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WHO NEEDS AN EVIDENCE CODE?: THE NEW YORK COURT OF APPEALS’S RADICAL RE-EVALUATION OF HEARSAY

Steven Zeidman*

INTRODUCTION

As we move into the next century, New York remains one of a handful of states without an evidence code.1 Since the Federal Rules of Evidence were enacted in 1975,2 thirty-seven states have adopted evidence codes based squarely on the Federal Rules,3 and eight other states have codes that either predate the Federal Rules or are independent of them.4

The law of evidence in New York has not, however, remained dormant. In the vital field of hearsay evidence jurisprudence,5 the New York Court of Appeals in the past decade has dramatically reshaped the admissibility landscape through common law development, leading to an unprecedented increase in the

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1 The others are Connecticut, Illinois, Massachusetts, and Virginia. The law of evidence in New York emanates from case law and a limited number of statutes. See, e.g., N.Y. C.P.L.R. art. 45 (McKinney 1992); N.Y. CRIM. PROC. LAW art. 60 (McKinney 1992).
3 They are Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Louisiana, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Washington, and Wyoming.
4 Four states have codes enacted prior to the Federal Rules of Evidence (Alabama, California, Kansas, and New Jersey) and four states have modern codes independent of the Federal Rules (Georgia, Missouri, Pennsylvania, and South Carolina).
5 See, e.g., People v. Caviness, 144 N.E.2d 24 (N.Y. 1957) (stating that prohibiting the admission of hearsay is “the best known feature of Anglo-American law”). See also 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 28 (James H. Chadbourne ed., rev. 1974) (referring to the rule against hearsay as “that most characteristic rule of the Anglo-American law of evidence—a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world’s methods of procedure”).

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admission of out-of-court statements.

The tortuous history of codification efforts in New York has been well-documented. One of the primary arguments in support of codification is that it is the best way to achieve much-needed reform. The underlying theory is that courts are unable, or unlikely, to effect change through the common law, while the legislature can write new laws quickly and easily to correct old problems. The legislature is seen as the best, if not the only, vehicle for reforming evidence laws.

Codification opponents aver that statutory codes usually vest the trial judge with too much discretion, which in turn results in increased admissibility. They also argue that involving the legislature will lead to the politicization of evidence law. This reasoning assumes that the legislature will react to public pressures and sentiments by enacting a code—and any subsequent amendments—in response to those prods, rather than fashioning rules grounded in fundamental evidence precepts.

Ironically, in the past decade, coinciding with the most recent failed attempt to pass an evidence code, the Court of Appeals has confounded many of codification’s most ardent supporters and critics alike. The 1990s have witnessed a dramatic change in the Court of Appeals’s approach to evidence, primarily with respect to hearsay. To the chagrin of codification supporters, the court has shown itself to be a highly effective agent of reform, and to the

7 See id. at 672-73 (“The desire to reform the law has helped to drive most codification movements.”). Other justifications for an evidence code are that the common law is inaccessible and that it is not applied uniformly across jurisdictions. See id.
8 See id.
9 For example, Federal Rule of Evidence 807 expressly confers residual discretion to the trial judge to admit reliable out-of-court statements that do not fit within any of the enumerated hearsay exceptions. See FED. R. EVID. 807.
10 According to those who are against codification, the increase in admissible evidence comes at the expense of an emphasis on reliability. As Salken points out, the defense bar has been the most vociferous opponent of codification. See Salken, supra note 6, at 693. Since defendants do not have the burden of proof, it is logical that the defense bar would be against any changes that lead to greater admissibility. See id.; see also Faust F. Rossi, The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective, 28 LOY. L.A. L. REV. 1271, 1276-77 (1995).
11 See Salken, supra note 6, at 681.
12 The most recent effort ended in 1991. In the hopes of increasing the chances that the legislature would pass the proposed code, the drafters opted for a conservative approach that basically attempted to codify existing law, as opposed to a reform-driven approach that incorporated many of the modernizations contained in the Federal Rules. The code, nonetheless, never made it out of the Assembly Codes Committee. See id. at 662, 673-74.
dismay of codification opponents, it has displayed a clear and undeniable movement toward greater admissibility—a movement that appears, at least in part, to be a response to public and political sentiments.

This article shows that the Court of Appeals has altered the face of hearsay in New York State both by creating new exceptions and expanding existing ones, resulting in a pronounced trend toward greater admissibility. More and more out-of-court statements that in the recent past would have been deemed impermissible hearsay are now routinely being admitted. The consequence is a transformation in the types of evidence that jurors are permitted to hear and the ways in which trials are conducted. Part I examines the expansion of existing hearsay exceptions, focusing on excited utterances and statements made by witnesses who are unavailable due to the defendant's misconduct. Part II analyzes the recently adopted present sense impression exception, and the newly recognized due process catchall for reliable evidence that does not fit within any presently recognized exception. Part III evaluates the increased reliance on judicial interpretations of out-of-court statements as "nonhearsay." Finally, Part IV analyzes the unintended, but predictable, consequences of the relaxation of evidentiary standards and attendant greater admissibility and their implications for the codification debate.

I. PUSHING THE ENVELOPE OF EXISTING EXCEPTIONS

A. Excited Utterances

To appreciate the expansion of the "excited utterance" exception, it is necessary to begin with the traditional definition. Excited utterances are extra-judicial assertions made as the result of the "declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative." According to one commentator, excited utterances "are admissible when uttered so spontaneously as to exclude the idea of fabrication." The rationale for the purported reliability of these statements is that the excitement or shock of the event so controls the mind that the declarant is unable to fabricate, reason, or deliberate. The key elements of excited utterances are

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14 EDITH L. FISCH, FISCH ON NEW YORK EVIDENCE § 1000, at 576 (2d ed. 1977).
15 See WILLIAM PAYSON RICHARDSON, RICHARDSON ON EVIDENCE § 281, at 246-48
therefore spontaneity and an excited mental state.\(^{16}\)

Judicial decisions have delineated a number of factors for trial courts to examine when deciding whether a statement qualifies as an excited utterance. One consideration is the identity of the declarant. Cases suggest the intuitive point that people will react differently to traumatic events.\(^{17}\) Another factor looks at the substance of the statement to determine if it is self-serving to the declarant. Here, the theory is that if the statement is helpful to the declarant, it is evidence that she or he had time to reflect upon it.\(^{18}\) Practically speaking, this factor focuses on efforts by defendants to admit their exculpatory statements as excited utterances. These exculpatory statements made by a defendant are rarely admitted as excited utterances.\(^{19}\) An important question must also be asked: Just how startling was the event itself? Presumably, the greater the trauma, the greater the effect on the declarant, thereby increasing the likelihood that the reflective faculties did not operate normally.\(^{20}\)

\(^{16}\) See Vasquez, 670 N.E.2d at 1334-35; see also Randolph N. Jonakait et al., New York Evidentiary Foundations 359 (2d ed. 1998) ("A startling event occurs, an observer becomes excited, and the observer then makes a spontaneous statement about the event. The statement's spontaneity is the circumstantial guarantee of the declarant's sincerity.").

\(^{17}\) For example, a child may more likely be in a continuing state of excitement than an adult, or emergency medical technicians may less likely be traumatized by various startling events than other individuals. See, e.g., People v. Knapp, 527 N.Y.S.2d 914 (App. Div. 1988) (examining statements of four-year-old child victim). For an interesting case focused on the nature of the declarant, see People v. Brooks, 635 N.Y.S.2d 275 (App. Div. 1995) (dealing with statements made by off-duty police officer).

\(^{18}\) See People v. Irizarry, 671 N.Y.S.2d 331 (App. Div. 1998) (finding that defendant's exculpatory statements made upon his arrest were made after he had the opportunity to reflect and possibly to fabricate); People v. Seaman, 656 N.Y.S.2d 350 (App. Div. 1997) (determining that because defendant had sufficient time to reflect, his exculpatory 911 call was not an excited utterance).

\(^{19}\) But see People v. Cannon, 644 N.Y.S.2d 311 (App. Div. 1996) (ruling that it was error to exclude defendant's exculpatory statements made immediately after the bus he was driving crashed into another car).

The amount of time elapsed between the traumatic incident and the hearsay statement is another critical factor. In the usual case... if the utterance is not made immediately after the event, the court is likely to find that there was time to contrive and that, consequently, the declaration was not spontaneous. The Court of Appeals has spoken consistently about "the brief period when consideration of self-interest could not have been brought fully to bear by reasoned reflection." The spontaneity requirement, one of the linchpins that leads to the conclusion that excited utterances are reliable, suggests as much. Webster's Ninth New Collegiate Dictionary ("Webster's") defines "spontaneous" as "arising from a momentary impulse." Indeed, most New York cases use phrases such as "shortly after," "immediately after," and "almost immediately" when describing the gap between the excited utterance and the startling event. While there is no fixed time limit after which a statement automatically ceases to qualify as an excited utterance, the underlying rationale for the exception anticipates an event followed closely by a statement. The longer

21 See MCCORMICK, supra note 20, § 297, at 856 ("Probably the most important of the many factors entering into this determination is the time factor.") (citation omitted); see also FISCH, supra note 14, § 1000, at 577 ("[T]he time interval between the event and the declaration is a significant factor."); MARTIN ET AL., supra note 20, § 8.3.3, at 799:

It stands to reason that the amount of time between the startling event and the hearsay statement is critical to admissibility under the exception. However, there is no hard and fast rule prescribing the amount of time that may elapse between a startling event and an excited utterance. Of course, if the statement is made shortly after the event, the likelihood of the declarant having remained excited is increased.

Id. (footnote omitted).

22 RICHARDSON, supra note 15, § 282, at 249; see also People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979) ("One of the better known exceptions to the injunction against the receipt of hearsay testimony permits the introduction of [an]... excited utterance—made contemporaneously or immediately after a startling event...") (emphasis added); People v. Marks, 160 N.E.2d 26, 28 (N.Y. 1959) (defining a spontaneous declaration, New York's forerunner to an excited utterance, as "a narrative of a past transaction, although usually of a transaction occurring immediately before") (emphasis added).


24 WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1140 (9th ed. 1990).


28 See, e.g., People v. Vasquez, 670 N.E.2d 1328, 1337 (N.Y. 1996) ("While the statement must have been made before the declarant had the opportunity to reflect, 'the time for reflection is not measured in minutes or seconds,' but rather 'is measured by facts.'") (quoting Marks, 160 N.E.2d at 28); Brown, 517 N.E.2d at 518 (stating that the trial judge must take into account the nature of the event, the actions of the declarant in the period between event and statement, and the amount of time that has elapsed and noting
the gap between event and statement, the greater the opportunity for, or likelihood of, reflection and deliberation.

Over time, appellate decisions have indicated that the permissible time lapse has been quietly, yet steadily, increasing in length.\(^9\) In the past, an appreciable gap between the event and the statement was seen as a hurdle for the proponent of the statement to overcome.\(^{30}\) The Court of Appeals reflected this attitude in *People v. Brown*.\(^{31}\) After ultimately deciding to admit a statement made one-half hour after the incident, the court stated, "[w]e hold only that, under the circumstances here, the lapse of 30 minutes, is not, as a matter of law, too long."\(^{32}\) Recent cases reveal a different approach. Gaps as long as thirty minutes or more are now often viewed as sufficiently brief intervals to actually be a factor supporting admission.\(^{33}\)

In the recent case of *People v. Cotto*,\(^{34}\) the Court of Appeals referred to the "short interval"\(^{35}\) between the event and the statements and found a series of statements to be properly admitted as excited utterances.\(^{36}\) Although the majority observed that the question and answer exchange took place within what it characterized as a ten-minute trip from the scene to the hospital,\(^{37}\) the dissent implied that the questioning went on for a prolonged period.\(^{38}\) Indeed, the Appellate Division decision referred to the statements as being made by the victim "within 30 minutes after he was shot."\(^{39}\) A recent case, citing *Cotto*, noted in favor of

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\(^9\) See also *Martin et al.*, supra note 20, § 8.3.3, at 799.

\(^{30}\) See, e.g., ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 803(1).1(b), at 608 (1996) ("Early on, the Court of Appeals applied the time factor strictly.").

\(^{31}\) 517 N.E.2d 515 (N.Y. 1987).

\(^{32}\) Id. at 519.


\(^{34}\) 699 N.E.2d 394 (N.Y. 1998).

\(^{35}\) See id. at 400.

\(^{36}\) See id.

\(^{37}\) See id. at 400 n.3.

\(^{38}\) See id. at 405-06 (Smith, J., dissenting).

admission that the statements at issue were made within twenty minutes.40

Another important factor that has recently experienced a liberal interpretation is whether the statements were made in response to questioning. A question, by its very nature, serves as a prompt that makes the individual engage his or her deliberative faculties.41 In this way, it is the antithesis of an excited utterance. If an individual was able to accurately and coherently answer a series of questions, it is harder to argue that he or she was too agitated or traumatized to reflect or fabricate.42 Again, a reference must be made to the essential element of spontaneity. Webster’s Dictionary further defines “spontaneous” as “developing without apparent external influence, force, cause or treatment.”43

The New York Court of Appeals has considered whether statements made in response to questions can qualify as excited utterances. In People v. Edwards,44 the court observed that “[i]t is unreasonable . . . to prohibit admission of these utterances in every instance in which they were prompted by a simple inquiry.”45 The inquiry in Edwards—”[w]hat is the matter?”—was simple indeed. The court also noted that the question was as spontaneous as the response, and that “[t]o be sure, if the question propounded or the identity of the questioner may suggest or influence the response or if it is asked an appreciable length of time after the startling event, the declarations might very well lack the inherent reliability basic to the rule.”46 More recently, in People v. Brown,47 the court permitted the admission of responses to questions, but cautioned that all courts should examine the nature, extent, and purpose of the questions as well as the identity, position, and manner of the questioner. The court explained that these elements should be examined prior to deciding whether the questions served to interrupt or moderate the declarant’s stress from the shocking

41 See, e.g., MARTIN ET AL., supra note 20, § 8.3.3, at 802 (“Responses to questions, as opposed to spontaneous statements, are viewed with some suspicion because the process of answering involves at least sufficient reflection to respond appropriately to the question.”); MCCORMICK, supra note 20, § 297, at 857 (“Evidence that the statement was . . . made in response to an inquiry, while not justification for automatic exclusion, is an indication that the statement was the result of reflective thought . . . .”).
43 WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1140 (9th ed. 1990).
45 Id. at 1232 (emphasis added).
46 Id.
event.\textsuperscript{48}

The decision in \textit{People v. Cotto} \textsuperscript{49} reflects the New York Court of Appeals's willingness to stretch the definition of an excited utterance. In \textit{Cotto}, the declarant, after being shot by the defendant, got up and tried to run away. He was chased down the street while the defendant continued to shoot at him. After the shooting, the declarant made the statements in question to a police officer and emergency medical technician ("EMT") in an ambulance en route to the hospital. According to the majority, the "short interval" between the event and the statements, coupled with the extraordinary stress of the event, prevented reflection.\textsuperscript{50} Holding that all the statements were admissible, the court observed that, even though the statements were made in response to questions, the questions did not serve to interrupt the excitement of the shooting.\textsuperscript{51}

The following is a synopsis of the questions asked and answered in the ambulance:

Police officer: "Who shot you?"
Declarant: "I know."
EMT: "You're not doing too good. Why don't you talk to the officer." [sic]
[Police officer reiterates the EMT's assertion.]
[Declarant provides his name, address, and apartment number.]
Police officer: "Who shot you?"
Declarant: "Richie."
Police officer: What is "Richie's" last name?
[Declarant does not answer.]
Police officer: "Do you realize that there's a good chance

\textsuperscript{48} In \textit{Brown}, the police inquiry appears to have been of limited duration and scope. The officer asked the victim in the emergency room whether the victim would "tell [him] who committed the crime," and also engaged in unspecified "further inquiries." \textit{Id.} at 516. This comports with the "simple inquiry" upheld in \textit{Edwards}. 392 N.E.2d at 1228. Similarly, in \textit{People v. Fratello}, 706 N.E.2d 1173 (N.Y. 1998), the court again observed that declarations made in response to questioning are not automatically inadmissible. The questioning involved, however, seems to have been limited to inquiries such as: "Who shot you?" \textit{See id.} at 1175.

\textsuperscript{49} 699 N.E.2d 394 (N.Y. 1998).

\textsuperscript{50} \textit{See id.} at 400. The dissent suggests that, given the testimony about the questions and answers in the ambulance, this interval was not particularly short. \textit{See id.} at 404-06 (Smith, J., dissenting). The Appellate Division had described the statements as being made "by the victim in the ambulance within 30 minutes after he was shot." \textit{People v. Cotto}, 658 N.Y.S.2d 278, 279 (App. Div. 1997).

\textsuperscript{51} \textit{See Cotto}, 699 N.E.2d at 400.
you’re going to die?"52
Declarant: “Yeah.”
[Some period of time elapses.]
Declarant: The shooter was “Richie from my building.”
Police officer: Was the shooter “Richard Cotto[?]”
Declarant: Yes, it was “Richie from the fourth floor.”
Police officer: “Do you realize that there’s a chance you’re going to die?”
Declarant: Yes.
Police officer: “Are you sure who shot you?”
Declarant: “Yeah.”
[Some period of time elapses.]
Declarant: “Richie Cotto shot me.”
Police officer: “What kind of car does he drive, because I want to make sure we’re talking about the same person here. What kind of car does he drive?”
Declarant: It was a white car.53

Judge Smith, in his dissent, agreed that statements in response to inquiries are not prohibited per se, but noted that the “nature, extent and purpose of the questions and the identity, position and manner of the questioner” must be examined.54 Judge Smith further observed that “[i]t is evident that the witness listened to multiple questions and proddings of both officer and technician, reflected upon his answers, deliberated before responding, and weighed his responses accordingly.”55 Judge Smith referred pointedly to the following testimony given by the EMT when asked during cross-examination who was the first to name the defendant as the shooter: “The [declarant] said ‘Richie.’ He didn’t say it right away. He sort of like thought about it for a few seconds and then he said ‘Richie.’”56 It is inconceivable that the original formulation of an excited utterance contemplated statements of

52 Arguably, the statements were admissible pursuant to the dying declarations exception to the rule against hearsay. However, there was no need to reach the prosecution’s alternative argument that the statements were admissible as dying declarations, since the court held that the trial judge had determined correctly that the statements were excited utterances. See id. at 399. See, e.g., People v. Nieves, 492 N.E.2d 109 (N.Y. 1986) (defining dying declarations as statements made while under a sense of impending death with no hope of recovery).
53 See Cotto, 699 N.E.2d at 405.
54 Id. (Smith, J., dissenting) (quoting People v. Brown, 517 N.E.2d 515, 519 (N.Y. 1987)).
55 Id.
56 Id. at 406 (emphasis added).
the minutes quicker. The defendant toward her. She saw two friends. She pushed the defendant away and ran toward them, yelling, “Get him!” At first, the complainant and her friends chased after the defendant, but then she went into her apartment and called 911. She told the 911 operator that the defendant had both a gun and a knife. However, at trial she admitted that she had lied about the existence of a gun. She explained, “I tried to get the cops there as quick as possible. And I knew that if I said that there was a gun, that the cops would come quicker.”

The majority upheld the trial court’s admission of the 911 call as an excited utterance. The court noted that “only about five minutes elapsed” between the incident and the 911 call, and that the complainant’s intervening activities consisted merely of telling her friends about the defendant’s actions and then briefly chasing him. The most important factor, however, was the nature of the event, which the court described as “undeniably traumatic.” The court held that it was not improper for the trial court to conclude that the call “taken as a whole shows by its contents and the demeanor of the voice . . . and the timing of the conversation that she was very clearly still under the influence of this stressful, terrifying event, and that . . . overcomes the significance of her admitted lie.”

The ease with which the majority dismissed the significance of the “admitted lie” is troubling. As the dissent observed: “[T]he fact that the complainant had the cognitive ability to purposely lie to the 911 operator that the defendant possessed a gun in an effort to prompt a more immediate police response demonstrates that

\[\text{57} \text{ N.Y.S.2d 765 (App. Div. 1997).}\]
\[\text{58} \text{ Id. at 767.}\]
\[\text{59} \text{ See id. at 767-68.}\]
\[\text{60} \text{ Id. at 767.}\]
\[\text{61} \text{ See id.}\]
\[\text{62} \text{ Id. (quoting the trial judge).}\]
she was 'acting under the impetus of studied reflection.'

These analyses suggest that in virtually any case where the underlying incident is "undeniably traumatic," statements made by the victim will be deemed admissible excited utterances. The extraordinary stress of the event will outweigh all other factors and result in the declarant being unable to reflect or fabricate, regardless of the time elapsed, the extent and duration of any questioning, and even evidence of purposeful deceit. This represents a dramatic shift in the analysis of excited utterances.

Although the Court of Appeals continues to espouse the traditional "normal reflective process [be rendered] inoperative" language as being the essence of an excited utterance, it actually countenances a far less strict standard. In Cotto, the declarant certainly reflected on some level. He answered many disparate questions over a period of time ranging from ten to thirty minutes. Of particular salience is the testimony of the EMT that the declarant "thought about [the question] for a few seconds and then" answered. Moreover, in Simpson, it can hardly be argued that the declarant did not engage in some degree of conscious reflection. The declarant assessed the situation and came up with a planned approach to her statements. Apparently, it is no longer essential that the declarant's "normal reflective process [be rendered] inoperative." Rather, it is sufficient that it merely be affected in some way.

Further evidence of the Court of Appeals's willingness to admit statements as excited utterances is found in the lack of attention the court paid to allegations of the declarants' bias against the defendants in People v. Fratello and Cotto. In his dissent in Cotto, Judge Smith suggested that the allegations of a "long-standing feud or enmity" between the declarant and the defendant impacted negatively on the reliability, and therefore admissibility, of the statements. The majority failed to even

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63 Id. at 768 (Joy, J., dissenting) (quoting People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979)).
64 See id. at 767.
65 See, e.g., MARTIN ET AL., supra note 20, § 8.3.3, at 800 (observing that "if the declarant suffered some physical trauma such as being attacked or shot, a statement made well after the event may still be an excited utterance").
67 See supra note 50 and accompanying text.
69 Vasquez, 670 N.E.2d at 1334.
70 706 N.E.2d 1173 (N.Y. 1998).
71 699 N.E.2d at 406 (Smith, J., dissenting).
discuss the relevance of those allegations. In Fratello, there was
evidence that the defendant and the declarant, former partners in
crime, had “a falling out... to such an extent that the victim had
allegedly shot defendant and attempted to kill one of the
defendant’s relatives.” Yet, the majority referred merely to the
victim’s “claimed bias” against the defendant and held that
“[g]enerally, the bias of an excited utterance declarant functions as
a basis for impeachment of the declaration, thus pertinent to the
weight, rather than admissibility of the declaration.” Judge
Smith, in dissent once again, argued that the alleged bias and
nefarious character of the declarant made the statements too
unreliable to be admitted.

In the past, New York trial courts have analyzed the
declarant’s motivations in order to determine whether to admit
out-of-court statements as excited utterances. For example, in
People v. Norton, perhaps the most salient factor against
admission of the victim/declarant’s statements as excited
utterances was that he had a motive to lie. The court emphasized
that “it is vitally important to consider whether [the declarant]
had, in addition to an opportunity to reflect, a reason to fabricate a
story implicating the defendant.”

The Court of Appeals has also recognized the importance of
the declarant’s possible motivations. In People v. Dalton, the
court observed that the defendant had a “powerful motive” to
exculpate himself, and therefore the 911 call did not have the

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72 706 N.E.2d at 1179 (Smith, J., dissenting).
73 Id. at 1176.
74 See id. at 1178-79 (Smith, J., dissenting). Judge Smith felt that, given the
questionable reliability of the victim’s statements, the court should have required that the
statements be corroborated before they were admitted. See id. For a discussion of the
requirement of corroboration in the context of the analytically similar present sense
impression exception, see infra text accompanying notes 160-63. Given that at trial the
declarant repudiated his hearsay statements that inculpated the defendant and attempted
to exonerate him, Judge Smith also felt that the hearsay statements, standing alone, were
an insufficient basis upon which to convict the defendant. See Fratello, 706 N.E.2d at
1178-79 (Smith, J., dissenting). For a discussion of the issues raised by the conflict
between the declarant’s out-of-court hearsay and in-court testimony, see infra notes 230-
47 and accompanying text.
75 563 N.Y.S.2d 802 (App. Div. 1990), aff’d on other grounds, 588 N.E.2d 72 (N.Y.
76 See id. at 810 (finding that the declarant could well have been motivated by revenge
to fabricate his statements inculpating the defendant).
77 Id. at 808.
78 People v. Dalton is one of the three cases decided by the court in People v. Vasquez,
requisite trustworthiness for admission as an excited utterance. The Court of Appeals’s cursory attention to the declarant’s possible interest and its impact on the reliability of the statements in both Cotto and Fratello signals a significant departure from prior analyses and will result in the admission of more out-of-court statements.

B. Unavailability Due to the Defendant’s Misconduct

The New York Appellate Division, Second Department, first formally recognized this hearsay exception in Holtzman v. Hellenbrand, and the Court of Appeals gave its stamp of approval in People v. Geraci. According to these cases, prior statements of an unavailable witness are admissible if it can be established “that the defendant procured the witness’s unavailability through violence, threats, or chicanery.” Simply put, the issue is whether the witness’s unavailability is due to the defendant’s misconduct. Although often referred to as “waiver by misconduct,” the underlying rationale is described more appropriately as “forfeiture dictated by sound public policy.”

Unlike other exceptions to the hearsay prohibition, this

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79 See id. at 1337. See supra text accompanying notes 18-19 (explaining that statements made by the defendant often do not qualify as excited utterances because they are viewed as self-serving). The declarant’s possible bias is an important inquiry in other hearsay contexts as well. One of the prerequisites for finding that hearsay statements are admissible as declarations against penal interest is that there is sufficient evidence independent of the declaration to assure its trustworthiness and reliability. See, e.g., People v. Brensic, 509 N.E.2d 1226 (N.Y. 1987). Courts have declined to admit statements otherwise appropriately deemed declarations against penal interest when there has been a showing of a possible motive to lie. See, e.g., People v. Shortridge, 480 N.E.2d 1080, 1083 (N.Y. 1985) (evidence of a “strong ulterior motive” to prevaricate); People v. Settles, 385 N.E.2d 612 (N.Y. 1978) (evidence of a “distinct possibility” of a motive to lie). For a discussion of the effect of the interest of the declarant on the admissibility of statements as present sense impression exceptions to the rule against hearsay, see infra note 164. For a comparable analysis pursuant to the Federal Rules of Evidence, see Margaret A. Berger, The Federal Rules of Evidence: Defining and Refining the Goals of Codification, 12 Hofstra L. Rev. 255 (1984) (discussing whether trial judges may, pursuant to the prejudicial effect versus the probative value determination mandated by Federal Rule of Evidence 403, refuse to admit statements that otherwise fit within the requirements of specific hearsay exceptions).

84 Id. at 820 (citing Holtzman v. Hellenbrand, 460 N.Y.S.2d 591, 596 (App. Div. 1983)).
85 See United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).
86 Geraci, 649 N.E.2d at 821 (emphasizing that the justification for the rule is premised on the principle that the law does not permit a person to benefit from his or her own wrongdoing).
exception is not grounded in its inherent reliability. Rather, the exception is a product of the public policy of reducing the incentive for witness tampering. In recognition of the lack of intrinsic reliability that is the linchpin of other hearsay exceptions, the Court of Appeals requires, as a precondition for admissibility, that the defendant's causal misconduct must be established by clear and convincing evidence. If the prosecution is able to meet its burden of proof, neither the constitutional right of confrontation nor the evidentiary rules against the admission of hearsay precludes the admission of the witness's out-of-court declarations.

In *Geraci*, a witness testified before the grand jury that the defendant had stabbed another man to death. However, shortly before the trial date, the witness moved out of New York, and when contacted by the prosecution stated that he would not testify against the defendant at trial. Following a hearing, the court admitted the witness's grand jury testimony into evidence, finding that his unavailability was a result of the defendant's intentional intimidation.

Although *Geraci* involved the use of what is generally referred to as "former testimony," it does not represent an expansion of Criminal Procedure Law section 670.10, entitled, "Use in a criminal proceeding of testimony given in a previous proceeding; when authorized." That statute explicitly limits the use of former testimony to three proceedings: a criminal trial, a felony preliminary hearing, or a conditional examination. The

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87 See id. at 822. It is arguable that reliability is established due to the defendant's actions. In other words, why would the defendant cause a witness to be unavailable unless the witness had relevant, reliable, and damaging information?

88 See id.

89 See id. at 821-22. The court specifically declined to follow the lead of some federal circuit courts, which utilized the lesser preponderance of the evidence standard. See id.; see, e.g., *Mastrangelo*, 693 F.2d at 273; *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982). This hearsay exception was codified in 1997 in Rule 804(b)(6) of the Federal Rules of Evidence. The Rule provides that the rule against hearsay does not bar admission of "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." FED. R. EVID. 804(b)(6). The Advisory Committee Note to the 1997 Amendment to Federal Rule of Evidence 804(b)(6) states that the "preponderance of the evidence standard has been adopted in light of the behavior the new rule 804(b)(6) seeks to discourage." FED. R. EVID. 804 (b)(6) advisory committee's note.

90 See *Geraci*, 649 N.E.2d at 823-24.

91 See id. at 822-23.

92 See N.Y. CRIM. PROC. LAW § 670.10 (McKinney 1992).

93 See id. § 180.60.

94 See id. art. 660. The testimony in these three proceedings was deemed reliable
court in *Geraci* was not concerned with statutory interpretation and did not add to the ambit of section 670.10. Rather, the holding in *Geraci* is an explicit recognition of this public policy exception to the traditional rule against hearsay.

The breadth of this exception cannot be overstated. Even though *Geraci* was concerned with sworn grand jury testimony, the types of extrajudicial statements admissible under this rule are vast. Since admission is not premised on inherent reliability, it is not necessary for the statements to have been made under oath, subject to cross-examination, or to have any sort of traditional indicators of reliability.

The nature of the circumstances that led to the creation of this exception invariably results in complex issues for the trial court to decipher. The essential difficulty for the prosecutor is proving the defendant’s misconduct when she does not have a willing, cooperative witness. For example, assume that the prosecutor believes she has a knowledgeable and compliant witness. A few days before the scheduled trial date, the prosecutor calls the witness to review the incident, and to her surprise the witness says, “What case? I forgot all about that. I don’t remember anything about it.” The prosecutor will likely suspect foul play and ask the witness if anyone has threatened her about testifying. The odds are, if the witness was in fact threatened, and scared enough to tell the prosecutor that she does not recall the incident, she will likely not admit it to the prosecutor. The prosecutor’s task is then to prove the defendant’s misconduct without the cooperation of the affected witness. In recognition of this dilemma, the court in *Geraci* provided that, “given the inherently surreptitious nature of witness tampering,” circumstantial evidence may be used, in whole or in part, to establish the defendant’s misconduct, and the

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because in each case the declarant was subject to cross-examination. See infra notes 174-76 and accompanying text.

95 *Cf.* Peter Preiser, *Supplementary Practice Commentaries, N.Y. CRIM. PROC. LAW* § 670.10 (McKinney Supp. 1999). Interestingly, the Court of Appeals’s recent expansive pro-admissibility approach to hearsay does not encompass statutory analysis. Section 670.10 has consistently been interpreted strictly so that testimony at pretrial suppression hearings, at civil proceedings, and even in the grand jury, continues to be impermissible hearsay if offered within the exception for former testimony codified by section 670.10. See, e.g., People v. Ayala, 553 N.E.2d 960, 963 (N.Y. 1990) (pretrial suppression hearing regarding the constitutionality of the identification procedures used by the police); People v. Harding, 332 N.E.2d 354, 356-57 (N.Y. 1975) (testimony from the police officer defendant’s departmental hearing).

96 *See Geraci,* 649 N.E.2d at 822-24.

97 *Id.* at 823.
prosecution is permitted to meet its burden through the use of hearsay testimony.\footnote{See id. at 823 n. 4 (addressing, but not ultimately deciding, whether hearsay may be used to establish the requisite misconduct); see also FED. R. EVID. 104(a) (stating that when deciding the admissibility of evidence, the court is not bound by the rules of evidence, except those with respect to privileges); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) ("[O]ften the only evidence of coercion will be the statement of the coerced person, as repeated by government agents.").}

Like many precedent-setting cases, Geraci created as many problems as it purported to solve. For example, consider the following variations of "unavailability:" (1) the witness disappears and cannot be found; (2) the witness is located but refuses to speak with the prosecutor or refuses to come to court; (3) the witness testifies in court, but repeatedly answers, "I don't recall"; or (4) the witness testifies inconsistently from his or her prior statements and/or makes a direct effort to exonerate the defendant.

Another question that remains unanswered after Geraci is: What does it mean for unavailability to be "procured by the defendant?"\footnote{Geraci, 649 N.E.2d at 823.} If a witness is threatened while the defendant is in jail, any misconduct is not directly attributable to the defendant. What if a friend of the defendant decides under his own volition to threaten the witness? What if a witness hears generally about the defendant's reputation for violence and becomes afraid to testify? If it is not necessary to prove that the defendant personally performed the misconduct, the question then becomes whether it is sufficient to show that the misconduct is attributable, directly or indirectly, to the defendant, or that the defendant somehow condoned, or acquiesced to the misconduct.

In People v. Cotto,\footnote{699 N.E.2d 394 (N.Y. 1998).} the court was confronted with the task of defining the parameters of clear and convincing evidence. What sort of evidence suffices to establish that the defendant's misconduct caused the witness to be unavailable? According to the prosecution, an eyewitness to the homicide who knew the defendant could testify that he saw the defendant shoot the victim. Just prior to the trial, the eyewitness told the prosecutor that his family was "in jeopardy," that "everything [wa]s off," and that he would not testify at trial.\footnote{See id. at 396.} The next morning, the prosecutor spoke with the eyewitness, who promised to testify truthfully. However, later that day, when called to the stand, the eyewitness claimed that he could not identify the shooter and he explained to
the judge that he was concerned for his family’s safety. The prosecutor informed the court that the eyewitness had told him that some men had approached his family and had given them “reason to believe that there was a ‘contract’ out on [his life].” As a result, the trial court ordered a hearing to explore the allegations of misconduct.

The ensuing hearing reflects the Pandora’s box that these cases have opened. The prosecution in Cotto called two police officers to the stand. The first officer testified that the eyewitness, after obtaining information from his fiancée, had told him that “someone had approached his mother and sister and inquired as to his whereabouts.” The second officer testified that the eyewitness’s sister told him that “unidentified people” had approached her and asked where her brother was being housed in jail. The officer testified further that the sister said that the “word on the street” was that her brother “was talking.” However, when called to testify by the prosecution, both the eyewitness and his sister failed to support the police testimony and, in fact, denied making the statements attributed to them. Finally, the prosecution called the eyewitness’s mother, who testified that her daughter had told her that someone had stopped her on the street and asked whether her brother was in jail.

Faced with denials by those who allegedly spoke about being threatened, the trial court nevertheless found that the prosecution had proven by clear and convincing evidence that threats had been made. The Court of Appeals affirmed the decisions of the Appellate Division and the trial court, holding that there was sufficient evidence to conclude that threats were made as well as enough evidence to link the threats to the defendant. The dissent argued that “[u]nder the authority of this case, vague allegations of ‘word on the street’ combined with tales of unsubstantiated visits by unnamed individuals will suffice to

102 See id. The eyewitness told the judge:

Spanish Harlem is a small place, okay. My family lives there. All right. I don’t live there. Okay. [The victim] was a friend of mine, a good friend of mine. All right. Now, see, I got to think about my family, all right. Even though I’m not going to live there, my family is going to be there, you know what I’m saying.

Id.

103 Id.

104 Id. at 397 (emphasis added).

105 See id. (emphasis added).

106 Id.

107 See id.

108 See id. at 397-400.
establish clear and convincing evidence of a defendant’s unlawful interference with a witness.\footnote{See id. at 396. The court emphasized that the defendant was out on bail and therefore had the opportunity to arrange the threats, and that the defendant had threatened the witness at the time of the crime by looking at him and pointing a gun in his direction. See id. These facts, and others, were held to clearly and convincingly link the defendant to the threats. See id. The impact of the holding in \textit{Cotto} is magnified by the harshness of the remedy fashioned by the trial court and upheld by the Court of Appeals. Following the federal rule, the court held that the defendant forfeited his right of confrontation for all purposes. Accordingly, the defendant was not permitted to cross-examine the witness on any subject.}^{109}

The decision in \textit{Cotto} marks a profound expansion of \textit{Geraci}. While the majority often referred to \textit{Geraci}, the facts of the two cases are substantially dissimilar. In \textit{Geraci}, it was the defendant himself who approached the witness and told him that his attorney wanted to discuss the case with him. In addition, the defendant’s uncle, a known person, spoke with the witness and promised him several thousand dollars. Indeed, by the time of the trial, the witness had already received $2,000. The evidence of misconduct in \textit{Cotto} pales in comparison. Although he was out on bail, there was no evidence that the defendant himself had committed acts of misconduct, and there was no evidence of any actual direct threats. Moreover, in \textit{Cotto}, the people alleged to have made threats were never identified.\footnote{People v. \textit{Geraci}, 649 N.E.2d 817, 822 (N.Y. 1995). The court further observed that “our statutory and decisional law counsels a cautious approach that permits use of the exception only when the predicate facts are proven with the degree of certainty that the ‘clear and convincing evidence’ test assures.” \textit{Id.} at 822-23.}^{110} The Court of Appeals in \textit{Geraci} rejected the preponderance standard and stated that a higher standard was necessary in order “to assure a great degree of accuracy in the determination of whether the defendant was, in fact, involved in procuring the witness’s unavailability for live testimony”\footnote{Id. at 404 (Smith, J. dissenting).}, yet the court’s holding in \textit{Cotto} appears to countenance a far less stringent standard in practice.

\textit{Cotto} is also significant with respect to the nature of the out-of-court statements that were admitted into evidence—they were unsworn statements that the witness made to a police officer and a detective. Although \textit{Geraci} did not limit its holding in this way, it is important to bear in mind that it involved the admissibility of the witness’s grand jury testimony, which was given under oath and therefore had additional indicia of trustworthiness. Recognizing the necessarily amorphous quality of standards such as “clear and convincing,” it nevertheless seems that if the hearsay
the prosecution seeks to admit under this exception is unsworn, the requisite clear and convincing proof should be crystal clear.

Other scenarios reveal the complexities and potential far-reaching consequences of this hearsay exception. In People v. Johnson, the defendant was charged with rape, sodomy, and endangering the welfare of a child. The defendant, a pastor, allegedly became involved in a sexual relationship with a thirteen-year-old parishioner. The victim's mother had become suspicious about the relationship between the defendant and her daughter and forced her to get a pregnancy test. While awaiting the results, she took her daughter to the police, whereupon the child was interviewed for four or five hours. The victim initially denied any sexual relationship with the defendant. However, when her mother confronted her with the positive results of the pregnancy test, she admitted that she was involved in a sexual relationship with the defendant. At the insistence of the police and her mother, the victim called the defendant. During the taped conversation, the defendant tacitly acknowledged their sexual relationship and repeatedly urged the victim to protect him by lying about their relationship. Meanwhile, the police went to the church and arrested the defendant.

The victim testified extensively to the grand jury, but at trial she refused to answer questions by repeatedly responding, "I have nothing to say." The victim's only explanation for her refusal to testify was, "[b]ecause I choose not to." The prosecutor moved for admission of her grand jury testimony on the theory that the defendant's misconduct caused the witness's unavailability at trial.

While the appeal focused primarily on the necessity of a formal hearing on the allegations of the defendant's malfeasance, the Johnson case flags the overarching issues of what constitutes "unavailability" and what constitutes "misconduct." The declarant in Johnson was present in court, but chose not to answer questions. Moreover, she did not explain her reason for that

112 711 N.E.2d 967 (N.Y. 1999).
113 See id. at 968.
115 Id.
116 See Johnson, 711 N.E.2d at 968.
117 See Johnson, 673 N.Y.S.2d at 759 (reversing the conviction on the grounds that the trial judge failed to hold a formal hearing as this hearsay exception absolutely requires).
118 See id. at 756-60.
refusal. Although there were no allegations of threats of any kind, the trial court found that the defendant had "induced" the witness's refusal to testify. The central issues became whether the defendant's alleged malfeasance must postdate the date of arrest, and whether it must involve threats, fear, or intimidation of physical harm. Surely, the witness's refusal to testify was attributable to the defendant. The questions that remain are whether there must be post-arrest actions by the defendant that are intended specifically to deter the witness from testifying, and whether misconduct of the psychological sort alleged here is sufficient.

Still another critical issue concerns the court's use of the act for which the defendant is on trial as the predicate misconduct necessary to permit introduction of the victim's hearsay statements. For example, in People v. Maher, the defendant was charged with the murder of his "estranged paramour." The trial court admitted statements made by the victim to police and hospital security officers regarding prior violent acts and threats the defendant directed at her. The New York Appellate Division, Second Department, affirmed the defendant's conviction and upheld the admission of the victim's statements under the authority of Geraci. The reasoning presumably was that the defendant's misconduct caused the victim's absence. The Court of Appeals reversed the conviction and held that admitting the statements was an "unwarranted expansion" of the Geraci

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119 Contrast this version of "unavailability" with the one contemplated by the genesis of this exception—the witness has disappeared and is presumed dead. See, e.g., United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982) (the witness was murdered).
120 See Johnson, 673 N.Y.S.2d at 757.
121 Again, one must consider that the origins and most common uses of this hearsay exception are in cases where there are threats of physical harm to the witness or his or her family.
122 See Johnson, 673 N.Y.S.2d at 759:
Moreover, we acknowledge that in a very real, albeit global sense, the victim's unwillingness to cooperate is a direct consequence of, or at least inextricably connected with, the misconduct of which defendant stands convicted. We are constrained, however, by the fact that we sit not in moral, but legal judgment.
Id; see also People v. Concepcion, 644 N.Y.S.2d 498 (App. Div. 1996) (finding no evidence that the defendant had committed any post-arrest misconduct to induce his mother not to testify); cf. id. at 762 (Peters, J., dissenting) ("His admonishment to her [made while on the phone with her just prior to his arrest] that only her words could send him to jail, silenced this child as surely as if he had cut off her tongue.").
123 677 N.E.2d 728 (N.Y. 1997).
124 See id. at 729.
125 See id. at 730.
126 See id.
exception. The court reasoned that admission of the statements would result in a rule permitting the use of the victims' statements in all homicides and, significantly, that there was "not a scintilla of evidence that the defendant's acts against the absent witness were motivated, even in part, by a desire to prevent the victim from testifying against him in court." Apparently, as long as the motive for the murder is homicidal rage, or anything except a desire to prevent the victim from testifying in court, the Geraci exception is inapplicable. The facts and decision in Maher are not sui generis.

The case of People v. Flowers presents a slight variation on Maher. In Flowers, three indictments were consolidated for trial. The defendant was charged with assaulting the victim on two prior occasions, and then with murdering her. At trial, the court followed the rationale of Geraci and permitted the prosecution to admit the deceased's grand jury testimony from the first assault indictment. Although the New York Appellate Division, Fourth Department, found that the testimony was erroneously admitted, the court did not even comment on the propriety of the prosecutor's attempt to admit the deceased's statements by asserting, essentially, that the defendant was guilty of the crime charged. Rather, the court merely noted that there was "no evidence that defendant's acts against the victim were motivated by a desire to prevent her from testifying."

These types of cases are proliferating. They are not limited to situations where a witness has disappeared, and will surface whenever a witness appears recalcitrant or answers questions in a manner that leads a prosecutor to suspect foul play. The exception is also not limited to cases where there is clear and convincing evidence that the defendant himself threatened the witness. The inquiry is necessarily more expansive, examining whether the defendant directly or indirectly caused the witness to be unavailable, or whether the defendant acquiesced in the misconduct. Furthermore, the exception is not clearly limited to post-arrest threats of physical harm. Courts are considering whether the nature of the relationship between the defendant and the witness, which existed prior to the arrest and is often part and

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127 See id.
128 Id. at 731.
130 See id. at 547.
131 Id.
parcel of the instant charges, is such that the witness's unavailability can automatically be attributable to the defendant's misdeeds. The expansion of this concept—that evidence otherwise inadmissible will be permitted if there is sufficient evidence of the defendant's misconduct—is especially worrisome, given that the exception is not premised on the intrinsic reliability of the statements.

II. CREATING NEW EXCEPTIONS

A. Present Sense Impression

The "present sense impression" exception to the rule against hearsay was recently adopted by the New York Court of Appeals in People v. Brown. The court held that "spontaneous descriptions of events made substantially contemporaneously with the observations are admissible if the descriptions are sufficiently corroborated." Unlike excited utterances, the event itself can be perfectly unremarkable and the declarant need not be startled or excited in any way. Present sense impressions are deemed reliable because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. Thus, the key components of the present sense impression exception are contemporaneity and corroboration.

The declarant in Brown was a caller to 911. He left an incorrect name and telephone number and was therefore, for all intents and purposes, anonymous. However, this did not deter the court from permitting the statements to be received into evidence.

\[\text{\textsuperscript{132}}\text{Significantly, the 1998 legislative program of the New York State judiciary urges the legislature to amend Criminal Procedure Law section 60.25 to permit a third party to recount a witness's prior identification of the defendant when, because of fear, the witness is unwilling to identify the defendant in court. See The Judiciary's 1998 Legislative Agenda, April 1998 (on file with author); see also N.Y. CRIM. PROC. LAW § 60.25 (McKinney 1992). Under common law, it is impermissible bolstering for a witness, typically a police officer, to recount a witness's prior identification of a criminal defendant. The statute presently recognizes an exception to this prohibition when the witness is unable, on the basis of present recollection, to identify the defendant in court. See id.}\]

\[\text{\textsuperscript{133}}\text{610 N.E.2d 369 (N.Y. 1993).}\]

\[\text{\textsuperscript{134}}\text{Id. at 373.}\]

\[\text{\textsuperscript{135}}\text{See id. at 371-72; People v. Vasquez, 670 N.E.2d 1328, 1334 (N.Y. 1996).}\]

\[\text{\textsuperscript{136}}\text{See Vasquez, 670 N.E.2d at 1334.}\]

\[\text{\textsuperscript{137}}\text{The court's willing acceptance of anonymous information is noteworthy given the court's uneasiness with anonymous information in other contexts. For example, the court has held that a finding of probable cause can be based on anonymous information only if}\]
Brown left open the question of whether the present sense impression exception requires that the declarant be unavailable.\textsuperscript{138} The only reference to the issue was in a footnote pointing out the difference between the Federal Rules of Evidence and the proposed New York Code of Evidence of 1982.\textsuperscript{139} This nascent hearsay exception was expanded considerably in People v. Buie.\textsuperscript{140} Following the lead of the Federal Rules of Evidence, the court in Buie held that "the present sense impression exception does not require a showing of the declarant’s unavailability as a sine qua non to admissibility."\textsuperscript{141}

Given that unavailability is not required, the issue now becomes whether the admission of the out-of-court statement amounts to improper bolstering. New York courts have long recognized the prohibition against bolstering testimony by the use of prior consistent statements.\textsuperscript{142} Prior consistent statements are permitted only as a response to a claim of recent fabrication.\textsuperscript{143} Judge Bellacosa, writing for the majority in Buie, stated that the rule against bolstering was inapplicable essentially for two reasons.\textsuperscript{144} First, the nature of present sense impressions differs from that of typical prior consistent statements.\textsuperscript{145} It does more than merely repeat the in-court testimony; rather, it adds an experiential element.\textsuperscript{146} The jury is able to experience the crime as it unfolded in a way that is not mimicked by in-court testimony.\textsuperscript{147}


\textsuperscript{138} The declarant in Brown, a 911 caller, gave an incorrect name and telephone number and as a result was unavailable. See Brown, 610 N.E.2d at 371.

\textsuperscript{139} See id. at 371 n.1 (stating that the proposed New York rule, unlike the Federal Rule, required that the declarant be unavailable as a witness).

\textsuperscript{140} 658 N.E.2d 192 (N.Y. 1995).

\textsuperscript{141} Id. at 195. The present sense impression exception is in section 803 of the Federal Rules of Evidence, entitled "Hearsay Exceptions; Availability of Declarant Immaterial." See FED. R. EVID. 803(1). The closely related excited utterance also does not require that the declarant be unavailable.


\textsuperscript{143} Prior consistent statements received in evidence to rebut a claim of recent fabrication are admitted to rehabilitate the credibility of the witness, not for the truth of the matter asserted. See, e.g., Barker & Alexander, supra note 30, § 801(1).2(b), at 561.

\textsuperscript{144} See Buie, 658 N.E.2d at 197.

\textsuperscript{145} See id.

\textsuperscript{146} See id.

\textsuperscript{147} See id.
Second, the bolstering concept is inapplicable because the out-of-court statements are admissible under an independent hearsay exception.\(^{148}\) While the statements might be inadmissible under the prior consistent statement exception, they may still be admissible pursuant to a "different, better-fitting exception."\(^{149}\) After Buie, the immediate result was a proliferation of cases where the declarant testified in court and his or her out-of-court statements, which were typically in the form of a 911 call, were also admitted into evidence.\(^{150}\)

This analysis has far-reaching implications. A typical criminal case involves the testimony of a police officer. At the conclusion of the officer's testimony, the prosecutor might move to admit into evidence a variety of the officer's reports, which were filled out based on personal, firsthand knowledge. One would expect the defense attorney to object and claim that the reports constitute improper bolstering by prior consistent statements. Surely, the prosecutor should respond by citing Buie for the proposition that the reports are admissible under an independent hearsay exception (business records) and that the bolstering argument is therefore inapplicable.\(^{151}\)

Surprisingly, but perhaps in response to the vast number of extra-judicial statements being admitted as present sense impressions, the court applied a more restrictive analysis in People v. Vasquez.\(^{152}\) In Vasquez, a trio of cases consolidated for appeal, the court held that hearsay statements offered by defendants did not qualify as present sense impressions.\(^{153}\) First, the court held that the statements were not sufficiently contemporaneous.\(^{154}\) While the court conceded that "there must be some room for a marginal time lag between the event and the declarant's description of that event,"\(^{155}\) it still required near simultaneity. The

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148 See id. at 197-98.
149 Id. at 198. Once deciding that the statements fit within the present sense impression exception, the trial court should then engage in an examination of relevance and also weigh the probative value versus the prejudicial effect. See id.
150 See infra note 165 and accompanying text.
151 See Buie, 658 N.E.2d at 197-98. There may be other independent grounds for exclusion of the police records. Courts distinguish reports that are accusatory in nature and bear directly upon the defendant's guilt from those that are routine and administrative in nature. The former affect the defendant's confrontation rights in ways not implicated by the latter. See, e.g., BARKER & ALEXANDER, supra note 30, § 803(3).1(b), at 638-39.
153 See id. at 1330.
154 See id. at 1335-37. This also was essentially the holding in the two other cases.
155 Id. at 1334.
court noted that in *People v. Brown*, the original definition of present sense impression required that statements be made "substantially contemporaneously" with the observations.\(^\text{156}\) However, two questions remain: (1) what is "substantially contemporaneously;" and (2) what, if any, time lag between the event and the statement is permitted?\(^\text{157}\) The Court of Appeals's expansive view of the temporal element in similar contexts indicated that the court would use an elastic approach to define the parameters of substantial contemporaneity.\(^\text{158}\) Nevertheless, *Vasquez* emphasized that present sense impression statements are reliable precisely because the contemporaneity minimizes the opportunity for calculated misstatements or inaccuracies of a faulty memory. Thus, since contemporaneity is the linchpin, any gap between the observations and the communications erases the assurance of reliability.

The *Vasquez* court further held that there was insufficient corroboration.\(^\text{159}\) While stating that it was impossible to spell out a general rule to define adequate corroboration, the court noted that "in all cases the critical inquiry should be whether the corroboration offered to support admission of the statement truly serves to support its substance and content."\(^\text{160}\) Although *Vasquez* did not define the requirements of corroboration, it signified that the corroboration requirement should be construed strictly.

Even though the court in *Vasquez* reined in the seemingly runaway present sense impression train, on closer reflection and analysis that result is not so remarkable, given the uneasiness the court displayed when it initially adopted the exception in *Brown*. At that time, the court chose to require corroboration. Several other hearsay exceptions do not require corroboration. The premise is that if the hearsay is reliable, then corroboration is not necessary. Further, excited utterances, which have been referred to as "close cousin[s]"\(^\text{161}\) of present sense impressions, have no corroboration requirement. Similarly, the Federal Rules of

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\(^\text{157}\) See, e.g., United States v. Parker, 936 F.2d 950 (7th Cir. 1991) (finding a statement made within a few minutes of the event to be within the present sense exception). See generally FED. R. EVID. 803(1) (referring to statements made "while the declarant was perceiving the condition or immediately thereafter").

\(^\text{158}\) For example, with respect to excited utterances, see supra notes 21-40 and accompanying text; with respect to prompt outcry, see infra notes 199-201 and accompanying text.

\(^\text{159}\) See *Vasquez*, 670 N.E.2d at 1335.

\(^\text{160}\) Id.

\(^\text{161}\) See *People v. Buic*, 658 N.E.2d 192, 195 (N.Y. 1995)
Evidence's present sense impression exception does not explicitly mandate corroboration.\textsuperscript{162} It appears that the court was saying, in effect: We will adopt this exception because we believe that these statements are reliable, but since we are not entirely convinced, we will require an additional guarantee of trustworthiness in the form of independent corroboration.\textsuperscript{163} With that background in mind, it is hardly shocking that \textit{Vasquez} applied a stricter standard to qualify statements as present sense impressions.\textsuperscript{164}

Although it is becoming increasingly rare for a criminal case not to contain some reference to a present sense impression, especially when 911 calls are involved, questions persist about the underlying rationale of this exception.\textsuperscript{165} Indeed, Dean Wigmore opposed the present sense impression exception, asserting that only a traumatic or startling event guaranteed trustworthiness, and that spontaneity and contemporaneity were insufficient guarantors of reliability.\textsuperscript{166}

Consider the facts in \textit{People v. Dingle}:\textsuperscript{167} A woman observed a man climbing through the window of a building directly across the

\textsuperscript{162} See FED. R. EVID 803(1); cf. Daniel J. Capra, \textit{Present Sense Impressions}, N.Y. L.J., Mar. 12, 1993, at 3, 35-36 (arguing that a careful reading of Rule 803(1) in conjunction with Rule 104 reflects the fact that the trial judge has discretion to require independent evidence that the event occurred in the manner described by the declarant).

\textsuperscript{163} The defendant in \textit{Brown} argued that the court should require corroboration in the nature of an “equally percipient witness.” \textit{Brown}, 610 N.E.2d at 373. The prosecution argued that the statement was inherently reliable and that therefore no corroboration was necessary. \textit{See id.} at 374. The court apparently adopted a middle ground requiring “sufficient” corroboration. \textit{See id.}

\textsuperscript{164} The court has not directly addressed the extent to which the interest of the declarant should be taken into account when the trial court decides whether there was adequate corroboration. In one trial court case, the judge declined to admit statements as present sense impressions due to the potential interest of the declarant, even though they were made substantially contemporaneously and were corroborated. See \textit{People v. Anonymous}, N.Y. L.J., June 5, 1996, at 26 (N.Y. Sup. Ct.) (McMahon, J.). Certainly, that sort of inquiry already occurs in other hearsay contexts. Statements offered by defendants as excited utterances are often rejected due to a determination that they are self-serving and therefore indicative of reflection. \textit{See supra} notes 18-19 and accompanying text.

\textsuperscript{165} See Barker \& Alexander, \textit{supra} note 30, § 803(1)(a), at 607 (“New York cases on the present sense impression are beginning to proliferate.”); see, e.g., Faust F. Rossi, \textit{Evidence}, 48 SYRACUSE. L. REV. 659, 669 (1998) (“New York’s acceptance of the present sense impression has opened the door to a large number of tape recorded conversations; mostly 911 telephone calls.”).

\textsuperscript{166} See 6 John Henry Wigmore, \textit{Evidence in Trials at Common Law} § 1757, at 236-40 (James H. Chadbourn ed., rev. 1976). Similarly, acceptance of the underlying reliability of excited utterances is by no means unanimous. Some question the underlying premise for admission of excited utterances and imagine that the stress from a startling event might render something someone says to be less accurate and reliable. \textit{See supra} note 20.

street from her apartment. She immediately called 911, reported the crime, and described the man. This call is quickly becoming a hallmark, prototypical present sense impression. However, “[b]ecause she was nervous and unsure of the address of the building, she gave the emergency operator several different street numbers. Less than two minutes later, the witness called the 911 emergency number again to clarify the address and give a more detailed description of the intruder.”\textsuperscript{168}

The above fact pattern is easy to imagine. The 911 caller would be anxious, and would begin to scrutinize the situation only after hanging up the phone and composing herself. Yet, the Vasquez analysis leads inexorably to the conclusion that only the first, less reliable 911 call is admissible. As one commentator pointedly observed, “[present sense impression] will tend to admit the statements of those who are prone to rush to judgment and exclude the statements of those more careful persons who wait, albeit momentarily, to comment upon an event.”\textsuperscript{169}

\section*{B. Due Process/Reliable Evidence}

In the 1997 \textit{People v Robinson}\textsuperscript{170} decision, the Court of Appeals again broke new ground. This time, evidence favorable to the defense was implicated.\textsuperscript{171} \textit{Robinson} held that due process required that the defendant was entitled to the admission at trial of the grand jury testimony of a defense witness who was no longer available.\textsuperscript{172}

The facts in \textit{Robinson} are as follows: The defendant was charged with rape in the first degree, sexual abuse in the first

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{168} \textit{Id.} at 585.
\item\textsuperscript{170} 679 N.E.2d 1055 (N.Y. 1997).
\item\textsuperscript{171} Although the excited utterance exception is not on its face more readily available to the prosecution than the defense, it is utilized to a much greater degree by the prosecution. The prosecution has the burden of proof and is more likely to call witnesses than the defense. The declarant is often the victim of the crime, and efforts by the defendant to admit his own statements as excited utterances are usually deemed to be self-serving and inadmissible. \textit{See supra} notes 18-19 and accompanying text. The \textit{Geraci} exception is a judicially created remedy for misconduct by the defendant and is therefore, by its very terms, a device for the prosecution. \textit{See People v. Geraci}, 649 N.E.2d 817 (N.Y. 1995). Present sense impressions (typically in the form of 911 calls) are, as is the case with excited utterances, usually offered by the prosecution. Judicial categorizations of statements as nonhearsay such as “prompt outcry” or “description of the perpetrator” are also means for the prosecution to avail itself of out-of-court statements. \textit{See infra} notes 187-230 and accompanying text.
\item\textsuperscript{172} \textit{See Robinson}, 679 N.E.2d at 1056.
\end{enumerate}
\end{footnotesize}
degree, and sexual misconduct. He claimed that there had been consensual sex and that his fiancée was a witness. His fiancée testified before the grand jury and corroborated his account. Robinson was then indicted for sexual abuse in the third degree and sexual misconduct. His fiancée left New York and refused to testify at trial. The trial court denied the defendant's application to have his fiancée's grand jury testimony admitted at trial.

Traditionally, Criminal Procedure Law section 670.10 is the sole mechanism for admitting former testimony in criminal cases. That section lists only three proceedings from which former testimony may be admissible at trial—a criminal trial, a felony preliminary hearing, or a conditional examination. These three proceedings are delineated because of the assumption that a full cross-examination ensures the reliability of the statements made during the former proceeding. The courts interpret this section strictly, and former testimony from various hearings and similar proceedings has been found inadmissible because those proceedings were not specifically listed in section 670.10.

The defendant's argument in Robinson, however, was that the due process clause gave him the right to present reliable evidence on his own behalf despite state evidentiary rules. The Court of Appeals held that the grand jury testimony should have been admitted at trial as an exception to the general prohibition against hearsay, since the defense established the foundational requirements of unavailability, materiality, and reliability. Even though grand jury testimony is generally viewed as insufficiently reliable because there is not necessarily a full and thorough cross-examination, the grand jury testimony in Robinson revealed that

174 See N.Y. CRIM. PROC. LAW § 670.10 (McKinney 1992). Section 670.10 is entitled, "Use in a criminal proceeding of testimony given in a previous proceeding; when authorized." Id.
175 See id.
176 See id.; see also supra note 95 and accompanying text. Just as Geraci does not represent an expansion of New York Criminal Procedural Law section 670.10, neither does Robinson. Although the courts in both cases admitted former grand jury testimony, admission was not premised in either case on statutory construction. In Geraci, the basis for admission was the court's identification of the need for a public policy exception to reduce the incentive for witness tampering. See Geraci, 649 N.E.2d at 822. In Robinson, the evidence was admitted pursuant to the due process clause and a constitutional analysis. See Robinson, 679 N.E.2d at 1059.
177 The court in Robinson noted other reasons why grand jury testimony is not sufficiently reliable—because evidentiary standards are more relaxed in the grand jury setting and because the proceeding is not subject to public scrutiny. See 679 N.E.2d at
"the prosecutor's direct examination accomplished the goal of cross-examination, testing the accuracy of the declarant's testimony."\textsuperscript{178}

\textit{Robinson} does not stand for the proposition that exculpatory grand jury testimony is always admissible. But when the treatment of the witness in the grand jury is "trial-like," and when the testimony is materially exculpatory, the defendant's right to due process mandates its admission even though it falls outside the narrow confines for former testimony spelled out in Criminal Procedure Law section 670.10.\textsuperscript{179}

While the Federal Rules of Evidence accord the trial judge residual discretion to admit hearsay that does not fit within any delineated exception,\textsuperscript{180} the New York common law has not explicitly adopted a similar rule. The federal residual provision has generated a large amount of controversy. Although the legislature intended it to be used sparingly,\textsuperscript{181} many scholars have concluded that the residual exception has overwhelmed the rule.\textsuperscript{182} The result, claim the critics, has been an unprecedented increase in the admission of extrajudicial statements.\textsuperscript{183} For some time, it appeared that the Court of Appeals would continue to reject any type of catchall exception. The court addressed this issue squarely in \textit{People v. Nieves},\textsuperscript{184} holding that the statements in question

\textsuperscript{1059 n.2.}

\textsuperscript{178} Id. at 1061. The court also noted that even the grand jurors posed questions to the witness. \textit{See id.} at 1060.

\textsuperscript{179} \textit{See N.Y. CRIM. PROC. LAW} \textsection 670.10 (McKinney 1992). Already, cases are being reversed on the grounds that the trial court improperly excluded grand jury testimony offered by the defense. \textit{See, e.g., People v. James, 661 N.Y.S.2d 273 (App. Div. 1997).}

\textsuperscript{180} \textit{Federal Rules of Evidence} 803(24) and 804(b)(5) were recently combined into Rule 807, which provides, in pertinent part, that "[a] statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule." \textit{FED. R. EVID. 807.}

\textsuperscript{181} \textit{See, e.g.,} Roger C. Park, \textit{Hearsay, Dead or Alive?}, 40 ARIZ. L. REV. 647, 651 (1998) ("Admittedly, the residual exceptions . . . were probably intended for use only in unusual situations . . . ."); Rossi, \textit{supra} note 10, at 1279 ("Congress envisioned a limited role for the residuals, intending to keep the hearsay exclusion intact and operating along traditional lines."); see also, \textit{e.g.,} BARKER \& ALEXANDER, \textit{supra} note 30, \textsection 804(5).2, at 748 (referring to the Senate Committee report which indicated that the residual exception should be used "very rarely, and only in exceptional circumstances").


\textsuperscript{183} \textit{See, e.g.,} Jonakait, \textit{supra} note 182; Raeder, \textit{supra} note 182.

\textsuperscript{184} 492 N.E.2d 109 (N.Y. 1986).
"were admissible only if the People demonstrated that they fell within one of the exceptions to the hearsay rule."\textsuperscript{185}

Robinson represents significant movement away from the court's position in Nieves. A careful reading of Nieves, however, foreshadows Robinson's result. Addressing the prosecutor's argument in Nieves that the statements were sufficiently reliable to be admitted, the court stated: "[W]e are not prepared \textit{at this time} to abandon the well-established reliance on specific categories . . . particularly in criminal cases where to do so could raise confrontation clause problems."\textsuperscript{186} In Robinson, the defendant sought admission of the evidence. The due process clause was implicated, but the confrontation clause was not. Accordingly, Robinson represented an apt vehicle for the court to introduce something akin to the Federal Rules of Evidence's residual exception for reliable evidence that does not fit within any pre-existing hearsay exception.

III. RE-EXAMINING TRADITIONAL PROHIBITIONS

As a general rule, a crime victim may not testify at trial about his or her statement to the police concerning either the specific facts of the crime or the perpetrator's appearance. The victim's in-court testimony about what he or she told the police out-of-court is both inadmissible hearsay and improper bolstering through the use of prior consistent statements. Over time, the New York courts have crafted exceptions to these prohibitions and, over the past decade, these exceptions have expanded beyond their narrowly drawn original parameters.

A. Prompt Outcry

According to the New York Court of Appeals:

Evidence that the victim of a sexual attack promptly complained has long been deemed admissible as an exception to the hearsay rule, the premise being that prompt complaint was "natural" conduct on the part of an "outraged female," and failure to complain therefore cast doubt on the complainant's veracity; outcry evidence was considered necessary to rebut the adverse inference a jury would inevitably draw if not presented with proof of a timely complaint.\textsuperscript{187}

\textsuperscript{185} Id. at 112 (emphasis added).
\textsuperscript{186} Id. (emphasis added).
\textsuperscript{187} People v. Rice, 554 N.E.2d 1265, 1266 (N.Y. 1990) (citing RICHARDSON, supra note 15, \S 292).
Subsequently, the court elaborated that evidence of a sexual assault victim's prompt complaint was admissible "to corroborate the allegation that an assault took place."\(^{188}\) Statements admitted under the "prompt outcry" theory are not hearsay because they are not offered for the truth of the matter asserted.\(^{189}\) As the name of the "exception" suggests, to be admissible the complaint must have been made promptly after the crime.\(^{190}\) Given its underlying rationale, the rule only permits evidence that a timely complaint was made, but does not allow testimony concerning details of the incident.\(^{191}\)

Here, as with many hearsay exceptions, the temporal element is a crucial factor.\(^{192}\) Webster's defines "prompt" as "performed readily or immediately."\(^{193}\) In *People v. McDaniel*,\(^ {194}\) the court held that a complaint was timely for purposes of the prompt outcry exception if it was made "at the first suitable opportunity."\(^ {195}\) Courts have taken an expansive view in defining what constitutes the first suitable opportunity. For example, in *People v. Vanterpool*,\(^ {196}\) the victim complained to her cousin "within three weeks" of the incident.\(^ {197}\) The court in *Vanterpool* held this time frame to be sufficiently prompt because of the victim's unspecified

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\(^{188}\) *People v. McDaniel*, 611 N.E.2d 265, 268 (N.Y. 1993). The court acknowledged that recent studies suggest that it is not unusual for a rape victim to remain silent, but held the prompt outcry exception to remain necessary because "our judicial process cannot remove from every juror all subtle biases or illogical views of the world." *Id.* at 269 (quoting State v. Hill, 578 A.2d 370, 374 (N.J. 1990)).

\(^{189}\) For the definition of hearsay in New York State, see, for example, *Nieves*, 492 N.E.2d at 112, which defined hearsay statements as "out of court [statements] sought to be introduced for the truth of what [they] assert[]." *See also* FED. R. EVID. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); *see also*, e.g., *People v. Settles*, 385 N.E.2d 612 (N.Y. 1978); *Richardson*, *supra* note 15, § 200, at 176 ("[A] statement made out of court, that is, not made in the course of the trial in which it is offered, . . . is hearsay if it is offered for the truth of the fact asserted in the statement."). Although the Court of Appeals has stated that prompt outcry statements are nonhearsay because they are not offered for the truth of the matter asserted, many commentators question this premise. *See*, e.g., *Martin et al.*, *supra* note 20, § 8.2.4, at 735 (arguing that the prompt outcry doctrine is "dubious as a matter of hearsay analysis" since the outcry "has no probative value unless it is assumed to be a true allegation").

\(^{190}\) *See McDaniel*, 611 N.E.2d at 269.

\(^{191}\) *See Rice*, 554 N.E.2d at 1266.

\(^{192}\) For a discussion of the importance of the timing of the declarant's statements in the context of excited utterances, see *supra* notes 21-40 and accompanying text, and in the context of present sense impressions, see *supra* notes 152-58 and accompanying text.

\(^{193}\) WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 942 (9th ed. 1990).

\(^{194}\) 611 N.E.2d 265 (N.Y. 1993).

\(^{195}\) *Id.* at 269 (quoting *People v. O'Sullivan*, 10 N.E. 880 (N.Y. 1887)).


\(^{197}\) *See id.* at 39.
"young age" and "her expressed fear of serious punishment from her mother if she disclosed the fact of her rape." 

Recall that the timing of the statement in relation to the event is also crucial to the determination of whether a statement qualifies as an excited utterance. Even so, there is no particular amount of time after which a statement automatically ceases to be an excited utterance. The situation regarding prompt outcry is similar. Courts consider the parameters of "first suitable opportunity" by focusing on various factors, including the victim’s age, the proximity of the perpetrator, and the availability of individuals to whom the victim can reach out. The liberal interpretation of the time factor has led, necessarily, to the increased use of the prompt outcry category of out-of-court statements.

After a court determines that an out-of-court statement is a prompt outcry, it must determine what portion of the statement is admissible. If the statement is admitted for the sole purpose of establishing that a timely complaint was made, the details of the complaint are irrelevant. However, in McDaniel, the prosecutor, at trial, asked the complainant’s mother whether her daughter complained to her about the incident. The complainant’s mother answered: "[Y]es." While purporting to limit the evidence of prompt outcry to the fact that a complaint was made, the court permitted the prosecutor to elicit "the nature of the complaint." Accordingly, the court did not strike the prosecutor’s question: "[W]hat was the substance of the complaint?" Nor did the court strike the witness’s response that her daughter told her that the defendant had "bothered her," "attacked her," and "tried to molest her."

Subsequent cases have admitted outcry, statements that go

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198 Id.
199 See supra note 28. It is easy to imagine scenarios where statements could be offered as either excited utterances or as evidence of a prompt outcry. Given a choice, the prosecution would surely prefer that the court admit the statement as an excited utterance and therefore for the truth of what the statement asserts.
200 See, e.g., MARTIN ET AL., supra note 20, § 8.2.4, at 736 ("There is no talismanic time period for 'promptness.'").
202 See McDaniel, 611 N.E.2d at 269.
203 Id.
204 Id. at 267.
205 See id. at 267, 269.
beyond the "nature of the complaint." For example, in People v Newsome,206 the court found that a note written by the complainant to her mother qualified as prompt outcry and permitted the entire note to be admitted into evidence.207 Once again, critical focus remains on the complainant208—courts are increasingly willing to take an expansive view of what constitutes "the nature of the complaint" when the victim is a child.209

The question remains: Who is permitted to testify about the outcry, the declarant or the listener? Suppose the complainant testifies about what she told the police had happened to her. Should the court permit the police officer to testify about what the complainant told her? Prompt outcry does not refer to a hearsay exception. Rather, prompt outcry refers to statements that are not offered for the truth of what they assert, and therefore are not hearsay. Given that classification, the availability of the declarant—an essential inquiry in any hearsay analysis—is not directly implicated.210

Of course, the issue remains whether that testimony constitutes impermissible bolstering. The answer lies in the rationale for the prompt outcry rule. According to the court in People v. Rice,211 statements are admitted to "rebut the adverse

207 See generally People v. Boddie, 640 N.Y.S.2d 47 (App. Div. 1996) (stating that the testimony of the treating physician and nurse concerning the victim's statements to them was relevant to treatment and diagnosis and did not exceed the scope of the prompt outcry exception); People v. Guerra, 571 N.Y.S.2d 279 (App. Div. 1991) (stating that the testimony of the complainant's sister that complainant told her that complainant had been raped and that defendant was the rapist was properly admitted as prompt outcry).
208 For examples of use of the complainant's age as a factor in determining the "first suitable opportunity," see supra notes 196-98, 201 and accompanying text.
209 See, e.g., People v. Sanders, 656 N.Y.S.2d 255, 255 (App. Div. 1997) ("[G]iven the child's age, ability to communicate, and fear of defendant, the outcry evidence was properly admitted and did not contain excessive detail."); People v. Arredondo, 642 N.Y.S.2d 630, 632 (App. Div. 1996) (permitting some detail of the incident, given that the victim was a young child and was not fully able to communicate what occurred); People v. Aybinder, 626 N.Y.S.2d 150, 150-51 (App. Div. 1995) (stating that the complainant's poor English necessitated the admission of some details of the sexual assault); People v. Pace, 535 N.Y.S.2d 821, 823 (App. Div. 1988) ("Some detail would have been appropriate, given the age of the victim and her unfamiliarity with terms referring to sexual acts and parts of the anatomy, in order to insure that she was clearly and unambiguously relating that she had been raped.").
210 Exceptions to the rule against hearsay are divided according to the declarant's availability. See, e.g., Fed. R. Evid. 803, 804. Some exceptions allow for the admission of hearsay even if the declarant is available to testify, while others require as a precondition to admissibility that the declarant be unavailable. See id. Prompt outcry, bearing as it does on the witness's credibility, would seem to require that the declarant be available.
inference a jury would inevitably draw if not presented with proof of a timely complaint.”

Is the adverse inference so strong that courts should permit both the declarant and the listener to testify as to the nature of the outcry? The courts indicate so. In fact, outcries to different listeners at different times have been upheld, provided that each individual outcry was sufficiently “prompt.” In those cases, courts permit the complainant to testify about her outcries to several different people at several different times, and also permit all listeners to testify.

B. Descriptions of the Perpetrator

In the 1990s, a new form of “nonhearsay” emerged with profound significance. In People v. Huertas, the victim testified about both the description of the individual who raped her and the description she had given to the police. As an out-of-court statement, the testimony about the victim’s report to the police was subject to challenge as inadmissible hearsay as well as impermissible bolstering through a prior consistent statement. Rather than determining whether a hearsay exception was available, the court held that the statements were not hearsay because they were not offered for their truth. The court found that the offered statements were presented to assist the jury evaluation of the witness’s opportunity to observe the crime, as well as the reliability of the witness’s memory at the time of the corporeal identification. Therefore, the testimony was properly admitted for nonhearsay purposes. As with the prompt outcry

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212 Id. at 1266 (citing RICHARDSON, supra note 15, § 292).
213 See, e.g., People v. Santos, 662 N.Y.S.2d 318 (App. Div. 1997) (“[T]he seriatim outcries to two different listeners were admissible since they were both prompt under the circumstances.”); People v. Boddie, 640 N.Y.S.2d 47, 47 (App. Div. 1996) (allowing both treating physician and nurse to testify with regard to complainant’s statements); People v. Fabian, 625 N.Y.S.2d 4 (App. Div. 1995) (upholding seriatim outcries to different listeners); People v. Williams, 581 N.Y.S.2d 21 (App. Div. 1992) (permitting five witnesses to repeat victim’s statement about her rape did not constitute improper bolstering); People v. Thomas, 574 N.Y.S.2d 551 (App. Div. 1991) (allowing two police officers to testify that complainant reported incident to them); People v. Guerra, 571 N.Y.S.2d 279 (App. Div. 1991) (permitting complainant’s sister to testify that complainant told her that complainant had been raped a short time earlier, and police detective to testify that complainant told him the next morning about the rape); People v. Maldonado, N.Y. L.J., Mar. 3, 1997, at 27 (N.Y. App. Term. 1997) (stating that repetition of prompt outcry evidence does not constitute improper bolstering and permitting complainant and stepfather to testify about her outcry to him).
215 See id. at 995-96.
216 See id.
category of nonhearsay, commentators question the underlying rationale for this “exception” and assert that the basis for admission of the prior description depends on its truth.\(^\text{217}\)

The parameters of this form of nonhearsay have also increased in scope. For example, *Rice*, which was decided the same day as *Huertas*, held that testimony of the complainant and police officers regarding the description of the perpetrator given by the complainant to the police immediately after the rape was not properly received as prompt outcry.\(^\text{218}\) However, the court cited *Huertas* for the proposition that it is not the case that “such testimony is never admissible under any theory.”\(^\text{219}\) The scenario that now unfolds with regularity in trials across the state is that the victim and the police officer both testify as to the out-of-court statements describing the perpetrator.\(^\text{220}\)

Similar to the issues surrounding prompt outcry statements, the propriety of allowing the testimony of the listener as well as that of the declarant is questionable.\(^\text{221}\) If the rule’s purpose is to assist the jury in evaluating the witness’s opportunity to observe and the reliability of her memory,\(^\text{222}\) it is sufficient that the witness testify about the description she gave the police. It is unclear how permitting the listeners (police officers) to repeat what the declarant told them will serve to advance the purpose of the rule. Instead, the trial devolves into the witness’s bolstering of her own testimony and the police officers’ bolstering of her testimony yet again.\(^\text{223}\)

Although the genesis for this nonhearsay exception was a rape case, *Huertas*, leading many to the conclusion that it would be so cabined, the underlying rationale for the doctrine is not limited to

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\(^\text{217}\) See *supra* note 189 and accompanying text (producing a similar argument with respect to prompt outcry); see, e.g., MARTIN ET AL., *supra* note 20, § 8.2.4, at 734 (arguing that the distinction in *Huertas* between hearsay and nonhearsay is “murky at best”).


\(^\text{219}\) Id. at 1266.


\(^\text{221}\) See *supra* notes 210-13 and accompanying text.

\(^\text{222}\) See People v. Huertas, 553 N.E.2d 992, 996 (N.Y. 1990).

\(^\text{223}\) In essence, the witness testifies as to what the perpetrator looked like. The witness then testifies as to the description of the perpetrator that she gave to the police. The police then testify as to the description that the witness gave to them. This level of repetitious bolstering of prior consistent statements seems well beyond what is necessary to satisfy the goal enunciated in *Huertas*. 
a specific charge.\textsuperscript{224} Recent cases have applied this logic to various charges, including murder,\textsuperscript{225} manslaughter,\textsuperscript{226} robbery,\textsuperscript{227} undercover drug sale,\textsuperscript{228} attempted murder,\textsuperscript{229} and burglary.\textsuperscript{230}

IV. CONSEQUENCES

A. Out-of-Court Statements Versus In-Court Testimony

As more evidence is admitted under the general rubric of furthering the search for the truth, the trier of fact is increasingly put in an untenable position.\textsuperscript{231} With expanding frequency, the factfinder hears conflicts between the declarant's out-of-court statements and his or her in-court testimony. This result is inevitable as standards for admission are relaxed and more extrajudicial statements are received into evidence.

The New York Appellate Division, Second Department, confronted this recurring problem in People v Rawlings.\textsuperscript{232} In Rawlings, a police officer arrived at the scene of a shooting and encountered a man crouched over a shooting victim. The man, who was hysterically screaming and crying, told the police officer that the defendant committed the crime. The police officer testified and recounted the excited utterance. However, when called to the witness stand, the man testified that "he did not actually see the defendant shoot the deceased."\textsuperscript{233} The jury thus was placed in a quandary. The jury heard out-of-court statements because they fit within an exception to the hearsay rule and were, therefore, reliable. However, the declarant of this presumably

\textsuperscript{224} It is important to bear in mind that Huertas and Rice were decided the same day and both involved rape cases. Rice, in particular, was concerned explicitly with the unique issues that arise in rape prosecutions. However, it is clear that the logic of prompt outcry espoused in Rice extends to all types of sexual assaults. See, e.g., People v. Thomas, 574 N.Y.S.2d 551 (App. Div. 1991).


\textsuperscript{231} See infra notes 254-59 and accompanying text.


\textsuperscript{233} Id. at 207. There is no evidence in the record that the man's testimony was in any way the result of the defendant's misconduct.
reliable statement then cast doubt upon its trustworthiness. The appellate court held that "[a]ny error ... in failing to strike the police officer's testimony of [the man's] excited utterance was harmless." 234 One possible remedy, therefore, is to strike the excited utterance from the record.

The Court of Appeals recently addressed this fact pattern in People v. Fratello, 235 where the victim of an attempted murder was also the declarant of the out-of-court statements. During the prosecution's direct case, the trial court admitted two excited utterances into evidence. The shooting victim at the scene made the admitted utterances to a civilian and a police officer. In both instances, the victim named the defendant as his shooter. Prior to trial, the defense submitted an affidavit from the victim wherein he recanted his earlier statements and maintained that the defendant was not the shooter. As a result, the prosecution did not call the victim as a witness, but instead called the civilian and the police officer to testify about the victim's out-of-court-statements. The victim was called as a defense witness. On direct examination, he denied that the defendant shot him, and on cross-examination he denied ever having told anyone that the defendant was the man who shot him. 236 Once again, the factfinder had to resolve the unusual discrepancy between the witness's out-of-court statements and his in-court testimony. During the bench trial, the trial judge resolved the incongruity by finding the defendant guilty. The Court of Appeals affirmed, holding that "the trial court ... had a sufficient, non-speculative basis to resolve the contradictions between [the victim's] out-of-court statements implicating [the] defendant in the crimes, and his exonerating testimony at the trial." 237 Thus, it was permissible to credit the excited utterances over the in-court testimony and convict the defendant on the basis of those extrajudicial, unsworn statements. 238

234 Id.
236 Apparently, there were no allegations raised that the defendant's misconduct caused the witness to alter his testimony.
237 Fratello, 706 N.E.2d at 1178.
238 See id. at 1176-77. The court addressed at length the rationale of People v. Jackson, 480 N.E.2d 727 (N.Y. 1985). The court in Jackson held that "[w]hen all of the evidence of guilt comes from a single prosecution witness who gives irreconcilable testimony pointing both to guilt and innocence, the jury is left without basis, other than impermissible speculation, for its determination of either." Id. at 732. The defendant in Fratello argued that dismissal was required as a matter of law, given that the prosecution's case was based on the victim's statements, which were directly contradicted by his in-court testimony. See Fratello, 706 N.E.2d at 1176. The court disagreed, finding that Jackson did not create a
The predicament of conflicting statements from the same witness often occurs in cases where the prosecution alleges that the defendant's misconduct has caused the witness to become unavailable. In *People v. Geraci*, the conflict arose at the pretrial *Sirois* hearing devoted to determining whether the defendant was responsible for the witness's unavailability. Two police investigators testified for the prosecution and recounted threats that the witness had reported to them. The witness, who also testified, denied that he saw who committed the crime, and also denied having ever been threatened. Nevertheless, the court held that the prosecution had proven, by clear and convincing evidence, that the witness had been threatened. The prosecution was able to prove its allegations of misconduct by relying on hearsay—including the police investigators' recollections of what the witness told them—and was, therefore, permitted to prove its case at trial by relying on hearsay. Put another way, the prosecution was allowed to use the witness's hearsay at trial because it proved its allegations of misconduct through hearsay at the hearing. The holding in *Geraci* is especially significant because the witness's hearsay, in the form of his grand jury testimony, was the crux of the prosecution's case at trial. The conviction rested primarily on hearsay that the declarant repudiated at the pretrial *Sirois* hearing.

The Court of Appeals faced the same dilemma in *People v. Cotto*. At the *Sirois* hearing, a detective and a police officer testified regarding threats that the witness had reported to them. However, the witness testified that the defendant was not the perpetrator, and that he had neither been threatened nor told the police he had been threatened. Contrary to this testimony, the trial court held that the witness had in fact been threatened.

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240 This hearing is named after the defendant in *People v. Sirois*, the case at issue in *Holtzman v. Hellenbrand*, 460 N.Y.S.2d 591 (App. Div. 1983). In *Holtzman*, the court spelled out the procedures for determining whether the defendant's misconduct caused the witness's unavailability. See id. at 597.
241 See *Geraci*, 649 N.E.2d at 824.
242 Indeed, the witness did not even testify at the trial.
243 Similarly, in *Fratello*, the repudiated hearsay was the basis for conviction. Moreover, the hearsay that constituted the heart of the prosecution's evidence in *Fratello* was in the form of unsworn excited utterances. See *Fratello*, 706 N.E.2d at 1176-78. At least the hearsay in *Geraci*, in the form of the declarant's grand jury testimony, was given under oath.
244 699 N.E.2d 394 (N.Y. 1998).
245 See id. at 398.
Once again, the prosecution proved its allegations through hearsay, and was permitted to use hearsay to prove the charges at trial.246 Cotto presented an additional problem. Unlike the witness in Geraci, the witness in Cotto testified, albeit briefly, at the trial and again denied, in front of the jury, that the defendant was the perpetrator. After the Sirois hearing, the prosecution was able to admit into evidence, through the testimony of the police officers, statements made by the witness when he named the defendant as the perpetrator. The jury was stuck in the increasingly familiar quandary of first hearing the witness testify that the defendant was not the perpetrator, and then hearing police officers testify that the witness told them that the defendant was in fact the perpetrator. The defendant was eventually found guilty and the conviction was affirmed.247

B. Codification

Many lessons can be learned for the codification debate. It appears that the arguments of codification’s supporters and opponents have been turned on their heads. Those in favor of an evidence code believe that common law development occurs in piecemeal fashion, since courts can only address issues as they are presented in particular cases.248 Moreover, supporters argue that “[s]ystemic changes or revisions of a complicated set of principles is simply not possible” through common law evolution.249 One commentator observed that “New York’s common law system provides a classic example of the slow pace of judicial reform,” and that the courts are the “wrong forum if development of the law is [the] goal.” 250 Written laws, as opposed to common law development, are viewed as the best, if not the only, way to revise evidence rules.

Opponents of codification argue that all modern codes vest the trial judge with too much discretion, which leads, in turn, to increased admissibility.251 They contend that the courts, not the
legislature, should make evidence law, and that maintaining common law development of evidentiary rules will serve to contain the modern trend toward admissibility.\textsuperscript{252}

Both supporters and opponents of codification appear to have been mistaken. The Court of Appeals has shown itself to be a highly effective agent of reform, systematically overhauling New York hearsay jurisprudence. Far from effecting change in a gradual or piecemeal way, the court has purposefully reshaped the hearsay landscape on a grand scale, leading to a profound increase in the number of out-of-court statements admitted at trial.\textsuperscript{253} Opponents of an evidence code, who want the judiciary to develop the evidentiary laws, should, as the saying goes, be careful what they wish for. Far from curtailing or controlling the modern admissibility movement, the New York Court of Appeals has jumped to the forefront and taken a significant role in expanding the reach of admissible hearsay.

The overriding purpose of the Federal Rules of Evidence is to foster the search for the truth.\textsuperscript{254} Rule 102 provides specifically that the goal of the Rules is to ensure "that the truth may be ascertained and proceedings justly determined."\textsuperscript{255} Pursuit of the truth, especially when coupled with a discretionary, residual hearsay exception, will inevitably lead to greater admissibility.\textsuperscript{256} The Court of Appeals, without either a statutory catchall hearsay exception or a mandated goal of searching for the truth, has

\textsuperscript{252} See Salken, \textit{supra} note 6, at 692.

\textsuperscript{253} In the recent case of \textit{People v. James}, No. 92, 1999 WL 444267 (N.Y. July 1, 1999), the Court of Appeals took an expansive view of yet another hearsay exception, this time broadly interpreting the exception for statements relating to a declarant's state of mind.


\textsuperscript{256} See David P. Leonard, \textit{Power and Responsibility in Evidence Law}, 63 S. CAL. L. REV. 937 (1990). It is by no means clear that the objective of discerning the truth is best achieved through increased admissibility of out-of-court statements. The genesis for the rule against hearsay was the concern that these statements, since not made under oath or subject to cross-examination, were unreliable and therefore impacted negatively on the factfinder's pursuit of truth and justice. See \textit{Barker & Alexander, supra} note 30, § 801.1(a), at 546 ("The rule prohibiting hearsay evidence was developed to insure that the declarant had the opportunity to \textit{perceive} the event, had the \textit{memory} necessary to recall the event, and had the ability to \textit{accurately narrate} the event."); \textit{McCormick, supra} note 20, § 245, at 726-28. Adopting a more permissive approach toward admissibility leads to valid concerns that the truth-seeking function of the trier of fact may actually be hindered, due to the injection of less trustworthy evidence into the trial.
followed suit. Commentators have cogently observed that “[t]he New York Court of Appeals on more than one occasion has been influenced by one or another of the federal rules . . . indicating that a process of integration is already underway.”257 In fact, the trend toward admissibility indicated in the Federal Rules of Evidence is part of New York’s common law tradition. A quarter century ago, the New York Court of Appeals observed that “this court has in recent years emphasized that the hearsay doctrine has been too restrictively applied to exclude otherwise reliable evidence from the jury.”258 As one scholar noted, “[i]ronically, if there is a hope for reducing the effect of this liberalization movement, it may be in the process of codification itself.”259

Another argument offered in opposition to codification is that placing the law of evidence in the hands of lawmakers will likely result in the politicization of evidentiary rules, as the legislature is seen as especially susceptible to public pressure and opinion.260 It is equally clear, however, that the judiciary is not immune to these influences.261 It could certainly be argued that the Court of Appeals has been responsive to public sentiment. Categorization of statements as nonhearsay grew out of rape cases and a general belief that jurors were deliberating with a series of inappropriate and inaccurate assumptions. The burgeoning use of expert testimony is another example of judicial reaction to changing times. Following the crack cocaine epidemic of the mid-1980s, New York courts began permitting the prosecution to offer more and more police officers as expert witnesses in drug cases. Suddenly, it became routine in cases involving the sale of drugs for

257 BARKER & ALEXANDER, supra note 30, at vii.
258 People v. Arnold, 309 N.E.2d 875, 875 (N.Y. 1974) (concerning statements made by the deceased); see, e.g., People v. Nieves, 488 N.Y.S.2d 654, 657 (App. Div. 1985) (referring to the quote in Arnold as “perhaps one of the most important judicial pronouncements on evidence in many years”).
259 Salken, supra note 6, at 695.
260 See, e.g., Rossi, supra note 10, at 1277; Salken, supra note 6, at 696.
261 See, e.g., Salken, supra note 6, at 694 (“[T]here is little that is more disconcerting to a trial judge than to find his or her name on the front page of the local newspaper because of a[n allegedly] pro-defendant decision.”). Interestingly, statistics reveal that since 1978, the percentage of defendants’ applications for leave to appeal granted by the Court of Appeals has dropped from 6.4 percent to less than 2 percent. See Mark Gimpel, Court Should Lead in Criminal Justice, N.Y. L.J., Aug. 10, 1998, at 2. Moreover, the court ruled in favor of the prosecution in 81 percent of the cases decided from September, 1997, to July, 1998, up from an average of 57 percent of the cases heard from 1986 to 1993. See Paul Shechtman, Prosecution Wins Frequently in Term Marked by Moderation, N.Y. L.J., Oct. 5, 1998, at S4. One commentator suggested that the hearsay rule could erode further in the future because fear of crime might cause both legislators and judges to weaken the protections afforded to criminal defendants. See Park, supra note 181, at 657.
a police witness to testify to the intricacies of street-level drug-dealing and try to explain why a particular defendant did not possess any drugs or prerecorded buy money at the time of his arrest. Commentators have suggested that New York courts are moving away from the "beyond the ken" standard for the admission of expert testimony and toward the less restrictive, pro-admissibility helpfulness test. Indeed, New York Court of Appeals Chief Judge Judith Kaye once described the role of common law judges as "cautiously and creatively developing the law in ways appropriate to a changing society." To the extent that codification opponents believed that the Court of Appeals would simply maintain the evidence law status quo, they were apparently mistaken.

CONCLUSION

Whether by expanding existing hearsay exceptions, adopting new ones, or categorizing classes of statements as nonhearsay, recent rulings by the Court of Appeals have led to a substantial increase in the use of out-of-court statements at trial. By admitting new classes of evidence, the court has dramatically revised the nature of the proof that jurors are permitted to hear. An unintended, but predictable, consequence has been a proliferation of situations where declarants' out-of-court statements conflict with their in-court testimony. These anomalous scenarios place factfinders in perplexing situations and require further articulation of the rapidly changing evidentiary landscape.

The New York Court of Appeals has long been a leader in advancing the law through common law development. The court has refined and modernized the law of evidence, paralleling a trend toward increased admissibility already evident in the federal courts. Although New York will enter the next century still without an evidence code, one can expect the law of evidence in New York to continue to rapidly and purposefully evolve pursuant to the court's development of the common law.


263 See Rossi, supra note 165, at 682-83. The Federal Rules, by removing certain common law barriers, have also led to an increased use of expert testimony and a corresponding increase in the admission of hearsay. See Rossi, supra note 10, at 1271, 1276.