510-12.

87. *Id.* at 514.

88. Raeder, *Catch-Alls*, *supra* note 52, at 36-37.

89. 110 S. Ct. 3139, 3148 (1990).

standard will be meaningless in cases where the declarant is unavailable because the standard would permit hearsay by relying on the very corroboration that must be excluded for Confrontation Clause purposes. Moreover, as the court in *Wright* noted, "[t]here is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement."[90]

When the confrontation issue is not implicated or raised, or is incorrectly decided by the trial court, injecting corroboration into the trustworthiness analysis effectively merges harmless error doctrine with evidence law. There may be benefits of such a merger. For example, if the defendant is not promised a perfect trial, why decide difficult evidence issues that are ultimately not important to the outcome of the case? On the other hand, this approach devalues the role of cross-examination in criminal trials. Furthermore, as previously mentioned, catchall hearsay is not intended to encompass unimportant information.

While it is too soon to tell if *Wright*'s trustworthiness criteria will result in more careful catchall rulings, at least one recent case reversed the admission of grand jury testimony based on the new standard.[91] Obviously, if judges exclude corroboration from their original assessments of whether the hearsay is reliable enough to meet the Confrontation Clause, less hearsay will be admitted than if corroboration were considered in the trustworthiness analysis. On appeal, of course, such corroboration will be examined in determining the existence of harmless error.[92]

The routine admission of catchall hearsay should not be permitted regardless of whether the evidence is reliable by virtue of the circumstances surrounding its creation or by reference to corroboration. In either event, cross-examination often has more than marginal utility. The fact that a statement has some reliability is not the same as saying that it is free from doubt. For example, cross-examination of a declarant could reveal the presence of bias or stress or reveal mistaken assumptions that are not obvious on the face of the statement.

Moreover, it is much more difficult to contest the validity of a statement when the witness in court is an authoritative or sympathetic person who has no or few testimonial disadvantages. For example, compare a police officer testifying about a statement made by one of the defendant's cohorts with the testimony of the declarant. The police officer will usually be a good witness, one to whom the jurors can relate—articulate,

90. *Id.* at 3151.

91. United States v. Gomez-Lemos, 939 F.2d 326, 327 (6th Cir. 1991).

92. *Wright*, 110 S. Ct. at 3150-51.

confident and usually not in possession of information that discredits the hearsay.

The declarant, in contrast, is usually not a good witness and will likely be viewed as trying to exculpate himself or herself. The declarant's appearance and testimony will often put off the jury, and at best, will result in the impression that he or she is either biased or evasive. Similarly, if an officer testifies to the statements of the defendant's estranged wife, her mixed motives cannot be presented to the jury as forcefully by presenting her impeachment through the officer's testimony as by cross-examining her. A child witness may give contradictory or coached testimony or be manipulated by parents or other authority figures. Such infirmities are less likely to be exposed when the medical doctor or teacher testifies to statements made by that child than if the child were to testify. Countervailing arguments based on the cost or inconvenience of producing declarants scarcely provide enough justification to warrant foregoing the protections of the hearsay rule in criminal cases.

### *B. Confronting the Hearsay Wolf*

Beyond hearsay theory, what if any protection does the Confrontation Clause offer from overuse of the catchalls? In 1975 the strict interpretation of the Confrontation Clause led Congress to assume that there would be relatively few attempts to rely on the catchalls when the declarants were unavailable for trial. The constitutional revolution that has occurred in the past ten years has frustrated this expectation by substituting a minimalist approach to confrontation and other individual liberties.

As a result, the United States Constitution must currently be viewed as providing a floor rather than a ceiling for such rights. Both confrontation and due process analysis are viewed as balancing tests which weigh the competing interests of effective law enforcement and accurate factfinding.[93] The United States Supreme Court is primarily concerned with confrontation as a functional right that promotes reliability in criminal trials. In particular, the Sixth Amendment now acts as a virtual rubber stamp for traditional hearsay exceptions.[94] Even statements ad-

93. *See* Ohio v. Roberts, 448 U.S. 56, 64 (1980) (confrontation analysis); Manson v. Brathwaite, 432 U.S. 98, 111-13 (1977) (due process analysis).

94. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 183-84 (1987) (holding that Confrontation Clause does not require court to independently inquire into reliability when evidence falls within firmly rooted hearsay exception, such as Rule 801(d)(2)(E), which allows out-of-court statements by co-conspirators to be admitted); *Roberts*, 448 U.S. at 66 (particularized search for indicia of reliability unnecessary when prior testimony at preliminary hearing was subject to cross-examination, even though declarant now unavailable for trial).

White v. Illinois, 112 S. Ct. 736, 742 n.8 (1992), recently embraced this approach when it

mitted pursuant to the catchalls, which do not otherwise fall within a firmly rooted hearsay exception, may be sufficiently trustworthy to satisfy the Confrontation Clause,[95] because cross-examination is not the exclusive means of determining if hearsay has particularized guarantees of trustworthiness.[96]

The focus of confrontation has shifted from the right to cross-examine declarants of out-of-court statements to the right to prohibit unreliable hearsay.[97] This approach confers constitutional status on Wigmore's analysis of hearsay logic. Wigmore believed that when it is sufficiently clear that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, "cross-examination would be a work of supererogation."[98] *Idaho v. Wright*[99] interpreted this to mean that hearsay is permitted when "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."[100] In a sleight of hand, *Wright* then transformed this explanation into a test for determining whether the Confrontation Clause has been violated. First, the Court asserted that " 'firmly rooted' hearsay exception[s] are so trustworthy that adversarial testing would add little to their reliability."[101] Second, the Court required that other hearsay, which must demonstrate " 'particularized guarantees of trustworthiness' . . . [be] so trustworthy that adversarial testing would add little to their reliability."[102]

*Wright* does limit the search for reliability to the inherent trustworthiness of the statement, thereby excluding reference to other evidence at trial.[103] However, this restriction is also grounded in the quest for reliability, since such corroboration "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement

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noted that spontaneous declarations and statements made for purposes of medical diagnosis or treatment were both firmly rooted. As a result, the Court held that no showing of unavailability of the declarant is necessary to survive a Confrontation Clause challenge. *Id.* at 743. Thus, any statement which is admitted pursuant to either of these exceptions automatically passes the Confrontation Clause analysis. *Id.*

95. *See* Idaho v. Wright, 110 S. Ct. 3139, 3147 (1990).

96. Lee v. Illinois, 476 U.S. 530, 543 (1986).

97. *See* JoAnne A. Epps, *Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?*, 77 KY. L.J. 7, 46 (1988-89).

98. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1420, at 251 (Chadbourn rev. 1974).

99. 110 S. Ct. 3139 (1990).

100. *Id.* at 3149.

101. *Id.*

102. *Id.*

103. *Id.* at 3150.

that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility."[104]

Even the dissenters in *Wright*, who would rely on corroboration, do so by analogy to Fourth Amendment cases that are "premised upon the idea that corroboration is a legitimate indicator of reliability."[105] While *Wright* held that introduction of a particular statement of an unavailable child pursuant to Idaho's catchall violated the Confrontation Clause, it rejected a rule which would per se exclude any statements of child declarants as frustrating the truth-seeking purpose of the Confrontation Clause and hindering states in developing their law of evidence.[106] Thus, confrontation is now viewed primarily as preventing convictions based on unreliable out-of-court evidence.

### *C. Should Live Testimony Vanquish the Hearsay Wolf?*

The pursuit of reliability downplays confrontation as a constitutional preference for live testimony. The United States Supreme Court has repeatedly made clear that the word "confront" does not prohibit the admission of all accusatory hearsay statements made by an absent declarant.[107] When the declarant is unavailable, necessity dictates that the hearsay be admitted if it is trustworthy.[108] In other words, the public's "strong interest in effective law enforcement," may tip the balance against the interests of the accused.[109] The Court has further devalued the benefits of cross-examination by eliminating any requirement for a showing of unavailability when evaluating co-conspirators' statements.[110] Yet permitting the defendant to call the declarant for impeachment purposes does not provide the same opportunity to discredit a witness as requiring the prosecution to present the declarant's direct testimony subject to cross-examination. In dissent, Justice Marshall has protested that " '[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the great-

104. *Id.*

105. *Id.* at 3156 (Kennedy, J., dissenting). Rehnquist, C.J., White & Blackmun, JJ. joined in the dissent.

106. *Id.* at 3151-52.

107. Maryland v. Craig, 110 S. Ct. 3157, 3164-65 (1990).

108. Ohio v. Roberts, 448 U.S. 56, 65 (1980).

109. *Id.* at 64.

110. *See* United States v. Inadi, 475 U.S. 387, 399-400 (1986).

est safeguard of American trial procedure.' "[111]

On the other hand, the Court acknowledges that " 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' "[112] even though it " 'must occasionally give way to considerations of public policy and the necessities of the case.' "[113] Thus, it has not entirely forsaken other values inherent in a trial with live witnesses. The Court in *Maryland v. Craig*[114] quoted extensively from *Mattox v. United States*,[115] a seminal Confrontation Clause case which defined the nature of the right as follows:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[116]

Nevertheless, much of what is being admitted pursuant to the catchalls appears to be exactly what *Mattox* would prohibit. For example, admitting grand jury testimony and statements made to law enforcement personnel is contrary to the spirit of *Mattox*.

Similarly, *Craig* recognized that confrontation has other benefits. Confrontation:

> (1) [I]nsures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defend-

111. *Id.* at 410 (Marshall, J., dissenting) (quoting New York Life Ins. Co. v. Taylor, 147 F.2d 297, 305 (D.C. Cir. 1945)).

112. Maryland v. Craig, 110 S. Ct. 3157, 3165 (1990) (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

113. *Id.* (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

114. *Id.* at 3163-65.

115. 156 U.S. 237, 242-43 (1895).

116. *Craig*, 110 S. Ct. at 3163 (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)).

> ant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[117]

The preference for face-to-face accusation has been considered a basic political commitment to shared responsibility for criminal outcomes, which emphasizes the moral responsibility of witnesses as accusers and of juries as decision makers.[118] Discarding this preference for live testimony reduces the solemnity of trials, since no oath is taken, and the declarant is not required to face the accused or to be cross-examined. The overuse by prosecutors of the catchalls denigrates such process goals that are implicit in confrontation but are not addressed by decisions that look primarily at whether hearsay is reliable.

Moreover, if the criminal justice system reflects the shared values of our society concerning the preservation of individual rights against the power of the government, we should be wary of evidentiary rules that effectively lessen the prosecutor's obligation to prove each element of an offense beyond a reasonable doubt, even when such rules do not actually violate constitutional norms. Justice Harlan saw confrontation as providing a check against "flagrant abuses, trials by anonymous accusers, and absentee witnesses."[119] The Court recently reiterated that the "jury acts as a vital check against wrongful exercise of power by the State and its prosecutors."[120] Yet the shift towards reliability ignores the role of confrontation as a shield between the accuser and the accused.[121]

The focus on reliability also ignores broader societal goals. As the Court noted in a different context, "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."[122] In *Coy v. Iowa*[123] the Court acknowledged that confrontation " 'contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.' "[124] The Court has also recognized:

> To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's in-

117. *Id.* (quoting California v. Green, 399 U.S. 149, 158 (1970)).

118. Swift, *Abolishing Hearsay*, *supra* note 84, at 512 n.45.

119. California v. Green, 399 U.S. 149, 179 (1970) (Harlan, J., concurring).

120. Powers v. Ohio, 111 S. Ct. 1364, 1371 (1991).

121. *See* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 580 (1988).

122. *Powers*, 111 S. Ct. at 1372 (exclusions of black jurors can be raised by white defendant as violating Equal Protection Clause).

123. 487 U.S. 1012 (1988).

124. *Id.* at 1019 (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)).

> terest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.[125]

Similarly, the Court appreciates that it is more difficult to tell a lie about a person to his face than behind his back.[126] " '[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." ' "[127] Even a commentator whose review of the empirical literature led him to believe that transcripts were more reliable than live testimony, concluded that "[l]ive testimony may be essential to perceptions of fairness, regardless of the real relation between live testimony and accuracy of outcomes."[128]

Thus, we should care about the type of evidence used to convict a defendant in terms of the public perception of the fairness of the criminal justice system. We do not want to foster the perception that there are two systems of justice: one for affluent defendants who have high visibility or are accused of white collar crimes, in which live witnesses are the rule and the record on appeal is painstakingly reviewed for error; and another for the poor and minorities who are charged with violent crimes, in which courts appear to care less about the type of evidence which is adequate for conviction and rely heavily on harmless error.

Ultimately, our society must determine how much worse it is to convict an innocent defendant than to acquit a guilty one. The admonition of *In re Winship*[129] that it is "far worse to convict an innocent man than to let a guilty man go free,"[130] has been revised to read "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[131] We are constantly reminded that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."[132] It is time to recognize that the Con-

125. Lee v. Illinois, 476 U.S. 530, 540 (1986).

126. Maryland v. Craig, 110 S. Ct. 3157, 3164 (1990) (quoting Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988)).

127. *Id.* (quoting Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965))).

128. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1092 (1991).

129. 397 U.S. 358 (1970).

130. *Id.* at 372 (Harlan, J., concurring).

131. Patterson v. New York, 432 U.S. 197, 208 (1977).

132. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); *see also* United States v. Hasting, 461 U.S. 499, 508-09 (1983) (recognizing that "there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial"); Bruton v. United

frontation Clause may be an unreliable way to protect the criminal justice system against the onslaught of "trustworthy" hearsay.

Rather than criticizing the Supreme Court for its narrow reading of confrontation law, we should view this as an opportunity to enact evidentiary rules that exceed constitutionally required standards and incorporate criteria reflecting concerns about fairness in the adversary process.[133] In a universe of shrinking constitutional protections, evidence law becomes very important to criminal defendants. Without any evidentiary response, the overuse of the catchalls in criminal cases may ultimately affect the very character of criminal trials. To preserve trials in their current form where live witnesses are the rule rather than the exception, the catchalls should be revised. Only if trial courts must follow stringent criteria will they be less likely to let in ordinary or questionable hearsay pursuant to the catchalls.

### *D. Should Red Riding Hood Take Advantage of the Hearsay Wolf?*

While the focus of this Essay has been on the use of the catchalls against criminal defendants, it is necessary to briefly discuss use of the catchalls by the defense to determine how the exceptions should be revised in criminal cases. Given the existing catchall jurisprudence, it is important for defense counsel to fashion arguments to obtain as favorable treatment from courts as is currently being enjoyed by prosecutors.[134] However, revising the catchalls to encourage use by criminal defendants raises many of the same concerns about devaluing the preference for live witnesses. Moreover, the risks of fabrication must always be considered in evaluating such defense evidence. Even without any modification of the catchalls, in some cases the defendant's right to due process will require admission of hearsay barred by the evidence rules.[135] Similarly, the United States Supreme Court has agreed that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment the Constitution guarantees criminal defendants 'a meaningful opportunity

States, 391 U.S. 123, 135 (1968) (" 'A defendant is entitled to a fair trial but not a perfect one.' ") (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)).

133. States that have enacted the catchalls can also interpret their own constitutions as providing greater protection for such rights as confrontation than does the United States Constitution.

134. See Raeder, *Catch-Alls*, *supra* note 52, at 39-40, for a detailed analysis of how to structure such arguments.

135. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 301-02 (1973).

to present a complete defense.' "[136] Thus, it is ultimately more important to limit the prosecutor's use of the catchalls than to expand the defendant's use of them.

## IV. PROPOSALS

The following proposals offer several approaches to revising the catchalls.[137]

### *A. Alternative 1*

OTHER EXCEPTIONS. *A statement whose trustworthiness is demonstrated by clear and convincing evidence based on the totality of circumstances that surround the making of the statement, if the court specifically finds that: (A) exceptional circumstances exist for its admission into evidence; (B) it is not specifically excluded by any of the foregoing exceptions; and (C) the proponent of the statement provides reasonable notice of its intention to offer the statement and its particulars in advance of trial, or during trial if the court excuses pretrial notice on good cause shown. Such notice shall include the name and address of the declarant, if known, unless the proponent establishes good cause for not revealing this information.*

This alternative makes no distinction between criminal and civil cases. It also treats prosecutors and criminal defendants identically. Such a revision would severely limit the casual use of the catchalls for all parties and probably reflects the original intention of the rule. It clearly prohibits the use of the catchall as a way to admit hearsay specifically prohibited by Rule 803(8). It should also meet any confrontation concerns in criminal cases.

### *B. Alternative 2*

OTHER EXCEPTIONS. *In a civil action or when introduced by a criminal defendant, a statement which has circumstantial guarantees of trustworthiness if: (A) the proponent of the statement has made a reasonable effort to produce all more probative admissible evidence to establish the fact to which the proffered statement relates; and (B) the proponent of the statement provides reasonable notice of his or her intention to offer the statement and its particulars in advance of trial, or during trial if the court excuses pretrial notice on good cause shown. Such notice shall include the*

136. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citations omitted) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

137. These proposals as well as others are currently being studied by the ABA Criminal Justice Section's Committee on Federal Rules of Evidence and Criminal Procedure which I chair. The opinions expressed in this Essay are solely my own.

*name and address of the declarant, if known, unless the proponent establishes good cause for not revealing this information.*

This proposal eliminates the use of the catchall against criminal defendants but permits a fairly expansive use in civil trials and when offered by criminal defendants, subject to Rule 403. It retains the preference for live testimony by requiring a reasonable effort be made to produce the other evidence concerning the issue but permits the hearsay to be introduced in addition to or in lieu of that testimony if the condition is satisfied. The rule does not limit trustworthiness determinations to circumstances surrounding the making of the statement.

### *C. Alternative 3*

OTHER EXCEPTIONS. *In a civil action or when introduced by a criminal defendant, a statement which has circumstantial guarantees of trustworthiness, if the proponent of the statement has made a reasonable effort to produce all more probative evidence to establish the fact to which the proffered statement relates. In a criminal action, when introduced by the prosecutor, a statement whose trustworthiness is demonstrated by clear and convincing evidence based on the totality of circumstances that surround the making of the statement shall be admissible if the court specifically finds: (A) exceptional circumstances exist for its admission into evidence; and (B) it is not specifically excluded by any of the foregoing exceptions. The proponent of any statement offered pursuant to this rule must provide reasonable notice of its intention to offer the statement and its particulars in advance of trial, or during trial if the court excuses pretrial notice on good cause shown. Such notice shall include the name and address of the declarant, if known, unless the proponent establishes good cause for not revealing this information.*

This alternative would result in the catchall being available against criminal defendants in extremely limited circumstances, while substituting the standard proposed in the second alternative in civil cases and by criminal defendants. Other rules have made similar distinctions between criminal defendants and other witnesses, for example Rule 609.[138]

### *D. Other Alternatives*

Eliminate Rule 803(24) and revise Rule 804(b)(5) as suggested in the first, second and third alternatives. This would prohibit any catchall hearsay in cases where the declarant testifies. These are undoubtedly the

138. *See* FED. R. EVID. 609 (allowing evidence of criminal defendant's prior conviction to impeach credibility only if probative value outweighs prejudicial effect to accused).

most restrictive approaches to the catchalls, and it may be unnecessary to include such a restriction in the first alternative which already is limited to exceptional circumstances. Arguably, the first criteria of the second alternative already accomplishes this result. However, as written, the second alternative would permit the court to admit the hearsay in addition to the other admissible evidence. In contrast, this alternative would only permit the hearsay when the declarant of the statement is unavailable.

Conversely if any of the first three alternatives are adopted they can be codified as Rule 803(24), and Rule 804(b)(5) could be eliminated. Rule 804(b)(5) is unnecessary because Rule 803(24) always provides a method to admit the same evidence.

## V. CONCLUSION

Continued resort to the catchalls by prosecutors raises the specter of "reliable" hearsay being regularly introduced against the accused in criminal trials. Such a result was unintended when the catchalls were drafted, and may exacerbate the tendency to downplay the importance of live witnesses as a key ingredient of criminal trials. It is time to reaffirm the value of evidentiary rules by rewriting the catchalls in order to reduce their routine invocation, instead of continuing to rely on constitutional barriers to their use.