HOW THE PROMPT OUTCRY RULE PROTECTS THE GUILTY

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A lawyer, it is said, once asked a judge to charge the jury: "It is better that a hundred guilty should go free, than that one innocent man should be convicted."[1] The judge agreed to give the charge, but said he would also tell the jury that he had already seen more than a hundred guilty go free at the current term of court.

The release of many guilty people is inevitable in any decent legal system. That is because errors are inevitable, and decency requires us to err on the side of releasing the guilty rather than imprisoning the innocent. Still, I am convinced that our system releases many more guilty people than it has to.

Probably the main reason for this is our overuse of exclusionary rules as sanctions for police or other governmental misconduct. Exclusionary rules, in almost all cases, protect the guilty without significantly reducing the chance of convicting the innocent.[2] I have grumbled about this problem in several dissenting opinions.[3] But in this article, for a change, I will grumble about something else—another rule that protects guilty defendants far more than innocent ones. That is the rule excluding prior consistent statements,[4] and particularly the narrowness of the "prompt outcry" exception to that rule in cases of rape or sexual abuse.[5]

It is hornbook law that prior statements of a witness that are consistent with his or her testimony are inadmissible unless they fit

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[1] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *358 ("[B]etter that ten guilty persons escape than that one innocent suffer.").

[2] *See* People v. Weaver, 909 N.E.2d 1195, 1206 (N.Y. 2009) (Smith, J., dissenting).

[3] *See, e.g.*, People v. Gavazzi, 981 N.E.2d 256, 258 (N.Y. 2012) (Smith, J., dissenting) ("The suppression of evidence . . . increases the likelihood of, if it does not guarantee, an unjust result. Very often it means . . . that '[t]he criminal is to go free because the constable has blundered.'" (alteration in original) (other citations omitted) (quoting People v. Defore, 15 N.E. 585, 587 (N.Y. 1926))); *Weaver*, 909 N.E.2d at 1206 ("[T]he exclusionary rule . . . is a blunt instrument whose effect is often to guarantee an unjust result in a criminal case . . . .").

[4] People v. Rosario, 958 N.E.2d 93, 99 (N.Y. 2011).

[5] *Id.*

within a hearsay exception,[6] though one of the hornbooks that states the rule also criticizes it.[7] This rule is merely an application of the hearsay rule itself: a prior consistent statement is, like any other out-of-court statement, hearsay, when it is offered to prove the truth of the matter asserted.[8] Prior consistent statements are often stigmatized as "bolster[ing]" of the witness's in-court testimony, and the rule excluding them is rationalized on the ground, among others, that "untrustworthy testimony does not become less so merely by repetition."[9]

Like the authors of the *New York Evidence Handbook*, I find the rationales for excluding prior consistent statements unpersuasive.[10] It is true that such statements are sometimes merely cumulative, but not always: "[p]rior statements of witnesses, being closer in time to the described event, are sometimes more reliable than in-court testimony."[11] And the main reason for the existence of the hearsay rule—protecting the right to cross-examination—is absent in the case of prior consistent statements, because the witness is in court, and can be cross-examined about the prior statement as well as the present one. To quote my favorite form of authority, one of my own opinions: "[s]ince the admission of prior consistent statements is rarely prejudicial, courts should be . . . willing to relax the rule excluding such statements when their admission will advance the efforts of a factfinder to learn the truth."[12]

There is perhaps no better case for relaxation of the rule than one in which a victim of rape or sexual abuse has kept the crime secret for some time after it occurred, but has made an exception to the secrecy by confiding in someone close to her. Our court confronted two such cases not long ago, and decided them in a single opinion under the title *People v. Rosario*.[13] In both cases, trial judges had allowed evidence of the victims' prior consistent statements, applying the prompt outcry exception to the hearsay rule.[14] In both cases, a majority of the court held that the trial judges were wrong,

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[6] EDITH L. FISCH, FISCH ON NEW YORK EVIDENCE 325 (2d ed. 1977); MICHAEL M. MARTIN ET AL., NEW YORK EVIDENCE HANDBOOK 684 (2d ed. 2003).

[7] *See* MARTIN ET AL., *supra* note 6, at 678 (calling the prohibition on prior consistent statements "a rule not worth keeping").

[8] People v. Rosario, 958 N.E.2d 93, 104 (N.Y. 2011) (Smith, J., dissenting and concurring).

[9] *See* People v. McDaniel, 611 N.E.2d 265, 268 (N.Y. 1993).

[10] *See* MARTIN ET AL., *supra* note 6, at 678.

[11] *Id.*

[12] *Rosario*, 958 N.E.2d at 104 (Smith, J., dissenting and concurring).

[13] *Id.* at 93 (majority opinion).

[14] *Id.* at 97, 99.

and that the juries should never have learned of those statements.[15] In a separate opinion (dissenting in *Rosario* and concurring in the companion case, *People v. Parada*), I acknowledged that the majority was correctly applying the prompt outcry rule as found in previous decisions.[16] But I said that the application of the rule to these cases and cases like them was an invitation to miscarriages of justice—to the acquittal of undoubtedly guilty defendants—and that the rule should be changed.[17]

To state the facts of the cases is painful, as it is in all cases involving the abuse of children, and I will omit the uglier details. In *Rosario*, a child testified that her father began to abuse her sexually when she was nine, and continued to do so over four or five years.[18] When the complainant was fourteen, she told the defendant: "[t]his is never going to happen again"—and it did not.[19] The complainant mentioned it to no one for the next several months.[20]

About four months after the abuse stopped, the complainant was talking to her boyfriend at school.[21] He noticed that she seemed upset; she could not bring herself to say what was bothering her, but at her boyfriend's suggestion she wrote it down.[22] This was her note:

> Well, um I kind of get sexually harassed by my Dad since I was I think 10. And im not very proud of it + I havent told nebody cause he's my dad n i didn't want him 2 go away + pwease don't tell ne1 [and] lately ive bin pushing him off n stuff so like yeah. please don't say anything.[23]

The complainant finally reported her father to the authorities a year later, after she had an argument with him about whether she could go to the movies with her boyfriend.[24] Defendant was convicted, and the issue on appeal was whether her handwritten note was properly admitted into evidence.[25]

In *People v. Parada*, the complainant said that the defendant, a

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[15] *Id.* at 100, 102 (majority opinion) (holding that admission of statements in *Parada* was harmless error).

[16] *Id.* at 102 (Smith, J., dissenting and concurring).

[17] *Id.*

[18] *Id.* at 95 (majority opinion).

[19] *Id.* at 96.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* (alterations in original).

[24] *Id.*

[25] *Id.* at 97.

friend of her mother's boyfriend who had babysat for her occasionally, sexually abused her beginning when she was six or seven years old.[26] The abuse ended after the complainant's mother and her boyfriend broke up.[27] More than two years later, the child confided her secret to an aunt, and about a month after that she told her mother, who called the police.[28] The issue on appeal was whether the aunt's testimony was properly admitted.[29] Here is an excerpt from that testimony:

> I took [the complainant] in to the living room with me, I sat down with her and I asked her what was going on, why was she crying like that, she should have no reason to be crying so much.
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> At that point she told me that she had said to me before remember I had something to tell you and I didn't say anything to you. I told her yes I do remember, and she told me that the problem was that Buddy was touching me . . . .
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> Q. When she told you that Buddy had touched her when she lived at the apartment, describe her demeanor when she told you that, her tone of voice?
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> A. She said it low, at the same time she was trying to still catch her breath from crying and she was just crying and she was with her head down like she wanted to took a look at me and tell me to my face.
>
> Q. Was she still hugging you?
>
> A. Yes, she was still hugging me.
>
> Q. Were you hugging her?
>
> A. Yes.
>
> Q. Had you ever seen her like this before?
>
> A. No, not like that . . . .
>
> Q. Did she ask you to keep this a secret?
>
> A. Yes.[30]

My view of these cases was, and is, dominated by one obvious point: the prior consistent statements of the victims—the note to the boyfriend in *Rosario*, the conversation with the aunt in *Parada*—provided strong, perhaps overwhelming, evidence of the defendants' guilt. It is hardly open to doubt that the out-of-court statements

[26] *Id.* at 97–98.
[27] *Id.* at 98.
[28] *Id.*
[29] *Id.* at 99.
[30] *Id.* at 103–04 (Smith, J., dissenting and concurring) (internal quotation marks omitted).

really were made: the statement in *Rosario* was in writing,[31] and the aunt in *Parada* had no apparent motive for making it up.[32] And what jury could believe either that the first victim was lying when she wrote her note, or that the second was lying to her aunt? And of what unfairness could the defendant in either case possibly complain? In each case, the defendant's lawyer had a full opportunity to cross-examine the victim.[33]

Without the statements, however, I thought that both defendants—who took the stand and testified, in substance, that the children were lying—had a shot at acquittal. In *Rosario*, a jury might well find reasonable doubt, based on the possibility that the complainant had invented her story in anger, or for fear of punishment, when she defied her father's refusal to let her go to the movies. It is true that, if the defendant's lawyer had explicitly advanced that line of defense, it would have opened the door to the prior consistent statement under the "recent fabrication" rule.[34] But the possibility is obvious enough that jurors might well think of it on their own.

In *Parada* an acquittal seems less likely, because the child was only eleven when she made her accusation, and her mother provided some corroborative testimony; indeed, the majority found in *Parada* that the error in admitting the prior consistent statement was harmless.[35] But there was no corroborating evidence as strong as the aunt's testimony, which refuted the idea—unlikely, but not impossible—that the accusation resulted from a conspiracy against the defendant by the mother and her daughter.[36]

Yet the majority found the two prior consistent statements should not have been admitted[37]—and, as I have said, they had the support of precedent in doing so.[38] While there is an exception to the hearsay rule for a prompt outcry made by a rape victim,[39] these two outcries were not prompt. We made clear in the nineteenth century,[40] and continued to hold in the twentieth,[41] that "outcry" is

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[31] *Id.* at 96 (majority opinion).

[32] *Id.* at 102 (Smith, J., dissenting and concurring).

[33] *See id.* at 96, 97 (majority opinion) (noting that both victims testified at trial).

[34] *See* People v. McClean, 508 N.E.2d 140, 141 (N.Y. 1987).

[35] *See Rosario*, 958 N.E.2d at 102 (majority opinion).

[36] *Id.* at 103 (Smith, J., dissenting and concurring).

[37] *Id.* at 100, 102 (majority opinion).

[38] *Id.* at 102 (Smith, J., dissenting and concurring). *See* People v. McDaniel, 611 N.E.2d 265, 268–69 (N.Y. 1993); *McClean*, 508 N.E.2d at 141 (N.Y. 1987); People v. O'Sullivan, 104 N.Y. 481, 490 (1887).

[39] People v. Rice, 554 N.E.2d 1265, 1266 (N.Y. 1990).

[40] *O'Sullivan*, 104 N.Y. at 487.

not admissible if it is not "prompt." The nineteenth century case explained the rationale for this rule:

> It is a general rule that the evidence of a witness can never be corroborated or confirmed by proof that the witness stated the same facts testified to in court on some occasion when not under oath. Such statements, like all hearsay evidence, are excluded as unsatisfactory and incompetent. But there is an exception to the rule in the case of rape. The outrage in such a case upon a virtuous female is so great that there is a natural presumption that at the first suitable opportunity she would make disclosure of it; and she would be so far discredited if she did not make the disclosure. For the purpose of confirming her evidence where she is a witness, such disclosure may be received. But where the disclosure is not recent, as soon as suitable opportunity is furnished, the reason for receiving it in evidence does not exist, and the principle justifying its reception does not apply.[42]

I do not think I need to argue to contemporary readers that this reasoning is obsolete. Indeed, I would admire the courage, but would deplore the ignorance, of anyone asserting today that no "virtuous female" would be slow to report a sexual assault or a rape. We now know that even adult victims of such crimes suffer a trauma and humiliation that often makes it hard for them to disclose what has happened—and the victims in *Rosario* and *Parada* were children. For this reason—and, more fundamentally, because the rule excluding prior consistent statements rests on shaky ground in the first place—I said in my dissenting and concurring opinion, in substance, that the prompt outcry rule should be converted into a simple "outcry" rule:

> When a victim testifies to an act of rape or sexual abuse, every disclosure of the alleged crime by the victim before it was reported to the authorities should be admissible, subject of course to a trial court's normal power to exclude evidence that is repetitive, unnecessarily inflammatory or otherwise prejudicial.[43]

None of my colleagues voted, in the *Rosario* and *Parada* cases, to

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[41] *McDaniel*, 611 N.E.2d at 269.
[42] *O'Sullivan*, 104 N.Y. at 486–88.
[43] *Rosario*, 958 N.E.2d at 105 (Smith, J., dissenting and concurring).

adopt the rule I suggested.[44] It is not my purpose here to criticize them; as I have said, they were following precedent, and that is what judges should normally do. The usual way of changing the law is through statutes passed by a legislature.[45] Perhaps one day the New York Legislature will recognize that New York's prompt outcry rule is too narrow, and lets too many guilty people go free.

[44] *Id.* at 106 (identifying Smith as the lone dissenter with no concurring votes).

[45] *See generally* Gerald Benjamin, *Reform in New York: The Budget, the Legislature, and the Governance Process*, 67 ALB. L. REV. 1021, 1024–25 (2004) (discussing the recent failures of the New York State Legislature in implementing legal reform).