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Crying Wolf or an Excited Utterance - Allowing Reexcited Statements to Qualify under the Excited Utterance Exception

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CRYING WOLF OR AN EXCITED UTTERANCE? ALLOWING REEXCITED STATEMENTS TO QUALIFY UNDER THE EXCITED UTTERANCE EXCEPTION

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I. DEFINING THE EXCITED UTTERANCE EXCEPTION

The Federal Rules of Evidence define hearsay as an out-of-court statement that is offered into evidence for the truth of the matter asserted.² Hearsay is traditionally excluded as evidence because the courts are concerned with protecting each party’s ability to rebut statements which are offered against that party.³ Hearsay deprives the party against whom the hearsay is offered of the ability to cross-examine the declarant in court to test the declarant’s memory, sincerity, perception, and narration

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²FED. R. EVID. 801.

³See ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW: A STUDENT’S GUIDE TO EVIDENCE AS APPLIED TO AMERICAN TRIALS § 7.01 (1998) [hereinafter EVIDENCE LAW].

of the statement.⁴ Cross-examination is critical because, “[t]he theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination.”⁵

To ameliorate the rigid application of the rule against hearsay, the Federal Rules of Evidence have enumerated many categorical exceptions and exemptions.⁶ The exceptions exist for situations when the hearsay is particularly trustworthy because the out-of-court statement does not present the usual hearsay dangers.⁷ One such exception is the excited utterance exception in Federal Rule of Evidence 803(2), which states that regardless of whether the hearsay declarant is available to testify as a witness to be cross-examined, “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” may be admitted for the truth of the matter asserted.⁸ Professor John Henry Wigmore articulated three requirements in the exception: 1) a startling occasion 2) which generates a statement related to the circumstances of the occurrence 3) that is made before time to fabricate.⁹

Excited utterances are said to lack the same reliability dangers as classic hearsay, and therefore may supplant in-court testimony, because the utterance is unlikely to be fabricated as there is no time for peaceful reflection and the utterance has not yet been subject to the influences of the adversarial court system.¹⁰ Excited utterances do not present the credibility dangers of hearsay because the immediacy of the statement to the exciting event when made during the period of heightened emotions, obviates problems of memory or insincerity.¹¹

The justification for the excited utterance exception stems from the reasoning that because the declarant is in an intensely stressful and highly emotional state, she is not afforded an opportunity to contemplate and therefore fabricate what she excitedly

⁴See Lawrence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974).

⁵5 J. WIGMORE, EVIDENCE § 1420 (J. Chadbourn rev. 1974).

⁶See FED. R. EVID. 801, 803 804, 807.

⁷See WIGMORE, *supra* note 5, at §§ 1420, 1422; PARK ET AL., EVIDENCE LAW, *supra* note 3, at § 7.12.

⁸FED R EVID. 803(2).

⁹See 6 J. WIGMORE, EVIDENCE § 1750 (J. Chadbourn rev. 1976).

¹⁰See PARK ET AL., EVIDENCE LAW, *supra* note 3, at § 7.12; *see also* Tribe, *supra* note 4, at 958-61.

¹¹See WIGMORE, *supra* note 9, at § 1749.

[The] circumstantial guarantee here consists in the consideration, already noted . . . that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief. The utterance it is commonly said must be “spontaneous,” “natural,” “impulsive,” “instinctive,” “generated by an exciting feeling which extends without let or breakdown from the moment of the event they illustrate.”

Id. Additionally, from the requirement that the statement be made during a period where the declarant is subject to the “stress of continuous excitement,” stems an implicit time element that suggests that such statements generally must be made contemporaneously with the exciting event.

declares.¹² Professor Wigmore has articulated the earliest restatement of the principles underlying the modern exception:

[U]nder certain circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or at least as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.¹³

Therefore, the excited statement lacks traditionally obscuring factors common to hearsay because the declarant's "mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence."¹⁴

II. RAMIFICATIONS ON THE APPLICATION OF THE EXCITED UTTERANCE EXCEPTION AFTER THE REEXCITEMENT ANALYSIS SET FORTH IN *UNITED STATES V. NAPIER*

The current application of the excited utterance exception is contentious, namely because of the divergent court interpretations of the timing element and the cause of the excitement element. Critics claim that these prongs have been applied inconsistently and have become increasingly more relaxed in recent years. Perhaps one of the more controversial applications of these two prongs rests in the Ninth Circuit's opinion in *United States v. Napier*.¹⁵

In *Napier*, the defendant was alleged of kidnapping a female victim after stealing her vehicle and beating her severely.¹⁶ The victim's blood and hair and the defendant's fingerprints were found on a broken rifle, which was discovered beside the victim's unconscious body.¹⁷ Though the rifle alone provided evidence which substantially implicated the defendant, his fingerprints were also discovered on the steering wheel of the victim's vehicle, and his personal documents and other items were discovered inside the victim's purse.¹⁸

¹²See PARK ET AL., EVIDENCE LAW, *supra* note 3, at § 7.12.

¹³WIGMORE, *supra* note 9, at § 1747.

¹⁴*Lira v. Albert Einstein Med. Ctr.*, 384 Pa. Super. 503, 512 (1989). *But see* Robert M. Hutchins & Donald Slesinger, Note, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432 (1928) (noting that excitement may actually impair rather than improve accuracy of observation).

¹⁵518 F.2d 316, 317-18 (9th Cir. 1975).

¹⁶*Id.* at 317.

¹⁷*Id.*

¹⁸*Id.*

The victim—who had suffered significant brain damage as a result of the vicious attack—was hospitalized for approximately seven weeks, during which time she underwent two brain operations in an attempt to mitigate the damage incurred from her head injuries.¹⁹ The serious injuries resulting from the ordeal left the victim unable to comprehend the significance of an oath and incapable to testify at a trial.²⁰ Although the victim's communication was limited to isolated words and simple phrases frequently precipitated by stress and strain, the hospital found that her memory remained intact.²¹ A week after the victim was released from the hospital, her sister showed her a newspaper article.²² The newspaper article contained a photograph of the defendant, her alleged attacker.²³ Upon viewing the photograph, the victim began to show immediate signs of apprehension, great distress, and horror. The victim pointed directly to the defendant's photograph and repeating frantically, "He killed me!"²⁴ The Ninth Circuit held that the victim's out-of-court statement was admissible under the excited utterance exception, even though the utterance took place a considerable time (more than eight weeks) after her physical attack.²⁵

The facts in *Napier* consist of two "exciting" events: 1) the original attack and 2) the event of the victim viewing the attacker's photograph in the newspaper.²⁶ Normally, one would classify the events consisting of the physical attack and the kidnapping as the "exciting event" that triggered the utterance. The Ninth Circuit, however, found that the startling event of physically viewing the photograph of her attacker fulfilled the "exciting event" prong of the excited utterance exception.²⁷

The Ninth Circuit's analysis in *Napier* is particularly disconcerting because it potentially permits excited utterances into evidence where there have been two "exciting events," but *only the first* is objectively exciting enough to satisfy the dual

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.* at 318.

²⁶See Stephen A. Saltzburg, *Excited Utterances and Family Violence*, 15 CRIM. JUST. 39, 39-40 (2001).

What makes *Napier* atypical is that the attack, which was too far removed from the statement for the declarant to have remained continuously under its influence, was not the startling event. When the court of appeals agreed that the statement was admissible, despite the fact that a week had passed since the assault, it was because it was based on another startling event: i.e., the recognition of the assailant in the newspaper. The statement was clearly made under the influence of that startling event, and the court assumed that the statement was sufficiently related to that event to be admissible under Rule 803(2).

Id.

²⁷*Napier*, 518 F.2d at 318.

protections of the excited utterance exception.²⁸ The following hypothetical situations illustrate the problems raised by *Napier*'s use of the reexcitement analysis in the excited utterance hearsay exception.

A. Hypothetical # 1

Strictly applying *Napier*, excited statements made by a victim after identifying her accused attacker from a lineup would be admissible, even though the victim may have been contaminated by post-event information (such as photo arrays of potential suspects). Thus, the victim may recognize an individual in the lineup only because of this information without consciously realizing it. Furthermore, because the law enforcement officials who conduct the lineup know who the suspect is, they also may subtly or blatantly influence the identification. The victim has likely been the subject of several police interrogations and has been subject to the considerable pressures of influential questioning. Despite these compromising factors, the victim could *still* circumvent potential hearsay challenges to the protracted duration of time elapsing from her original attack, by claiming that the subsequent event of "viewing the accused"—not the original attack—was the traumatizing event which triggered her excitement. The possible admission of this statement is especially problematic because there should be no "case in any jurisdiction which stands for the proposition that a request to identify followed by a deliberate choosing of an offender from a lineup . . . qualifies as an excited utterance."²⁹ Nevertheless, the reexcitement theory has already been applied to admit assertive conduct by a victim upon viewing her assailant in a lineup under the excited utterance exception.³⁰

B. Hypothetical # 2

An exculpatory statement made by an accused murderer during her arrest, days after the murder, could also be admissible under a mechanical application of *Napier*, even though the murderer had ample time to contemplate her actions or to be prejudiced by outside influences. The murderer could evade using the murder as the exciting event, by instead referencing the event of the arrest—though days after the original murder—as the agitating and highly emotional event which triggered the statement.

Clearly, such declarations in the preceding hypotheticals were not intended to be protected under the excited utterance exception either by the drafters of the Federal Rules or by Professor Wigmore, the central proponent of the modern day excited utterance exception. To admit such statements might unduly expand the excited utterance exception, because under the reexcitement analysis, statements triggered by objectively calm events—events which may be subjectively exciting only to the

²⁸An excited utterance is considered more trustworthy because an agitated individual who has no time to peacefully reflect upon the exciting event is unlikely to fabricate his statements *and* has not yet been subjected to the influence of an adversarial court system.

²⁹*Johnson v. State*, 934 S.W.2d 179, 183 (Ark. 1996).

³⁰*See State v. Meyer*, 694 S.W.2d 853, 856 (Mo. Ct. App. 1985) (holding that assertive conduct by a rape victim who was "shaking," "fearful," and "noticeably affected" by spontaneously recoiling upon viewing her alleged rapist in a lineup fulfilled the requirements of an excited utterance under the *Napier* reexcitement analysis).

specific declarant—could be admissible.³¹ Furthermore, the reexcitement application to the excited utterance exception raises profound questions because

[i]n most cases, the nexus (if it exists) is a direct one, for the utterance describes an exciting event that is itself the subject matter of the case (“Most often the excited utterance, as a practical matter, relates to the exciting cause, i.e., description of an accident, an attack . . .”). Where an exciting event is the stimulus for a statement about something other than that event, a concern arises that the declarant might be speaking from conscious reflection, and hence the statement’s reliability is in doubt.³²

Under the reexcitement analysis, the nexus between the exciting event and the statement is too far removed because the statement is actually triggered by another event that reexcites a memory of the initial event, rather than the “exciting event” alone.³³

III. DANGERS PRESENT IN THE REEXCITEMENT ANALYSIS

No hearsay exception can perfectly distinguish between statements that are fabricated or truthful; however, the purpose of the excited utterance exception is to use palpable evidence such as lapse of time, the occurrence of an exciting event and a highly emotional state to best gauge accuracy and trustworthiness.³⁴ Elements of the exception cannot stand alone; they must each work in unison for an outside observer to make a fully informed conjecture about the declarant’s reliability. “The defendant’s *only* protection against the admission of fabricated testimony or [an] unfounded rumor is that there be sufficient safeguards to assure the statement’s reliability.”³⁵ Excited utterances are only reliable if they are not subject to external influences and there has been insufficient time and capacity for the declarant to engineer a false statement.³⁶ Unfortunately, these policy justifications behind the excited utterance exception may not be fully considered under the reexcitement analysis.

³¹One court has observed that “[t]he uniquely *subjective* nature of the determination of what constitutes a sufficiently startling event is *vividly* illustrated in *United States v. Napier*.” *State v. Carlson*, 808 P.2d 1002, 1011 (Or. 1991) (emphases added).

³²*Commonwealth v. Santiago*, 774 N.E.2d 143, 147-48 (Mass. 2002) (citations omitted).

³³*See State v. Gordon*, 952 S.W.2d 817, 820 (Tenn. 1997) (“Although the ‘startling event’ is usually the act or transaction upon which the legal controversy is based . . . the exception is not limited to statements arising directly from such events; rather, a subsequent startling event or condition which is related to the prior event can produce an excited utterance.”); *State v. DiBartolo*, No. 17261-9-III 2000 WL 968474, at *14 (Wash. Ct. App. 3, July 13, 2000) (“The startling event or condition need not be the ‘principal act’ underlying the case. For example, a later startling event may trigger associations with an original trauma, recreating the stress earlier produced and causing the person to exclaim spontaneously.”) (citations omitted).

³⁴*See WIGMORE*, *supra* note 9, at § 1750.

³⁵Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, Or Just a Crack?* 8 *CARDOZO WOMEN’S L. J.* 171, 179 (2002) (emphasis added).

³⁶*See PARK ET. AL.*, *EVIDENCE LAW*, *supra* note 3, at § 7.12.

As the preceding hypotheticals illustrate, the court's reasoning in *Napier* fatally disregards how external influences on the victim might have tainted the reliability of the victim's statements. The facts indicate that the victim's sister showed her a picture of the accused from a newspaper. The facts, however, are silent regarding the context in which the picture was shown.³⁷ Consequently, it is far from inconceivable that the sister—who, because of her relationship with the victim, had a possible bias in implicating the defendant—may have unduly influenced the victim, especially given the victim's impaired capacity and highly vulnerable state. That the sister deliberately showed the defendant's photo to the victim itself suggests that she may have suspected the defendant. Unfortunately, the failure of the *Napier* court to account for these highly germane external influences undermines the sanctity of the precedent establishing the reexcitement analysis of the excited utterance exception.³⁸

Napier's assessment of how unique psychological states affect one's trustworthiness is a meritorious consideration in applying the excited utterance exception. There are an assortment of chronic psychological syndromes that do not fit cleanly within the excited utterance exception and consequently should *toll* the "excited state" requirement or allow for the statement to fall under the exception because it constitutes "reexcitement." Such chronic syndromes and mental impairments include situations where the declarant suffers from unremitting physical pain, or where the declarant is a victim of a psychologically debilitating crime such as rape or brutal physical battery.³⁹ Following *Napier*, other courts have admitted excited utterances "made well after the event when the declarant was suddenly

³⁷See *Napier*, 518 F.2d at 317.

³⁸See Holland, *supra* note 35, at 188 ("[A]ggressive questioning may undermine the reliability of a statement that otherwise would qualify as an excited utterance.").

³⁹Professor Aviva Orenstein has spoken about how the documented reaction of women to rape and other sexual violence is plagued by preconceptions ingrained within the structure of the excited utterance exception on the appropriate reaction to highly emotional events. Aviva Orenstein, *MY GOD!: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 199-203 (1997). The excited utterance exception is problematic because "[b]y requiring a prompt utterance and visible signs of distress, the excited utterance exception fails to reflect the reported experiences of rape survivors, who often are too disoriented, numb, afraid, or ashamed to issue a prompt statement, excited or otherwise." *Id.* at 163. Furthermore, the excited utterance exception excludes "hearsay statements that may provide increased information and context, particularly where the survivor is traumatized, embarrassed, or is otherwise a reticent witness." *Id.* at 164.

The excited utterance exception relies on the assumption that victims will immediately and passionately exclaim implicating evidence about their ordeal. This, however, ignores the fact that female victims of rape may undergo a psychological paralysis where they may be uncommunicative and experience emotional withdrawal similar to the unconsciousness as in the *Napier* case. Orenstein claims that "psychological data indicate that, as a self-protective device, witnesses may initially suppress unpleasant memories, which only emerge in later, calmer times [and] . . . the witness' ability to recall will not be at its best so near in time to the traumatic event." *Id.* at 182. Due to Rape Trauma Syndrome, "a rape victim may be calm directly following the incident and subsequently become agitated when feeling safe. It is when the victim feels safe that the victim will be likely to report the details of the crime." Angela Conti & Brian Gitnik, *Federal Rule of Evidence 803(2): Problems with the Excited Utterance Exception to the Rule on Hearsay*, 14 ST. JOHN'S J. LEGAL COMMENT. 227, 241-42 (1999).

subjected to rekindled excitement” because “[e]vents may so deeply traumatize a person that long after stress has subsided a chance reminder may have enormous psychological impact, causing renewed stress and excitement and educing utterances relating to the original trauma.”⁴⁰

Questions pertaining to the psychological state of the victim raised in *Napier* may have surprising repercussions in cases involving conditions such as Rape Trauma Syndrome.⁴¹ Under a theory proposed by a scholar in this area, female victims of violence sometimes will not make excited statements regarding traumatizing events until after the danger has passed because of self-deprecating emotions such as fear, shame, and doubt.⁴² Furthermore, the liberalization of the standard of measurement for a “startling event” as seen in *Napier* has weighty implications in the realm of domestic violence law.⁴³ In a relationship of constant domestic abuse, there could be

⁴⁰In the Matter of Troy P., 842 P.2d 742, 746-47 (N.M. Ct. App. 1992).

⁴¹See Orenstein, *supra* note 39, at 199-203 (criticizing the excited utterance exception for failing to encompass such gender-specific reactions to brutal crimes as the Rape Trauma Syndrome).

⁴²See *id.* at 204 (explaining a female victim’s reaction to rape if she is afflicted with Rape Trauma Syndrome).

⁴³The excited utterance exception has gained great importance in domestic violence cases, namely because “[a]round the country, a growing number of prosecutors now use the excited utterance exception to the hearsay rule when attempting to prove their cases *without* the testimony of the victim.” Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 107-08 (1997) (emphasis added). Studies show that prosecutors use the exception as much as sixty-four percent of the time when the victim refuses to testify against her assailant. See *id.* at 108. One scholar writes that “[j]udges, who realize that abusers are unlikely to be convicted without victim testimony, have expanded the excited utterance exception to include statements made long after the underlying event. In effect, these judges have used the law of evidence in an effort to curtail domestic violence.” Jeffrey S. Siegel, *Timing Isn’t Everything: Massachusetts’ Expansion of the Excited Utterance Exception in Severe Criminal Cases*, 79 B. U. L. REV. 1241, 1267-68 (1999); see also Holland, *supra* note 35, at 175-77 (commenting on the extensive use of the excited utterance exception in the realm of domestic violence adjudication).

It is reasonable to attribute the frequency of use of the exception to the atypical patterns of behavior and pronounced psychological ramifications in domestic violence cases. “Domestic violence . . . can prove very unique in its ability to traumatize beyond the degree of any isolated offense that may be charged.” *Id.* at 180-81. In fact, “[c]reative prosecutors may attempt to use a defendant’s history of abuse against a complainant to help the court appreciate how a seemingly less serious incident—such as a defendant’s mere presence before the complainant—would prove most terrifying, let alone, ‘startling and upsetting,’ if considered in context.” *Id.*

The statistics documenting the frequency of domestic violence are profoundly disturbing, for “[d]omestic violence is a criminal justice and public policy epidemic of enormous proportions.” Andrea M. Kovach, Note, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future*, 2003 U. ILL. L. REV. 1115, 1116 (2003). “There has only recently been reliable data on the prevalence of domestic violence in the United States. One out of every five U.S. women has been physically assaulted by an intimate partner.” *Id.*; see also H. Morley Swingle et al. *Unhappy Families: Prosecuting and Defending Domestic Violence Cases*, 58 J. MO. B. 220 (2002).

many objectively calm events that could occur over the lifetime of the entire relationship that may be enough to constitute a subjectively “startling event” under the *Napier* analysis.

One must clearly distinguish between the two problematic areas under *Napier*’s reexcitement theory: 1) the subjective/objective distinction and 2) the continuous/interrupted distinction. It is only where a subjective test is applied that the time between the excited state and the statement is interrupted by an intervening period of calm that the reexcitement evils arise. Merely having a subjective test, though, would not raise these problems if the subjective excitement were required to be continuous.

IV. REEXCITEMENT CASES AFTER *NAPIER*

In the many cases following the *Napier* decision, courts have attempted to avoid confronting the thorny issues nearly asphyxiating the reexcitement theory. Generally, courts have reiterated that the Ninth Circuit’s *Napier* reexcitement

Although victims can be from either sex, the overwhelming majority [of the victims of domestic violence] are female. More than two million women are assaulted by spouses or boyfriends every year. A woman is abused every 15 seconds, making domestic abuse the leading cause of injury to women aged 15 to 44, accounting for more injuries than accidents, muggings and rapes combined.

Id. Linell A. Letendre, Note, Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence, 75 WASH. L. REV. 973, 976 (2000) (“Domestic violence affects more people than any other health-care problem in the United States. The Department of Justice estimates that more than 800,000 women are assaulted, beaten, or raped by their intimate partners each year.”).

Most important to the reexcitement analysis, “[a]lthough a [domestic] violence assault is undoubtedly a stressful and startling event, the victim may respond instead by withdrawing, becoming sullen, or going into shock, as opposed to conveying ‘excitement.’ In such an instance, failure of the declarant to be excited presents an arbitrary barrier to admissibility.” Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims’ Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 7 (2002); see also Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 713 (2003).

Given modern technology, rape cases are not so dependent on a victim’s hearsay statements: the presence of the defendant’s bodily fluid or other biological evidence on the victim’s person, coupled with bruises or other evidence that the victim withheld consent, would be a strong basis on which to prosecute a rape case even without the admission of the victim’s hearsay statements. By contrast, a typical prosecution of domestic violence in state court depends more heavily on hearsay statements, either because the offender’s identity is not readily apparent from the physical evidence, or because the offender may try to ascribe the defendant’s injuries to a fall or some other “innocent” case. *Id.*

The *Napier* analysis, therefore, may contribute to aiding victims of domestic violence, particularly because the Ninth Circuit used a *subjective standard* based on the experiences of the victim to measure whether the event was sufficiently exciting. In cases of domestic abuse, the victim may provide different statements regarding the defendant/abuser’s conduct at different emotional stages. Furthermore, complications arise in this area of law because, though “[t]he length of time between the startling event and her statement is not determinative, . . . it is an important factor When domestic violence is part of an ongoing reign of terror, it is difficult to say when the violence starts or stops.” *State v. Mineo*, No. 24993-6-II, 2001 WL 30184 at *3-4 (Wash. Ct. App. 2, January 12, 2001) (citation omitted).

concept is legitimate, but confine the reexcitement theory to uniquely trustworthy circumstances or highly egregious facts. Perhaps the most detailed case to undertake a comprehensive discussion of the reexcitement theory is *Bayne v. State*, a decision from the Maryland Court of Special Appeals.⁴⁴

Similar to the facts in *Napier*, the facts of *Bayne* are emotionally compelling and involve a victim of a violent crime. In *Bayne*, a five-year-old female victim was visiting the home of her uncle, aunt, and cousin, their male child.⁴⁵ Upon entering the cousin's bedroom, the uncle discovered the victim atop her cousin performing simulated sexual motions in a suggestive position.⁴⁶ Upon his discovery, the victim's uncle immediately accosted her and asked what she was doing and if anyone had taught the victim to act in that manner.⁴⁷ The victim ran from the bedroom and seemed panicked and confused.⁴⁸ The victim's uncle then related the incident to the victim's grandmother when the grandmother came to bring the victim home.⁴⁹

Later, upon arriving at the victim's home (also the residence of the alleged defendant and the victim's mother), the victim refused to go in, and began to scream, "No, no, I don't want to go in, I don't want to go in!"⁵⁰ The victim continued to scream and remained upset even after her grandmother attempted to console her and ask what was wrong.⁵¹ The grandmother then drove the victim to a convenience store, where the victim told the grandmother, "I don't want to go back in the house Mama. Butch [the defendant] hurts me. He touches me all over, he hurts me."⁵² The victim then made motions to her grandmother of how the defendant had touched her between the legs and on her body.⁵³ Throughout the recitation of the ordeal, the victim was frightened, shaking, crying, and screaming.⁵⁴ The victim was admitted to a hospital and the police were immediately notified.⁵⁵

At trial, the victim testified how the defendant had touched and rubbed his "privates" against hers.⁵⁶ The victim's grandmother also testified at trial of noticing bruises on the victim's legs and buttocks and having previously observed the defendant entering the victim's bedroom around 3:00 am.⁵⁷ The court affirmed the

⁴⁴632 A.2d 476 (Md. Ct. Spec. App. 1993).

⁴⁵*Id.* at 477.

⁴⁶*Id.* at 477, 490.

⁴⁷*Id.*

⁴⁸*Id.* at 490.

⁴⁹*Id.* at 477.

⁵⁰*Id.* at 478, 490.

⁵¹*Id.* at 490.

⁵²*Id.*

⁵³*Id.* at 478, 490.

⁵⁴*Id.* at 490.

⁵⁵*Id.* at 478.

⁵⁶*Id.*

⁵⁷*Id.*

reexcitement theory set forth in *Napier*, and held that the victim's excited statements were admissible under the excited utterance exception because the rousing event of being verbally disciplined by her uncle reexcited emotions stemming from the original molestation by the defendant.⁵⁸ The victim was emotional throughout the twenty minutes which elapsed from her confrontation with her uncle, and therefore did not have the reflective faculties necessary to fabricate her statements.⁵⁹ The court held as follows:

[A]n otherwise qualified excited utterance that includes comments about a *prior* happening may be admissible under the excited utterance/spontaneous declaration exception to the happening may be hearsay evidence rule if the *subsequent* startling event that generates the utterance relates directly or indirectly to that prior event, i.e., is likely to produce an exclamation about the prior event. [There exists] a relationship between the subsequent and prior events The time between the prior event, the subsequent event, and the utterance are all factors that may be considered by the trial court in determining whether the utterance is indeed a spontaneous declaration or exclamation [T]he trial court judge is uniquely situated to make that determination.⁶⁰

Because the excited utterance exception focuses on the declarant's mental ability to fabricate, not the amount of time that has elapsed, the court held that there was no reason "why a *subsequent* related startling event cannot be the startling event that produces an excited utterance about a *prior* event or why that excited utterance cannot be considered for admission under the excited utterance exception to the hearsay rule."⁶¹ The *Bayne* court, nonetheless, qualified the reexcitement rule: "The trial court, of course, would still have to consider all elements, including the passage of time and opportunity for fabrication or excuse, in resolving the issue of spontaneity . . . to rule on admissibility."⁶²

Despite *Bayne's* discussion buttressing the reexcited utterance concept through reasoning and extensive case law, *Bayne* suffers from the same critical flaw present in *Napier*—both fail to account for the external influences that may have tainted the declarant's reexcited utterances. In *Bayne*, the victim was calm from the period beginning with the confrontation with her uncle and ending when her grandmother parked in front of the convenience store. The fact finder does not know whether the grandmother may have deliberately or inadvertently influenced the victim to accuse the defendant, especially since the grandmother provided the primary account of the events during the intervening period of calm. One can surmise that perhaps the

⁵⁸*Id.* at 492.

⁵⁹*Id.* at 491-92.

⁶⁰*Id.* at 489 (emphases added).

⁶¹*Id.* (emphases added).

⁶²*Id.*; see also *United States v. Hill*, 13 M.J. 882, 885 (U.S. Armed Forces 1982) ("The factors to be considered [in determining whether the declarant is excited] include lapse of time between the startling event and the utterance, as well as, the declarant's age, physical and mental condition, the circumstances of the event, and the declarant's basis for knowing the statements to be true and accurate.").

grandmother may have disapproved of the defendant living with the victim's mother, and spoke to the victim suggestively before the child made her declarations. Perhaps the child victim knew that the grandmother had a preexisting suspicion of the defendant, and only made her excited statement after her grandmother gave outward signs of approval. Regardless of whether these proposed facts were present in the *Bayne* case, grave issues exist concerning the admissibility of reexcited utterances. If one allows the admission of reexcited statements, one is limited to the utterance *alone* and precluded from corroborating evidence of the pressures that may severely undermine its reliability.

Other high-level state courts have also spoken to the reexcitement issue and affirmed the analysis both implicitly and explicitly:

First, the startling event or condition that must occur for purposes of the excited utterance exception need not be the 'principal act' underlying the case For example, a later startling event may trigger associations with an original trauma, recreating the stress earlier produced and causing the person to exclaim spontaneously The second important principle regarding the requirement of a startling event or condition is that the startling nature of the event cannot be determined merely by reference to the event itself What makes an event startling is its effect upon those perceiving it, and an event might be startling to some but not to others. For purposes of the excited utterance exception, therefore, it is the event's effect on the declarant that must be focused upon.⁶³

Of those state courts that contended with issues of reexcitement—through their state's version of the excited utterance exception in their Rules of Evidence—they affirm the validity of the reexcitement analysis and find that, "a statement made several weeks after the original event may be admitted as an excited utterance because a second event was sufficiently startling to render the statement made in response thereto admissible."⁶⁴

The reexcitement analysis is generally applied to cases where a statement of identification is made by a victim-declarant. Similar to *Napier*, the highest court in Colorado has admitted the reexcited statements of identification by a child victim made upon viewing photographs of the alleged defendant.⁶⁵ Other courts, too, have admitted reexcited statements that identify the perpetrator of the crime.⁶⁶

⁶³State v. Chapin, 826 P.2d 194, 197 (Wash. 1992).

⁶⁴See, e.g., Byrd v. Blodgett, 1993 WL 22372, *2 (9th Cir. Wash. Feb 2, 1993) (quotations omitted).

⁶⁵People in the Interest of O.E.P., 654 P.2d 312, 319 (Colo. 1982) (holding that statements made by a child victim upon viewing "photographs depicting persons who subject[ed] her to the mistreatment is a type of event which would engender substantial excitement in the child and . . . constitutes an independent predicate for admitting the statement as an excited utterance.").

⁶⁶See, e.g., State v. Meyer, 694 S.W.2d 853 (Mo. Ct. App. 1985) (holding that rape victim's reexcited assertive conduct of identification fell under the reexcitement theory advocated by *Napier*); People v. Grubbs, 112 A.D.2d 104 (N.Y.A.D. 1 Dept. 1985) (holding that statements of identification made after a victim of attempted rape saw her attacker in the subway and became very nervous, upset, and fearful were admissible under the reexcitement analysis set forth in *Napier*).

Comparable to the facts in *Bayne*, New Mexico courts have also allowed reexcited statements made by a child victim upon being returned to the location where the original molestation occurred.⁶⁷

Another unifying similarity running through each of the reexcitement cases is the unique psychological ramifications that exist as a result of the original crime. By far, the most vociferous proponents of the reexcited utterance standard are those courts overseeing cases of child abuse and molestation—a crime that has unique and profound psychological consequences.

Two state supreme courts have controversially admitted reexcited statements made by children after emotionally waking from a dream about the original event of the abuse.⁶⁸ Tennessee courts have also admitted reexcited statements by child victims when those statements are coupled with circumstantial evidence of pain in the genital area from urination.⁶⁹ In fact, Tennessee courts have generally allowed excited statements when additional circumstantial evidence bolsters the trustworthiness.⁷⁰ Further evidence that courts are more prone to apply the reexcitement analysis in cases involving child-victims, is when those reexcited statements are triggered by an everyday and commonplace occurrence. The Wyoming Supreme Court admitted a statement made by a child victim of abuse when triggered by a regular activity of getting dressed for bed, while Washington Supreme Court refused to admit a reexcited statement triggered by an everyday occurrence involving an adult victim.⁷¹ Child abuse cases have also been distinguished from other cases when ruling on statements made to family members.⁷²

⁶⁷*Esser v. Com*, 566 S.E.2d 876, 879-880 (Va. App. 2002) (following the reexcitement analysis in *Napier* and *Bayne* in holding that statements made when the victim “believed she was to be returned to the place where she was assaulted and to the control of appellant, the man who had raped and sexually assaulted her” constituted excited utterances); *In the Matter of Troy P.*, 842 P.2d at 743-747 (holding that a four-year-old girl’s near hysterical statements referencing a molestation occurring more than several weeks earlier constituted an excited utterance because the girl was reexcited upon being returned to the place where the inappropriate touching occurred).

⁶⁸*See George v. State*, 813 S.W.2d 792, 795-96 (Ark. 1991) (holding that statements made by the child-victim upon waking from a dream are admissible as a reexcited utterance); *State v. Boston* 545 N.E.2d 1220, 1231 (Ohio 1989) (holding that reexcited statements made by a child-victim upon waking from a dream are admissible under the excited utterance exception).

⁶⁹*See State v. Gordon*, 952 S.W.2d 817, 821 (Tenn. 1997) (holding that pain experienced by a three-year-old victim of molestation while attempting to urinate “as opposed to the sexual offense itself constituted a startling event” under the *Napier* reexcitement analysis, and therefore statements fell under the excited utterance exception).

⁷⁰*See State v. Burns*, 29 S.W.3d 40, 47 (Tenn. Crim. App. 1999) (affirming *Napier*, yet finding that statements made after an emotional reaction to hearing the defendant’s name by the burned child victim did not fall under the excited utterance exception).

⁷¹*Compare In re Parental Rights of G.P.*, 679 P.2d 976, 1004 (Wyo. 1984) (regardless of whether the declarant’s “statements were triggered by the abusive act during her home visit or the subsequent pain [and reexcitement] she experienced while being dressed for bed,” her statements were admissible under the excited utterance exception) *with State v. Chapin*, 826 P.2d 194, 198-99 (Wash. 1992) (affirming *Napier*’s reexcitement theory but finding the excited utterance exception inapplicable because there was a period of calm before the elderly

Interestingly, the Advisory Committee Notes to Federal Rule of Evidence 803(1) cite *Sanitary Grocery Co. v. Snead*⁷³, a case that preceded *Napier*, but may also be categorized within *Napier*'s line of reexcitement cases because the excited utterance there also refers to a past event.⁷⁴ Unlike *Napier* and its progeny, however, the past event in *Snead* is objectively unexciting.⁷⁵

In *Snead*, a store clerk's excited and nervous statement after a customer slipped and fell in his grocery store was found to be admissible under the excited utterance exception.⁷⁶ The statement referred to the clerk's observation that the produce upon which the customer slipped had been on the floor for several hours.⁷⁷ The event of viewing produce on the ground, however, is *not* objectively exciting. Upon seeing such items on the ground, a store clerk would likely foresee a higher likelihood of customer injury and thus have a duty to clean or remove the items. The clerk, however, would not be so excited upon viewing the produce that his capacity to fabricate would momentarily be suspended.

This case substantially augments the validity of the reexcitement analysis, because it is evidence that the Advisory Committee anticipated *Napier*-like cases where the excited statement referenced an unexciting past event. That this case was explicitly mentioned in the Advisory Committee Notes is demonstrative of the Congressional intent behind the Federal Rules of Evidence. Obviously, *Snead* was prominent enough for the Advisory Committee to take note of and use as a model to illustrate the allowable lapse of time in the excited utterance exception.

If the Advisory Committee was willing to admit statements which explain and relate to a *non-exciting past* event under *Snead*, it is even more likely that it would admit statements which explain and relate to an *exciting* event under *Napier*. *Snead* merely required that the statement result from a new exciting event when explaining another past, unexciting event. *Napier* and its progeny, however, require that the initial event be exciting and that the second event both rekindle emotions from the

nursing home resident made his allegations of rape, and the statements were triggered by ordinary, not unusual activities by his caretaker/alleged rapist).

⁷²*Compare* State v. Owens, 899 P.2d 833, 836 (Wash. Ct. App. 1 1995) (questions by family members regarding an earlier molestation recreated the original stress; therefore, statements made by the child-victim immediately afterwards qualified as excited utterances) with State v. Henry, No. 9405000365, 1995 Del. Super LEXIS 185, at *3-4 (Del. Super Ct. March 24, 1995) (distinguishing *Napier* from facts where an elderly victim—who had broken his hip after being punched in the face by the defendant—trembled and wept while uttering, “he punched me,” while awaiting surgery, was not admissible because the victim had time to consult with family and was visibly calmer from the time of initial the battery unlike the facts in *Napier*).

⁷³90 F.2d 374 (D.C. Cir. 1937).

⁷⁴*Id.* at 376-77. The committee used the case to illustrate the distinction between the present sense impression and the excited utterance exception: The excited utterance exception is broader because the admissible statement may address a past event. FED. R. EVID. 801(1) and 801(2) Advisory Committee Notes.

⁷⁵*Snead*, 90 F.2d at 376-77.

⁷⁶*Id.*

⁷⁷*Id.*

initial event and thus generate an excited statement that explains the past event. Therefore, if the Advisory Committee consciously included *Snead* within the definition of the excited utterance exception, it must have also meant to include reexcitement cases like *Napier*, which are even more trustworthy because the earlier exciting event increases the likelihood that the declarant's reexcitement was genuine and actually stilled his or her reflective faculties.

Although the reexcitement theory has been uniformly acknowledged by state courts, it has not been subjected to extensive federal judicial criticism—the Ninth Circuit in its *Napier* opinion is the only circuit to speak dispositively regarding reexcitement. The federal court progeny directly affirming the reexcitement concept consist of brief statements by military courts or unpublished decisions of the Ninth Circuit restating *Napier's* holding and finding the reexcitement analysis inapplicable. One court aptly sums up the current state of the application of reexcitement as follows:

The argument that statements made after one has calmed down can never be excited utterances presents an unsettled legal question. The *implicit premise* underlying the excited utterance exception is that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of the lack of opportunity to fabricate This premise becomes more tenuous where the exciting influence has dissipated and one has had the opportunity to deliberate or fabricate. Even if one were to have a renewal of the stress involved in the original exciting event, the existence of a deliberative period increases the concern that subsequent statements will be inaccurate or contrived. On the other hand, some courts and commentators have accepted the premise that even after the excitement of a startling event has dissipated, a subsequent statement may constitute an excited utterance if a renewal of the excitement provides an adequate safeguard against fabrication.⁷⁸

Though there is no pronounced pattern of cases—either by state or federal courts—directly addressing the ills arising from the reexcitement analysis, the reexcitement concept is but a part of a larger movement in evidence law—that pertaining to the subjectivization of the excited utterance exception—that has been heavily criticized by proponents of the objective *res gestae* standard.

V. EVOLUTIONARY HISTORY OF THE EXCITED UTTERANCE EXCEPTION AND CRITICISM OF THE UNPRECEDENTED “SUBJECTIVIZATION” OF THE EXCITED UTTERANCE STANDARD

Prior to Professor Wigmore's definition of the excited utterance exception, scholars primarily used the *res gestae* doctrine to justify the exception.⁷⁹ The *res*

⁷⁸United States v. Donaldson, 58 M.J. 477, 483 (C.A.A.F. 2003) (quotations omitted) (emphases added).

⁷⁹The excited utterance exception is also referred to as the spontaneous exclamation or spontaneous declaration exception. This alternative moniker is demonstrative of the *res gestae* origins of the excited utterance exception. See 2 MCCORMICK ON EVIDENCE § 268 (John W. Strong ed., 5th ed. 1999); see also *Chapin*, 826 P.2d at 198 (noting that the *res*

gestae doctrine focused not on the reflective faculties of the declarant, but on the strict contemporaneousness of the statement with the exciting event, so that the statement was essentially a continuation of the event.⁸⁰ If the verbal response is made simultaneously with the exciting occurrence, it “can be considered part of the event which causes it.”⁸¹ The *res gestae* doctrine focuses on the insufficiency of time for—not the reflective capacity of—the declarant to fabricate or contrive any response, so that the hearsay statement is likely to be a truthful reflection of the declarant’s true observations or beliefs.⁸²

Wigmore’s endorsement of deliberation over spontaneity ultimately superceded the *res gestae* doctrine as the lynchpin to the excited utterance exception.⁸³ Wigmore’s modern psychological justification relegated the contemporaneous time requirement to only provide guidance as to whether there was any reflective capacity, so that the statement was not a result of fabrication.⁸⁴ One author documents the evolution as follows: “The excited utterance doctrine has evolved from the concept of *res gestae*, requiring simultaneity between the underlying event and the descriptive statement, to virtually *abandoning* a temporal requirement between the event and the statement.”⁸⁵ Thus, the modern evolution has been a part of the gradual transformation of the excited utterance exception from an objective measure of excitement—only a *short* period of time is reasonable to maintain excitement—to a subjective measure of excitement—looking to that individual’s reflective faculties.

Critics claim that the deterioration of the time requirement between the objectively exciting event and the utterance—as illustrated by *Napier* and its progeny—has resulted in erratic and increasingly relaxed applications by the courts

gestae doctrine was dubbed the common law equivalent of the excited utterance exception, and also that which the excited utterance exception was derived from *res gestae*).

⁸⁰See Conti & Gitnik, *supra* note 39, at 244 (decrying the current premise underlying the excited utterance exception, and advocating a return to the *res gestae* analysis).

⁸¹*Id.*

⁸²See WIGMORE, *supra* note 9, at § 1745; see also MCCORMICK *supra* note 79, at § 268.

⁸³See MCCORMICK *supra* note 79 at § 271.

Wigmore, however, saw as the basis for the spontaneous exclamation exception, not the contemporaneousness of the exclamation, but rather the nervous excitement produced by the exposure of the declarant to an exciting event. As a result, the American law of spontaneous statements shifted in its emphasis from what Thayer had observed to an exception based on the requirement of an exciting event and the resulting stifling of the declarant’s reflective faculties.

Id.

⁸⁴See WIGMORE, *supra* note 9, at § 1756

The declaration . . . may be admissible even though *subsequent* to the occurrence, provided it is *near enough in time to allow the assumption that the exciting influence continued*. It is therefore an error to apply to the present exception the verbal act rule that the utterance must be precisely contemporaneous with the act or occurrence. There was in the beginning a tendency to commit this error. But at the present day this error seems to have been almost everywhere repudiated.

Id. (emphasis added).

⁸⁵Siegel, *supra* note 43, at 1242 (emphasis added).

as to what constitutes a reasonable chronological proximity between the statement and the exciting event.⁸⁶ This deterioration has led critics of the current interpretation of the excited utterance exception to disparage the focus on the declarant's reflective faculties.

The 803(2) exception's greatest flaw inheres in the fact that there is no *objective* method of determining how much time may pass between the exciting event and the excited utterance. Courts have, however, agreed that the excited statement does not need to be made contemporaneously or even on the same day as the exciting event. This lack of *objectivity* leaves us with a rule that is lacking in uniformity, full of unpredictability, and unfair.⁸⁷

It is this evolution that has both defined and paved the way for the advent of reexcitement cases. However, critics claim that this evolution constitutes an exorbitant pattern of over-expansion which eviscerates the underlying aims of the exception.⁸⁸

Critics disdainfully contend that the expansion of the excited utterance exception since Wigmore's reclassification has destructively construed the composite elements of the exception as flexible guiding elements rather than mandatory to the functioning of the exception. Without a bright line test clearly indicating to the court whether such evidence is admissible, there will be discriminatory and wavering application of the exception to facts that are remarkably similar, thus subjecting members of the public to a double standard.⁸⁹ Furthermore, the judicial opinions that result may not be adequately challenged by the parties and may result in binding precedent, especially because "[l]itigants may not have the incentive or the resources to appeal decisions that are not clearly prejudicial or where the admission of hearsay did not contribute to the jury's verdict."⁹⁰

The intended beneficiaries of the increasingly subjective interpretation of the exception are those victims of particularly heinous crimes—especially violence or abuse against children, murder, rape, or domestic violence.⁹¹ However, the

⁸⁶See M. C. Slough, *Spontaneous Statements and State of Mind*, 46 Iowa L. Rev. 224, 243 (1961) (looking at the prolonged duration of intervening time between the exciting event and the declaration).

⁸⁷Conti & Gitnik, *supra* note 39, at 235 (emphases added).

⁸⁸See Siegel, *supra* note 43, at 1255-56 (providing illustrative case law from Massachusetts, documenting the pattern of courts allowing excited statements, even given evidence that the declarants were not excited and of the significant lapse of time); see also Conti & Gitnik, *supra* note 39, at 236-44 (looking to demonstrative rape and child abuse cases which show inconsistency in the spontaneity of the statement after the exciting event).

⁸⁹See Conti & Gitnik, *supra* note 39, at 250 ("The current predicament inheres in the 'no time for reflection' element, as courts make arbitrary and discretionary determinations Consequently, with regard to homicide, rape, and child abuse cases, courts utilize differing standards when applying the excited utterance exception, thereby resulting in unpredictable decisions.").

⁹⁰Siegel, *supra* note 43, at 1264.

⁹¹See *id.* at 1256-57 (commenting on the modern trend of expanding the excited utterance doctrine in several Massachusetts criminal cases, primarily in cases of murder, domestic

interpretation of the excited utterance exception has since increased beyond that realm.⁹² Although courts used their newfound discretion and flexibility to further public policy and make rulings that supplement areas where the law was traditionally lacking, their overly broad interpretations of the exception has admitted a copious range of statements that should not otherwise be admissible.⁹³ Such statements that are used solely to support the sympathetic victim-declarant should instead fall under the residual exception, rather than disfiguring, manipulating, and compromising the excited utterance exception to the evidence at hand.⁹⁴ Furthermore, “[i]f the balance of evidentiary issues needs to be shifted in favor of the prosecution, then the court should explicitly state such a policy.”⁹⁵

Critics further allege that though the evolution of the excited utterance exception may have been originally beneficial in protecting such victims, these victims are now protected with newly codified and more exacting evidence rules. Those rules are better suited to them, because the rules expressly rid specific evidentiary barriers unique to those victims.⁹⁶ Therefore, inconsistent precedent remains as a confusing vestige that weakens the original purpose of the excited utterance exception, excluding those who have made valid statements under the traditional definition of the rule. One author suggests that “[t]o maintain the integrity of the judicial process,

violence, and assault); *see also* Conti & Gitnik, *supra* note 39, at 250 (commenting on that the courts use diverging criteria in applying the excited utterance exception to rape, child abuse, and murder cases); *see also* In the matter of Troy P., 842 P.2d at 747 (summarizing cases “upholding the admissibility of children’s excited utterances naming the defendant immediately upon awaking in the middle of the night”); *see George*, 813 S.W.2d at 795-96 (holding that physically abused child’s excited statement made after a frightening dream admissible); *State v. Boston* 545 N.E.2d 1220, 1231 (Ohio 1989) (finding a molested child’s statement made after a nightmarish dream admissible as an excited utterance).

⁹²*See* Siegel, *supra* note 43, at 1275.

By repeatedly expanding, and arguably effectively eliminating, the temporal requirement implicit in the excited utterance exception in the criminal context, Massachusetts courts have inconsistently applied the exception under a rationale which no longer holds true. The term itself, whether spontaneous exclamation or excited utterance, includes the notion of an immediate or stressful condition caused by an underlying event. Courts have contorted the exception in order to reach desired results or correct perceived social ills by permitting the introduction of hearsay testimony made substantially after the event.

Id.

⁹³*See id.* at 1266-67 (noting that in general, cases in which the excited utterance exception has been expanded are “highly emotional events likely to inspire excited utterances, such as murder, assault, and sexual assault, and many of the cases involve children.”).

⁹⁴*See id.* at 1270-72 (explaining that explicit laws should be made to encompass changes in social policy, rather than awkwardly contorting a time-honored law).

⁹⁵*Id.* at 1271-72.

⁹⁶*See* FED. R. EVID. 413; *see also* FED. R. EVID. 414; Siegel *supra* note 43, at 1271-72 (“other jurisdictions . . . explicitly recognize evidentiary rules based on social policies designed to achieve a desired application of substantive law” such as section 1370 of the California Evidence Code which “created a ‘new hearsay exception for a declarant’s hearsay statements narrating, describing or explaining the infliction or the threat of physical injury upon the declarant by the party against who the statement is offered.’”).

trial judges should restrain from admitting out-of-court statements into evidence under the current excited utterance exception. Stretching the excited utterance exception undermines the consistency necessary in the judicial process.”⁹⁷ The wide-reaching inclusiveness of the rule now provides a gaping loophole for non-meritorious statements to come in as evidence.⁹⁸

VI. DEFENDING AND REIGNING IN THE EXCESSES OF THE EXCITED UTTERANCE EXCEPTION

The modern excited utterance exception, as illustrated by *Napier*, is not necessarily a lesser standard for the proponent of the evidence to meet; it is an exception that merely affords the district courts greater discretion⁹⁹ in molding the

⁹⁷Siegel, *supra* note 43, at 1271.

⁹⁸There has, however, been backing for the current state of the excited utterance exception from the highest judicial authority in the United States. The greatest support offered for the modern day excited utterance exception is the positive affirmation offered by the Supreme Court in two cases dealing with the Confrontation Clause. In a 1992 decision, the Supreme Court stated that “‘firmly rooted’ exceptions carry sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause.” *White v. Illinois*, 502 U.S. 346, 502 n.8 (1992). Moreover, the excited utterance exception is a firmly rooted exception to the rule against hearsay, and therefore sufficiently reliable to protect the criminal defendant of his Constitutional right to confront all accusers:

[T]he evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations . . . is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements’ reliability cannot be recaptured even by later in-court testimony. A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one’s exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom.

Id. at 355-56.

Additionally, in a 1990 decision, the Supreme Court found that showing “particularized guarantees of trustworthiness” required an analysis of the totality of the circumstances that surround the declarant’s making of the statement. *Idaho v. Wright*, 497 U.S. 805, 819 (1990). In dicta, the Supreme Court buttressed the circumstantial guarantees of trustworthiness underlying the excited utterance exception by stating that “[t]he basis for the ‘excited utterance’ exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.” *Id.* at 820.

The highest court has endorsed Wigmore’s justification of the excited utterance exception and, therefore, has heartily agreed that a statement made in a highly excited state is trustworthy and reliable enough to pass the Constitutional requirements articulated in the Confrontation Clause because of the lack of reflective faculties to fabricate.

Furthermore, *res gestae* critics of the excited utterance exception should be appeased because *res gestae* considerations are at work in many other accepted hearsay exceptions. For example, “[r]es gestae also sired the hearsay exceptions for present-sense impressions, excited utterances, direct evidence of state of mind, and statements made to physicians.” Orenstein, *supra* note 39, at 169.

⁹⁹Giving courts an exception based more on a subjective inquiry affords the courts with more discretion in admitting the evidence.

exception based on circumstantial evidence and the egregiousness of the crime—two elements which speak to the subjective excitement experienced by the declarant.¹⁰⁰ To understand one's mental ability to fabricate requires the court to subjectively assess this situation and use its authority to balancing competing factors. The exception still requires a showing of corroborating evidence that supports a court's judgment that the declarant was subjectively excited.¹⁰¹ All laws made by Congress are to some degree either over- or under-inclusive, but courts, in applying this exception, may best minimize the misapplication of the law through the monitoring device of court discretion.

In response to critics' claims that the controversial evolution of the excited utterance exception has resulted in non-uniform and highly deviant cases—and now has the great potential for misuse because of inconsistent and complicated precedent and complicated cases such as *Napier*—one must document the actual usage of the exception. Critics focus only on the ills that have resulted from use of the exception and not the wide-reaching benefits for those traditionally disadvantaged individuals such as victims of domestic abuse, child molestation, and rape.

The excited utterance exception serves to illustrate the changing policy behind the law, and the evolution of the law to meet those new aims. Just because there has been a shift in the application of the underlying principle of the excited utterance exception does not necessarily indicate that there has been a regression, but that the law has merely adapted its historical aims to new societal principles. When the defendant has committed an egregious crime where the victim is historically not afforded enough protections in the law, the courts have intervened and used the excited utterance exception to correct these historical barriers. Humans, psychological understanding,¹⁰² and society change over time. As they do, so does the meaning and the interpretation of the exceptions.

One must, nonetheless, guard against the great pitfalls in granting the courts too much discretion. One scholar writes,

If we used a rule similar to 403 to control the broad admissibility of hearsay, or if we have more fluid exceptions, we cede more power to judges. The more open-ended a rule is, the more it is subject to differing

¹⁰⁰Saltzburg, *supra* at note 26, at 43.

There is no thermometer-type test for excited utterances; statements must be examined in light of all circumstances. There is no time period, corroboration, or other thermometer-type test that will provide clear notice . . . to prosecutors and defense counsel as to statements that will qualify as excited utterances and those that will not. Judges will often have to assess the circumstances surrounding a statement in order to decide whether or not it is admissible. Because the judge sits as a fact finder, appellate courts will defer to the judgment of a trial court on admissibility decisions.

Id.

¹⁰¹*Id.* at 42. "Although questions are not disqualifying, evasive answers or inconsistent statements may suggest that the stress of excitement has given way to contemplative answers." *Id.*

¹⁰²Psychological processes are complex and constantly influenced by the level of psychological advancements; therefore, the lower level of understanding of psychology when the excited utterance exception was developed might not be applicable today. See Orenstein, *supra* note 39, at 159-223.

interpretations. The more a rule can be interpreted in various ways, the more power the interpreter has.¹⁰³

The scholar also writes of the possible slippery slope argument: “Such an extension would greatly change our litigation. It should mean that the hearsay about the incident for anyone who suffered violence, or perhaps the threat of violence, should be admissible.”¹⁰⁴ True, there must be safeguards, but as we have seen from the current pattern of use of the excited utterance exception in case law, the preexisting evidentiary thresholds coupled with court discretion serve to weed out unreliable statements.¹⁰⁵

It is true that the most effective means of applying the law would be to provide a bright line rule explicitly delineating the boundaries of the excited utterance exception. Such a bright line rule would, however, fail to take into account the true psychological considerations of possessing such an excited state as being unable to reflect and therefore fabricate excited statements. The excited utterance is distinguishable from the bright line hearsay exceptions because it looks to the excited state of the declarant—and this subjective test *necessarily* requires the court to take a balancing approach. Because hearsay is an all-or-nothing approach, it will necessarily exclude that which is trustworthy. Therefore, hearsay exceptions based on discretionary balancing are the best available methods to reconcile the opposing rights of victims and criminal defendants and to provide a countervailing protection against the exacting nature of the hearsay rule.¹⁰⁶

VII. RECENT CHANGES IN THE LAW THAT WILL CHANGE THE FUTURE LANDSCAPE FOR THE REEXCITED UTTERANCE ANALYSIS

In *Crawford v. Washington*,¹⁰⁷ a landmark Confrontation Clause case handed down in 2004, the Supreme Court found that it is a Constitutional violation under the Sixth Amendment to disallow the defendant from cross-examining the declarant

¹⁰³Randolph N. Jonakait, “My God! Is This How a Feminist Analyzes Excited Utterances?” 4 WM. & MARY J. OF WOMEN & L. 263, 286 (1997).

¹⁰⁴*Id.* at 290.

¹⁰⁵The proponent of the evidence, under a preponderance of the evidence standard, bears the burden of proof to establish that the declarant was excited. See FED. R. EVID. 103(a). Therefore, the court must assess the corroborating evidence around the statement to determine whether the declarant was sufficiently excited. “Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court.” FED. R. EVID. 104(a). Though the proponent of the evidence may attempt to bootstrap—that is, admit the statement under the excited utterance exception, claiming that the statement itself is evidence of the excitement—the hearsay protections are still present because the excitement must still be proven to the court by the preponderance standard before the court will admit such evidence. Holland, *supra* note 35, at 182 (“[U]nless some other evidence corroborates the complainant’s assertion of the startling event, the excited utterance alone would admit itself for its own truth. This presents a rather convenient tautology: the statement becomes admissible simply because the complainant said it.”).

¹⁰⁶Orenstein, *supra* note 39, at 193.

¹⁰⁷541 U.S. 36 (2004).

regarding his or her testimonial statement. “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”¹⁰⁸ This holding has profound effects on reexcitement cases involving statements made for a police investigation—such statements include those made while identifying the perpetrator at a line up or during a police interrogation. Reexcitement is logically related to testimonial statements, for it is commonplace for a victim to become reexcited when recounting exciting events to law enforcement officials. There have been cases where the courts have admitted testimonial statements under *Napier*’s reexcitement analysis;¹⁰⁹ however, courts generally tend to disallow the evidence on facts that indicated that the statements were not made in an excited state.¹¹⁰

Viewing the *Napier* in light of the recent *Crawford* decision, the potential dangers present in the reexcitement cases—namely, the discreet pressures and other societal influences in the period after the original exciting event—can be better evaluated and exposed through cross-examination. The reasoning behind *Napier* and *Bayne* was tenuous because both cases failed to address the effect that intervening influences might have had on the reexcited statement. Therefore, requiring that the defendant be given an opportunity to cross-examine the declarant on testimonial statements partially mitigates the dangers present in the reexcitement analysis.

VIII. CONCLUSION

It is clear that the reexcitement analysis has both benefits and detriments. Reexcitement *may* be a basis for admission of evidence in cases where the danger of influencing during the calm period is somehow obviated—as in the recent *Crawford* opinion. Because of the heightened danger of undue influence in reexcitement cases, the courts should require corroborating evidence that the declarant did not confide in anyone during the intervening period of calm, to reduce the chance of outside pressures and influences. Congress should provide an amendment to the Federal Rules of Evidence expressly allowing for reexcitement, but also requiring either physical corroborating evidence of the truthfulness of the statement or the declarant to be available for cross-examination—similar to *Napier* and the child abuse cases. Therefore, with the defendant’s opportunity to cross-examine, she may lead the fact finder to question the biased nature of the declarant’s statement. Furthermore, the

¹⁰⁸*Id.*

¹⁰⁹*See, e.g.,* Commonwealth v. Santiago, 774 N.E.2d 143 (Mass. 2002) (holding that statements made by the mother of the victim upon seeing the accused being arrested by police admissible under the excited utterance standard).

¹¹⁰*See, e.g.,* Portillo v. U.S., 710 A.2d 883, 885 (D.C. 1998) (though the victim-declarant saw the assailant immediately preceding her interview with police and was therefore reexcited, because she was calm in demeanor and evasive in her answers, her statements did not fall under the excited utterance exception); Biggins v. State, 73 S.W.3d 502, 504 (Tex. App. 2002) (holding that although there had been a period of calm from the original event of molestation, the statements made by the 19-year-old victim to police officers were not a product of reexcitement, but part of the unbroken chain of resulting “emotions, excitement, fear, or pain resulting from the occurrence”); Mineo, 2001 WL 30184 at *5 (citing *Napier* on the theory of reexcitement, but finding that although reexcitement is valid under the excited utterance exception, the details of domestic violence that the victim offered to the police officers were too “detailed and lengthy” and thus more likely to be the result of fabrication).

requirement of physical evidence that substantiates the excited statement also serves the same purpose.

The uniqueness of the holdings of the reexcitement cases may be due to the severity and the egregiousness of the crimes, the substantial amount of circumstantial evidence that was available to buttress allegations of the defendants' guilt, or the particularly sympathetic nature of the plaintiffs.¹¹¹ Nevertheless, the reexcitement cases present profound questions regarding how much time constitutes enough time for "calm reflection" and what constitutes a "startling event or condition." Ultimately, the reexcitement cases are an indicator of the high water mark of the excited utterance exception—an exception which has been deemed by some to be the "unofficial garbage pail of hearsay exceptions."¹¹² The *Napier* case and its progeny, applying the reexcitement analysis, scholarly commentary, and the ramifications of conclusions obtained from these combined sources have profound consequences on evidence law. It is uncertain whether reexcitement cases are to be categorized as merely a part of the expansion of the excited utterance exception, or as an anomaly analysis in a class of its own. It is, however, certain that the modern day interpretation of the excited utterance marks a pattern of changing societal attitudes which reflect an increasing awareness of the distinct aspects of a victim's psychological state.

¹¹¹See *Napier*, 518 F.2d at 317-18.

¹¹²See Orenstein, *supra* note 39, at 177.