Oklahoma Law Review

Volume 54 | Number 3

1-1-2001

Finding the Proper Balance in Hearsay Policy: The Uniform Rules Attempt to Stem the Hearsay Tide in Criminal Cases Without Prohibiting all Nontraditional Hearsay

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FINDING THE PROPER BALANCE IN HEARSAY POLICY: THE UNIFORM RULES ATTEMPT TO STEM THE HEARSAY TIDE IN CRIMINAL CASES WITHOUT PROHIBITING ALL NONTRADITIONAL HEARSAY

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It should come as no surprise to watchers of the hearsay rule that the past twenty-five years have witnessed an unwavering bias favoring the receipt of ever-enlarging amounts of hearsay into evidence at trials.[1] In criminal cases, the usual suspects for admitting previously excluded out-of-court statements include the residual or catch-all exception, state-provided child hearsay exceptions, the exclusion for coconspirator statements, and the exception for declarations against penal interest. While one can speculate about the causes of this trend, it is hardly a coincidence that this has occurred in an era of increasing hostility to the rights of criminal defendants and sensitivity to the rights of victims. It is also to be expected that the admission of additional types of hearsay has been attacked as unreliable, unfair, and even unconstitutional. The ever-burgeoning quantities of hearsay in criminal cases have required the Supreme Court, at best a reluctant player in the hearsay arena, to enter the fray. Yet the results of its decisions on both hearsay and Confrontation Clause grounds have been decidedly mixed.[2]

Against this backdrop, the Drafting Committee to Revise the Uniform Rules of Evidence[3] decided that rather than blindly following the Federal Rules of Evidence,

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1. Obviously, the revision of the Uniform Rules also affects hearsay in civil cases. I have limited these comments to criminal cases because the differences are most dramatic in this context. Considerations of fairness are typically less significant in civil cases because of more extensive pretrial discovery, and the inapplicability of the Confrontation Clause. *See, e.g.*, Myrna S. Raeder, *Commentary: A Response to Professor Swift; The Hearsay Rule At Work: Has It Been Abolished De Facto by Judicial Discretion?* 76 MINN. L. REV. 507 (1992) [hereinafter Raeder, *Commentary*].

2. While *Tome v. United States*, 513 U.S. 150 (1995), and *Williamson v. United States*, 512 U.S. 594 (1994), have restricted the use of prior consistent statements and declarations against penal interest, *Bourjaily v. United States*, 483 U.S. 171 (1987), expanded the ability of prosecutors to use coconspirator statements. Similarly, *White v. Illinois*, 502 U.S. 346 (1992), and *Idaho v. Wright*, 497 U.S. 805 (1990), appear to be on opposite ends of the Confrontation Clause spectrum. *See, e.g.*, Myrna S. Raeder, *White's Effect on the Right to Confront One's Accuser*, CRIM. JUST., Winter 1993, at 2 [hereinafter Raeder, *White's Effect*]. While the Court unanimously reversed a conviction based on admission of a declaration against penal interest in *Lilly v. Virginia*, 527 U.S. 116 (1999), because of the failure to reach any consensus on Confrontation Clause theory in its multiple opinions, little guidance is provided to lower courts. *See* Myrna S. Raeder, *Reading* Lilly*'s Tea Leaves*, AALS EVIDENCE SEC. NEWSL. (Fall 1999), *available at* http://www.law.umich.edu/thayer/raed/lill.htm.

3. Unless otherwise indicated, all textual references and citations to the "Uniform Rules" or

it was time to take a look at how the rules were actually working in practice.[4] As a result, the Uniform Rules approved by the National Conference of Commissioners on Uniform State Laws have taken a different approach to some of the more controversial hearsay questions. As one who was privileged to be an advisor of the American Bar Association to the Drafting Committee to Revise the Uniform Rules of Evidence, I found the Drafting Committee highly attuned to philosophical and practical questions raised by the application of current hearsay rules. Thus, its task might be described as fixing any rules that called the fairness of the criminal justice system into question, while at the same time permitting prosecutors to admit reliable hearsay in hard cases.

In my view, which I have argued elsewhere,[5] the hearsay pendulum has swung so far towards the open admission of "reliable" hearsay that it challenges the preference for live witnesses that is built into the Confrontation Clause. Moreover, fairness concerns and the inability to cross-examine hearsay declarants may ultimately reduce the acceptability of jury verdicts that lies at the heart of the adversary system. Thus, I applaud the Commissioners' efforts to balance the interests of criminal defendants against those of victims and the society at large. Such work is never easy, and is a result of compromises that can never totally satisfy prosecutors or defense counsel, but must be undertaken if we are to remain true to the highest ideals of the jury system. The Uniform Rules, as revised in 1999, valiantly attempt to stem the hearsay tide, without eliminating the ability of prosecutors to introduce what was once considered "rank hearsay" when truly reliable and necessary. In other words, the Commissioners have produced rules that serve well as a model for states. While a few of these rules may seem too restrictive for those steeped in the Federal Rules of Evidence, it must be remembered that, given the differences in evidentiary policy among the fifty states, the Commissioners' choices in some cases are actually more liberal in admitting hearsay than some current state practices, and mirror what is actually happening by case law or statute in other states. My comments will address some of the most distinctive differences between the federal and uniform hearsay rules.

The Residual (Catch-All) and Child Hearsay Exceptions

The Uniform Rules, as last revised in 1999, provide:

> RULE 808. RESIDUAL EXCEPTION.
>
> (a) Exception. *In exceptional circumstances a statement not covered by Rules 803, 804, or 807* but possessing equivalent, though not

"Uniform Rules of Evidence" refer to the Uniform Rules of Evidence as last revised in 1999.

4. Leo H. Whinery, *The American Version of the Rules of Evidence — Can They Be Improved?* 195 F.R.D. 57, 63 (1999).

5. Raeder, *White's Effect*, *supra* note 2; 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 (1992) [hereinafter Raeder, *The Effect of the Catchalls*]; Raeder, *Commentary*, *supra* note 1.

identical, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that

(1) the statement is offered as evidence of a fact of consequence;

(2) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and

(3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

(b) Making a record. The court shall state on the record the circumstances that support its determination of the admissibility of the statement offered pursuant to subdivision (a).

(c) Notice. A statement is not admissible under this exception unless the proponent gives to all parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the substance of the statement and the identity of the declarant.[6]

Taming the Catch-all: Catch-all Theory and Practice

At present, a slight majority of the states have enacted residual exceptions based on the Federal Rules and former Uniform Rules.[7] The catch-all has often been referred to as the hearsay "safety valve," or the rule that allows judges the discretion to admit trustworthy hearsay, without distorting the other hearsay rules.[8] "Otherwise, we face distorting or expanding our exceptions to the hearsay rule in a manner inconsistent with the text of the rules and the rationales justifying them, or excluding otherwise trustworthy hearsay evidence, which may make it impossible to best serve the interests of justice."[9] This exception was enacted to provide the flexibility of the common law to encompass unexpected situations that is absent in a categorical approach to hearsay. Because the specter of a judge having unfettered discretion to admit trustworthy hearsay was extremely controversial, the legislative history is replete with statements indicating the "exceptional" nature of the hearsay to be admitted under the rule.[10] Moreover, at the time of enactment, given the then-prevailing view that a criminal defendant's right to confront witnesses was typically violated in the absence of an ability to cross-examine the hearsay declarant, little thought was given to the rule's impact on criminal trials.[11]

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6. UNIF. R. EVID. 808 (emphasis added).

7. UNIF. R. EVID. 808 reporter's notes.

8. For a thorough review of issues associated with the residual exception, see generally G. Michael Fenner, *The Residual Exception to the Hearsay Rule: The Complete Treatment*, 33 CREIGHTON L. REV. 265 (2000).

9. W.C.L. v. People, 685 P.2d 176, 182 (Colo. 1984).

10. For example, the Senate Judiciary Committee report states that the rules should be used "very rarely and only in exceptional circumstances." S. REP. NO. 93-1277 at 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066.

11. Raeder, *The Effect of the Catchalls*, *supra* note 5.

Yet, there is no doubt that the adoption of the catch-all has resulted in the admission of more hearsay in criminal cases than originally envisioned. This occurred in part because the rule itself has few limitations on its use. Another key reason for the growing significance of the catch-all in criminal cases resulted from the transformation of Confrontation Clause analysis. In other words, when reliability became the key to satisfying the Confrontation Clause, all manner of uncross-examined hearsay became potential candidates for admission under the catch-all. This metamorphosis also undermined a crucial premise underlying the adoption of the catch-all: that it would prevent the distortion of other rules. Prosecutors soon recognized that admitting hearsay under "firmly rooted" hearsay exceptions had substantial benefit for purposes of Confrontation Clause analysis.[12] Thus, the incentive to expand the scope of traditional categorical exceptions, particularly in the area of child hearsay, resulted in reliance on the catch-all becoming the fallback position, rather than the primary argument.

Courts have willingly participated in the expansive interpretation of such categorical exceptions as excited utterances and medical statements to permit statements of children to be heard by the jury. While this makes sense in jurisdictions not adopting a residual exception, generous reading of these rules is commonplace even where a catch-all or specific child hearsay exception exists. Judges too may have found that it is easier to broaden the "firmly rooted" rules, thereby avoiding additional Confrontation Clause analysis. Determining if the hearsay fits the criteria of the catch-all or child hearsay exception often involves difficult statutory and constitutional questions, such as whether unavailability includes potential trauma to children who testify, as well as whether the offered hearsay is trustworthy without resort to after-the-fact corroboration. Currently, too much nontraditional child hearsay is being offered via traditional exceptions. Prosecutors and judges need to resist the lure of the sirens, instead admitting this type evidence under child hearsay or residual exceptions. Of course, even assuming such hearsay is trustworthy enough to satisfy the catch-all, it is still fair to ask whether it is "exceptional."

In addition to the quest for justice for abused children, the war on drugs has also played a role in the expansion of hearsay under the residual exception. Here, the underlying themes appear to be the difficulty of ferreting out information and the disappearance of witnesses. Thus, prosecutors have made numerous requests to admit grand jury statements of unavailable witnesses. The fact that such testimony has been admitted raises philosophical concerns about the proper scope of the residual exception. First, the trustworthiness of this type of testimony can be quite problematic when the declarant is a participant in illegal activity who is trying to curry favor with the prosecution. Second, grand jury testimony of an unavailable witness was not considered trustworthy enough to fall within a categorical hearsay exception. In other words, it does not quite fit into former testimony because of the lack of cross-examination.

12. *See generally* Raeder, *White's Effect*, *supra* note 2.

Near Misses and Exceptional Circumstances

Failed categories such as grand jury testimony have been referred to as "near misses." Whether a statement that almost meets, but fails to meet the requisite foundational requirements of one of the specific exceptions can nevertheless be admitted under the residual exception has been a recurring theme in catch-all litigation. The near-miss theory was originally popularized by Judge Becker[13] who separated the specific hearsay exceptions into well-defined categories and amorphous categories in order to determine whether a near miss could be admitted under the residual clauses. He rejected the admission of near misses in well-defined categories, such as former testimony, but permitted near misses of amorphous exceptions, such as business records and present-sense impressions. The Third Circuit rejected this formulation because it "puts the federal evidence rules back into the straitjacket from which the residual exceptions were intended to free them."[14] Similarly, the majority of federal circuit courts have held that the phrase "specifically covered" means only that if a statement is admissible under one of the prior exceptions, such prior subsection should be relied upon instead of the catch-all. If, on the other hand, the statement is inadmissible under the other exceptions, these courts allow the testimony to be considered for admission under the residual exception.[15]

In contrast, courts in a few jurisdictions have held that a statement determined to be inadmissible under a categorical exception is not admissible under its residual exception because a near miss was not intended to be within the residual exception.[16] Often, courts that reject near misses view the catch-all as being reserved for only exceptional circumstances. Thus, in *Shakespeare v. State*, the court opined that the

> residual exception, however, is one of rare application and is not meant to be used as a catch-all for the admission of statements falling just outside the borders of recognized exceptions. Under A.R.E. 804(b)(5) an independent analysis must be undertaken to see if the case involves exceptional circumstances where the court finds guarantees of trustworthiness equivalent to or exceeding the guarantees reflected in the present exceptions to the hearsay rule.[17]

Similarly, *State v. Stevens*[18] took a restrictive view of the catch-all, noting that "[i]t is for the novel or unanticipated category of hearsay that does not fall under one of

13. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1262-63 (E.D. Pa. 1980).

14. *In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 302 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1986).

15. United States v. Earles, 113 F.3d 796, 800 (8th Cir. 1997); United States v. Deeb, 13 F.3d 1532, 1537 (11th Cir. 1994) (rejecting near-miss arguments).

16. Shakespeare v. State, 827 P.2d 454, 460 (Alaska 1992) (holding hearsay rejected as a declaration against interest can not be admitted under residual exception).

17. *Id.* (citations omitted).

18. State v. Stevens, 490 N.W.2d 753, 760 (Wis. Ct. App. 1992).

the named categories, but which is as reliable as one of those categories. It is intended that the residual hearsay exception rule will be used very rarely, and only in exceptional circumstances."[19] One of the more comprehensive discussions of near misses occurred in *State v. Walker*,[20] which explained its view of exceptional circumstances and near misses as follows:

> The only kind of statement that is subject to admission under those rules is "[a] statement not specifically covered by any of the foregoing exceptions. . . ." We read that language as meaning that, if the statement *is* specifically covered by another exception, it does not qualify for admission under the residual exception, for the very good reason that admission under that exception would be unnecessary. At the very least, it is hard to imagine that there could be an "exceptional circumstance" justifying admission under the residual exception if the evidence is admissible under another exception.
>
> Regarding this element as a prerequisite does not necessarily preclude a court from admitting evidence under alternative theories . . . . Without becoming mired in the debate over "near misses," which we expressly refrain from doing in this case, we think that it may be possible for evidence potentially to qualify for admission under a categorical exception, but for there to be a legitimate dispute over whether, as a matter of *law*, as opposed to a matter of fact, that exception applies, and for the court properly to determine that, if the evidence does not legally qualify for admission under the categorical exception, it would clearly qualify under the residual exception. If the court resolves the legal issue in favor of coverage, it could admit the evidence under the categorical exception but find that, should an appellate court conclude that the evidence was legally inadmissible under that exception, it would then be admissible and would have been admitted under the residual exception. This kind of situation is not likely to arise very often, and, if it does arise, the court would have to make all of the other requisite findings necessary to justify admission under the residual exception. In that circumstance, if an appellate court were, indeed, to conclude that the categorical exception did not apply, it could affirm admission under the residual exception, for the "otherwise specifically covered" condition would then be satisfied.[21]

Why the Revised Uniform Rule Is a Better Approach

Uniform Rule 808, the residual exception, sides with the courts that both reject near misses and require exceptional circumstances. The introductory phrase — "In

19. *Id.* at 760 (citations omitted).
20. 691 A.2d 1341, 1353 (Md. 1997).
21. *Id.* at 1353 n.9 (first two alterations in original).

exceptional circumstances a statement not covered by Rules 803, 804, or 807"[22] — is included in the language of the rule to prevent courts from disregarding the rule's limited scope. As a result, courts can no longer ignore the legislative intent prohibiting the residual exception from acting as a means of admitting garden-variety trustworthy hearsay. Moreover, such limitations help to downplay the "wild card" quality that the catch-all has injected into litigation.[23] Today it is often difficult to evaluate the strength of a party's case when the admission of critical hearsay depends primarily on the discretion of the judge.

While prosecutors may complain that revised Uniform Rule 808 returns them to the straightjacket of the categorical exceptions, such criticism would be undeserved because of the inclusion of two additional Uniform Rules. First, Rule 807, the child hearsay exception, has been enacted to specifically address the thorny questions of admissibility for statements of children who are victims of abuse. Second, Uniform Rule 804(b)(5), entitled "Forfeiture by Wrongdoing," introduces a rule recently promulgated in the Federal Rules as 804(b)(6). This rule allows into evidence a "statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to and did cause the unavailability of the declarant as a witness."[24] Thus, to the extent that grand jury testimony and other hearsay of unavailable witnesses is necessary because the defendant is responsible for the absence of the declarant at trial, the residual exception is no longer the appropriate route to admission.

In other words, the reason for admission of such evidence is not based on its trustworthiness, but rather on the premise that defendants should not benefit from their wrongdoing. Given that the preliminary fact determination for the forfeiture rule is determined by a Rule 104(a) standard, it should be fairly simple for a prosecutor to admit hearsay via the forfeiture rule even if the circumstantial evidence would not support a finding of guilt on the charge of obstruction of justice or murder. Thus, the restrictions on the residual exception will not prevent the government from introducing hearsay that is reliable under the child hearsay exception or that is necessary due to the defendant's misconduct. As a result, previously excluded hearsay will still be admitted in cases that are difficult to prove, but the government will not be able to introduce all probative hearsay that it claims is trustworthy.

Uniform Rule 808 also clarifies that the statement must possess "equivalent, though not identical, circumstantial guarantees of trustworthiness," since each categorical exception carries its own specific reasons guaranteeing its reliability. In relation to the catch-all, such ad hoc determinations must be resolved by fact-intensive inquiries. In order to ensure that catch-all decisions are given appropriate reflection, a new criteria has been added in Rule 808(b), which requires the court to state on the record the circumstances that support its determination. In this regard, the commentary to Rule 808 lists a number of factors that courts have

22. UNIF. R. EVID. 808.

23. *See generally* Raeder, *Commentary*, *supra* note 1.

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

found useful. These factors include: (1) the age, education, and experience of the declarant; (2) the personal knowledge of the declarant regarding the subject matter of the statement; (3) the oral or written nature of the statement; (4) the ambiguity of the statement; (5) the consistency with which the statement is repeated; (6) the time lapse between the event and the making of the statement; (7) the partiality of the declarant and the relationship between the declarant and the witness; (8) the declarant's motive to speak truthfully or untruthfully; (9) the spontaneity of the statement, as opposed to responding to leading questions; (10) the making of the statement under oath; (11) the declarant being subject to cross-examination at the time the statement was made; and (12) the recantation or repudiation of the statement after it was made.[25] Obviously, it is expected that courts will now discuss trustworthiness with such factors in mind.

Finally, the rule adopts a notice provision consistent with those found in other rules. Notice can be given during trial for good cause and the proponent does not have the obligation of tracing the declarant's address. Arguably, the residual exception will always generate mischief regardless of its restrictions; however, a limited exception that provides the means of growth that typified the common law is a better solution than offering courts no choice but to distort categorical rules in order to do justice in individual cases.

Finding the Proper Balance for a Fair Child Hearsay Exception

Uniform Rule 807 provides:

> RULE 807. STATEMENT OF CHILD VICTIM.
>
> (a) Statement of child not excluded. A statement made by a child under [seven] years of age describing an alleged act of neglect, physical or sexual abuse, or sexual contact performed against, with, or on the child by another individual is not excluded by the hearsay rule if:
>
> (1) subject to subdivision (b), the court conducts a hearing outside the presence of the jury and finds that the statement concerns an event within the child's personal knowledge and is inherently trustworthy; and
>
> (2) the child testifies at the proceeding [or pursuant to an applicable state procedure for the giving of testimony by a child], or the child is unavailable to testify at the proceeding, as defined in Rule 804(a), and, in the latter case, there is evidence corroborative of the alleged act of neglect, physical or sexual abuse, or sexual contact.
>
> (b) Determining trustworthiness. In determining the trustworthiness of a child's statement, the court shall consider the circumstances surrounding the making of the statement, including:
>
> (1) the child's ability to observe, remember, and relate the details of the event;
>
> (2) the child's age and mental and physical maturity;

25. UNIF. R. EVID. 808 reporter's notes.

(3) whether the child used terminology not reasonably expected of a child of similar age, mental and physical maturity, and socioeconomic circumstances;

(4) the child's relationship to the alleged offender;

(5) the nature and duration of the alleged neglect, physical or sexual abuse, or sexual contact;

(6) whether any other descriptions of the event by the child have been consistent with the statement;

(7) whether the child had a motive to fabricate the statement;

(8) the identity, knowledge and experience of the person taking the statement;

(9) whether there is a video or audio recording of the statement and, if so, the circumstances surrounding the taking of the statement; and

(10) whether the child made the statement spontaneously or in response to suggestive or leading questions.

(c) Making a record. The court shall state on the record the circumstances that support its determination of the admissibility of the statement offered pursuant to subdivision (a).

(d) Notice. Evidence is not admissible under this rule unless the proponent gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of any such evidence the proponent intends to introduce at trial.[26]

As previously indicated, the admission of child hearsay has confounded the judicial system. Undoubtedly, the anguished voices of children were ignored in court until relatively recently. However, the current response has opened the floodgates to evidence untested by cross-examination. The child's statements are typically offered by adults who are likely to carry authority with the jury: mothers, caretakers, police officers, nurses, and doctors. Thus, the jury can convict a defendant without ever being required to evaluate the demeanor and truth telling of the child whose statements determine the verdict.

Approximately forty states have adopted child hearsay exceptions to date.[27] Their popularity is due in part to the recognition that the absence of such a provision increases strained interpretations of categorical exceptions.[28] Yet, we have very little hard data about the impact of suggestive questioning or coaching of children on the reliability of such hearsay, or the impact of child hearsay at trial. Empirical studies of child hearsay are in their infancy and at present do not yield uniform results.[29] Moreover, methodological flaws always plague such studies

26. UNIF. R. EVID. 807.

27. UNIF. R. EVID. 807 reporter's notes.

28. *See, e.g.*, John J. Capowski, *An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception*, 33 GA. L. REV. 353 (1999) (arguing for a separate child hearsay exception to cover statements made to mental health providers).

29. *See generally* Special Theme Issue, *Hearsay Testimony in Trials Involving Child Witnesses*, 5

because they obviously cannot replicate abusive incidents in order to test memory in a substantially similar circumstance. While an approach excluding all hearsay of children under the age of seven would ease Confrontation Clause concerns, it would undoubtedly do injustice to abused children. Yet, bright lines are difficult to come by in evaluating child hearsay and undefined trustworthiness standards offer judges virtually unfettered discretion to do what they think is right.

In contrast, the Uniform Rule as revised in 1999 has opted for a relatively complex formula for admission, but one that is much more likely to favor admission of statements than the former Uniform Rule. Ironically, even in the absence of any federal rule concerning child hearsay, the previous Uniform Rule was so restrictive that it played little role in developing a model for child hearsay statutes. Because the original rule was drafted at a time when its constitutionality was still suspect, its requirements were quite difficult to meet and focused primarily on the manner of recording the statement or taking the child's testimony. The Drafting Committee rejected that rule in favor of one focusing more on trustworthiness. The rule was extended to include acts of neglect and sexual contact in addition to physical or sexual abuse, and provides for its application in all proceedings. Rather than specifying the maximum age of children governed by the rule, each state has the flexibility to determine its own age.

Corroboration of the abusive act must be demonstrated only if the child does not testify. Thus, corroboration is not required if the child testifies via whatever type of videotaping or closed-circuit television arrangement is approved by the state. It should also be noted that corroboration does not extend to the identity of the perpetrator. When the child is absent from trial, the rule attempts to balance the need for the child's testimony against the inability of the defendant to obtain cross-examination. Because the child's statement must be trustworthy at the time it was made to satisfy the Confrontation Clause,[30] other corroboration was deemed necessary only to show that a crime had been committed. Since child abuse is likely to occur in secret, any corroboration requirement has the potential to defeat admission of trustworthy statements. However, given the existence of cases in which it is unclear that an abusive act ever occurred, it appeared prudent to limit the corroboration to this factor, particularly when physical or psychological manifestations of abuse may be demonstrated more easily than identity.

Rule 807 itself includes the general criteria by which trustworthiness should be measured and requires the court to make a record detailing the factors underlying its decision. Thus, unlike much current practice where the judge's view of a child's trustworthiness is basically, "I know it when I see it," such gestalt reasoning is not acceptable under the Uniform Rule. The commentary to Rule 807 recognizes that *Idaho v. Wright*[31] is the ultimate arbiter of whether such hearsay will survive a Confrontation Clause challenge. Therefore, the criteria chosen by the Drafting Committee generally relate to circumstances demonstrating trustworthiness at the

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PSYCHOL. PUB. POL'Y & L. 251 (1999).

30. Idaho v. Wright, 497 U.S. 805 (1990).

31. *Id.*

time the statement is made, rather than after-the-fact corroboration. However, three criteria bear mention. Factor 6, listed in the rule, asks whether any other descriptions of the event by the child have been consistent with the statement. While at first glance this appears to be corroborative rather than contemporaneous, its inclusion reflects child-development theory. Unlike adults, for whom consistency may equate with no more than retelling the same big lie, for children, consistency is unlikely unless the statement is true.[32] Factors 9 and 10 focus on the taking of the child's statement. This is due to the Drafting Committee's view that the manner of questioning the child and the person responsible for the questioning can be significant in evaluating trustworthiness. Indeed, a number of studies point to suggestiveness in child testimony and propose that statements taken pretrial should be videotaped where feasible.[33] Finally, notice is required to ensure that the defendant has a fair opportunity to object to the child's statements, which may be key evidence at trial.

While courts will still be called upon to make difficult decisions concerning the admission of child hearsay, this rule provides a much better vehicle for such rulings than the general residual clause. Because it is less restrictive than some child hearsay statutes and more restrictive than others, it has probably reached the best balance possible based on current knowledge of child development and prevailing police practices in questioning children. I would hope that advances in technology and training will result in courts and juries becoming more confident that they are receiving reliable evidence from children. Indeed, our present approach to child testimony could use an entire overhaul.[34] The Commissioners have recognized this problem and are currently designing a model statute on the taking of child testimony.

Coconspirator Statements: If It's Not Broke, Don't Fix It

Uniform Rule 801 provides:

> RULE 801. DEFINITIONS; EXCLUSIONS.
> (b) A statement is not hearsay if:
> (2) the statement is offered against a party and is: . . .
> . . . .

32. 2 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 195-96 (3d ed. 1997).

33. *See, e.g.*, Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000); Lucy S. McGough, *For the Record: Videotaping Investigative Interviews*, 1 PSYCHOL. PUB. POL'Y & L. 370 (1995).

34. *See, e.g.*, Gail S. Goodman et al., *Innovations for Child Witnesses: A National Survey*, 5 PSYCHOL. PUB. POL'Y & L. 255 (1999) (discussing the frequency of the use of innovation in child sexual abuse prosecutions, perceptions of its effectiveness, and reasons for not using innovation); Myrna S. Raeder, *Navigating Between Scylla and Charybdis: Ohio's Efforts to Protect Children Without Eviscerating the Rights of Criminal Defendants — Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, 25 U. TOL. L. REV. 43 (1994) (discussing all aspects of child abuse litigation).

> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.[35]

The exclusion from hearsay for coconspirator statements in the Federal Rules of Evidence has been amended to reflect *Bourjaily v. United States*.[36] Under Federal Rule of Evidence 801(d)(2)(E), a court may consider the contents of a coconspirator's statement in determining the existence of, and participation in, the conspiracy by the declarant and the defendant, but the declarant's statement alone is not sufficient to establish the existence of, or participation in, a conspiracy by the defendant. *Bourjaily* has not been uniformly well received because it eliminated the common law requirement that evidence independent of the statement support the foundational requirements without consideration of the statement itself.[37] As Justice Blackmun opined in his dissent in *Bourjaily*, independent evidence provided protection against unreliable statements being introduced because the exemption was based on an agency rationale rather than on trustworthiness.[38] *Bourjaily* rejected the well-established common law requirements[39] because of its reliance on the plain meaning of Rule 104.[40] However, the states have not uniformly followed this approach. Recognizing the division of authority that currently exists among the several states, including the majority rule that the existence of the conspiracy must be determined by evidence independent of the hearsay statements, the drafters of the Uniform Rules decided not to revise the rule to mirror the federal exemption. Thus, they left this issue to case law.

Declarations Against Penal Interest

Uniform Rule 804 provides:

> RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE.
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .
>
> (3) Statement against interest. A statement that at the time of its making was so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable individual in the declarant's position would not have made

35. UNIF. R. EVID. 801.

36. 483 U.S. 171 (1987).

37. *See, e.g.*, Myrna S. Raeder, *Re-thinking the Admissibility of Co-conspirator Statements*, CRIM. JUST., Spring 1991, at 39, 41; Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330, 637-38 (1997).

38. *Bourjaily*, 483 U.S. at 189, 193-95 (Blackmum, J., dissenting).

39. United States v. Nixon, 418 U.S. 683, 701 (1974); Glasser v. United States, 315 U.S. 60, 74-75 (1942).

40. *Bourjaily*, 483 U.S. at 178-79.

> the statement unless the individual believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate an accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other individual implicating both the codefendant or other individual and the accused, is not within this exception.[41]

The federal exception for declarations against penal interest has increasingly been used to offer evidence of unavailable accomplices against criminal defendants. As a result, the expansive reading of Federal Rule 804(b)(3) has spawned two Supreme Court decisions. *Williamson v. United States*,[42] decided on hearsay grounds, held that the exception "does not allow admission of nonself-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."[43] Thus, statements that are neutral, collateral, or self-serving are not within the exception. In *Lilly v. Virginia*,[44] the Court unanimously reversed a conviction because the admission of a taped custodial confession of a nontestifying accomplice introduced as a declaration against penal interest violated the defendant's right to confront witnesses. However, because of the multiple opinions in the case, the only thing that appears certain is that custodial confessions shifting blame will not pass constitutional muster. Yet, this leaves open how to treat accomplice statements in other settings. Uniform Rule 804(b)(3) has always differed from the federal rule on this point. It clearly excludes statements by accomplices as follows: "A statement or confession offered against the accused in a criminal case, made by a codefendant or other individual implicating both the codefendant or other individual and the accused, is not within this exception."[45] This is clearly a better approach than that taken by the Federal Rules. The Uniform Rule eliminates difficult Confrontation Clause analyses in situations where it is likely that the accomplice always has a motive to spread blame and curry favor from the prosecution.

Business and Official Records

Uniform Rules 803 provides:

> RULE 803. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL.
>
> (6) Record of regularly conducted business activity. A record of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person having knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record, all as

41. UNIF. R. EVID. 804.
42. 512 U.S. 594 (1994).
43. *Id.* at 600-01.
44. 527 U.S. 116 (1999).
45. UNIF. R. EVID. 804(b)(3).

shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11) or (12), or with a statute providing for certification, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. In this paragraph, business includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. A public record inadmissible under paragraph (8) is inadmissible under this exception.

. . . .

(8) *Record or report of public office.* Unless the sources of information or other circumstances indicate lack of trustworthiness, a record of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

(A) an investigative report by police and other law enforcement personnel, except when offered by an accused in a criminal case;

(B) an investigative report prepared by or for a government, public office, or agency when offered by it in a case in which it is a party;

(C) factual findings offered by the government in criminal cases; and

(D) factual findings resulting from special investigation of a particular complaint, case, or incident, unless offered by an accused in a criminal case.[46]

Rejecting Police Reports When Offered Against Criminal Defendants While Easing Foundational Requirements for Admitting Business Records

Uniform Rule 803(6) now mirrors the Federal Rule, which has also been revised to provide that the foundational requirements for the admissibility of a business record can be satisfied through certification as an alternative to the expense and inconvenience of producing a time-consuming foundational witness. Some have expressed concern that this revision continues a trend to devalue live witnesses. However, Rule 902(11) requires the offering party to provide the defendant with written notice sufficiently in advance of the offer into evidence, so that the defendant can inspect the record, inspect the custodian's declaration, and have a fair chance at challenging the evidence.

In contrast to the Federal Rule, Uniform Rule 803(6) has been revised to add the provision at the end of the rule that "[a] public record inadmissible under paragraph (8) is inadmissible under this exception" to prevent admission of reports that are prohibited under Uniform Rule 803(8). Given that the catch-all has been restricted to exceptional circumstances in cases of statements that are not near misses, the

46. UNIF. R. EVID. 803.

door has been firmly shut to the possibility of admitting police reports through any back route. In comparison, decisions under the Federal Rule can reach the opposite result.[47] The Uniform Rule also clarifies the type of records excluded — "investigative report[s] by police and other law enforcement personnel."[48] In contrast, the Federal Rule excludes "matters observed by police officers and other law enforcement personnel" in all criminal cases. The Uniform Rule thereby resolves the status of routine nonadversarial reports, which has long been a bone of contention in federal-rule interpretation.

Rule 803(8) also explicitly permits the defendant to introduce police and other investigative reports, a result that federal courts have reached despite the explicit language of the rule that appears to prohibit any use of such reports in criminal cases.[49] Uniform Rule 803(8) also has the advantage of specifically requiring that each category of public record be trustworthy. In contrast, the Federal Rule's reference to trustworthiness appears at the end of the rule, which leaves open whether the reference applies only to the last category mentioned.[50]

Thus, the revisions to the Uniform Rule concerning business and public records satisfactorily answer questions that still generate litigation in the federal arena.

Conclusion

The hearsay policy choices reflected in the 1999 version of the Uniform Rules recognize the defendant's interest in a fair trial, while giving the prosecution the ability to introduce trustworthy hearsay that is truly necessary to prove its case. These rules deserve adoption by states willing to rethink whether their present approach is skewed too heavily in favor of hearsay over live testimony. Moreover, it is time for academics and other commentators who have ignored any model other than the Federal Rules to expand their horizons.

47. *See, e.g.*, United States v. Simmons, 773 F.2d 1455, 1458-59 (4th Cir. 1985) (Bureau of Alcohol & Narcotics trace forms).

48. UNIF. R. EVID. 803(8)(A).

49. *See, e.g.*, United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975).

50. *See, e.g.*, Melville v. Am. Home Assurance Co., 443 F. Supp. 1064 (E.D. Pa. 1977), *rev'd on other grounds*, 584 F.2d 1306 (3d Cir. 1978).