CRYING OUT FOR CHANGE: A CALL FOR A NEW CHILD ABUSE HEARSAY EXCEPTION IN NEW YORK STATE

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I. INTRODUCTION

According to a 2000 report by the U.S. Bureau of Justice Statistics, nearly seventy percent of all sexual assaults in the country are committed against children.[1] In 1990, a U.S. Department of Health and Human Services task force declared child sex abuse a national emergency.[2] While the age with the greatest proportion of assaults reported was fourteen, more than half of all child victims were under twelve.[3] Of those children under age twelve, four-year-olds were at the greatest risk.[4] According to UNICEF, "5 [to] 10 percent of girls and up to 5 percent of boys [in industrialized nations] suffer penetrative sexual abuse."[5] Up to three times that amount experience some other type of sexual abuse.[6]

In 2007, Child Protective Services (CPS) in the United States investigated 3.2 million cases of suspected child maltreatment.[7] There were 164,831 maltreatment cases reported to New York State

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[1] HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, NCJ 182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 (2000).

[2] *See* Henry Weinstein, *Child Sex Abuse Cases Pose Dilemma for Prosecutors*, L.A. TIMES, Sept. 19, 1993, at A1.

[3] SNYDER, *supra* note 1, at 2.

[4] *Id.*

[5] UNICEF, PROGRESS FOR CHILDREN: A REPORT CARD ON CHILD PROTECTION 36 (2009), *available at* http://www.unicef.org/protection/files/Progress_for_Children-No.8_EN_081309(1).pdf.

[6] *Id.*

[7] U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2007, at 5 (2009) [hereinafter CHILD MALTREATMENT 2007], *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf.

Child Protective Services in 2009.[8] 51,348 of those cases were indicated,[9] which means that there was enough evidence to continue the investigation because an investigator believed that the allegations were not unfounded.[10]

Victims of child abuse[11] often do not disclose immediately after the abuse has taken place.[12] Sometimes, victims of abuse keep the events to themselves for many years.[13] For example, in a 1992 report, the National Victim Center & Crime Victims Research and Treatment Center found that only sixteen percent of sexual assault victims ever report the assault to the authorities, or fail to provide a full report.[14] Frequently, the child victim is unaware of the wrongful nature of the conduct or that what has occurred is not "normal."[15] The victim also often experiences feelings of confusion[16] and guilt, a desire to forget the incident, a fear of not being believed, and in many instances, may remain silent as a result of intimidation by the abuser.[17] If victims do eventually disclose the abuse, the disclosure is central to the prosecution's case: "Abusers may leave no physical marks on their victims, and children often do

[8] N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., 2009 MONITORING AND ANALYSIS PROFILES WITH SELECTED TREND DATA: 2005–2009, at 2 (2009), *available at* http://www.ocfs.state.ny.us/main/reports/2009%20Monitoring%20and%20Analysis%20Profiles%20NYC.pdf.

[9] *Id.*

[10] CHILD MALTREATMENT 2007, *supra* note 7, at 7.

[11] Child abuse can refer to different types of abuse. For the purposes of this article, child abuse refers to sexual contact by a person over the age of seventeen with a person under the age of fourteen, or a person over the age of seventeen who has sex with someone under the age of seventeen and the older person is more than five years older. *See, e.g.*, N.Y. PENAL LAW §§ 130.20–.65 (McKinney 2013).

[12] *See* Irving Prager, *"Sexual Psychotherapy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 61, 72 (1982); Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need for A New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. LEGIS. 207, 229 (1995); Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1756 (1983).

[13] *See* Prager, *supra* note 12, at 61, 72; Marks, *supra* note 12, at 229; Yun, *supra* note 12, at 1756.

[14] NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH AND TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 6 (Christine N. Edmunds, Dean G. Kilpatrick, & Anne Seymour eds. 1992).

[15] 2 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 7.34, at 245 (3d ed. 1997) (quoting People v. Brown, 883 P.2d 949, 956 (Cal. 1994)); *see also* Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS L. REV. 1851, 1853 n.7 (2006) (citing HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, NCJ 178257, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 30 (1999), *available at* http://www.ncjrs.gov/html/ojjdp/nationalreport99/frontmatter.pdf).

[16] *See* MYERS, *supra* note 15, at 245; Yun, *supra* note 12, at 1756.

[17] *See* Prager, *supra* note 12, at 72–73 ("[M]ore than ninety percent of all child molestations apparently go unreported.").

not resist outwardly or physically. Accordingly, there is usually little physical evidence to corroborate the child's allegations, and the child-victim is often the only witness [to the crime]."[18] So if a child discloses the abuse, testimony about what the victim said, to whom it was said, when it was said, and how the victim appeared while saying it, are important for establishing a strong case.[19] However, testimony about the disclosure is generally regarded as hearsay, and hearsay is typically inadmissible unless it fits within a hearsay exception.[20]

Children are unlike any other witnesses or victims.[21] A delayed disclosure and the reason for the delay are part of the story describing an incident of child abuse; each case needs to be told in completion in order for the jury to get a full and fair picture at trial.[22] Victims are often the only witnesses to the crime.[23] Although New York State has a prompt outcry exception to the

[18] Marks, *supra* note 12, at 214–15 (citations omitted); *see also* Heinz Brunold, *Observations After Sexual Traumata Suffered in Childhood*, *in* THE SEXUAL VICTIMOLOGY OF YOUTH 60, 62–63 (Leroy G. Schultz ed., 1980); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 34 n.120 (1989) ("[P]hysical or laboratory evidence of child sexual abuse is found in only 10 to 50 percent of cases."); Kee MacFarlane, *Sexual Abuse of Children*, *in* 3 THE VICTIMIZATION OF WOMEN 81, 88 (Jane Roberts Chapman & Margaret Gates eds., 1978). For example, in a study of 311 cases, genital trauma was found in sixteen percent of cases, and non-genital trauma was found in an additional sixteen percent. Myers et al., *supra*, at 34 n.120. Genital trauma was twice as likely if the perpetrator was a stranger. *See id.*

[19] *See* Marks, *supra* note 12, at 216 (explaining that out-of-court statements by children are found more credible by juries, as are the adult witnesses that recount these statements).

[20] *See* FED. R. EVID. 802; People v. McDaniel, 611 N.E.2d 265, 269–70 (N.Y. 1993) ("[The mother's] testimony about her conversations with [her daughter] on the mornings following each incident was properly admissible [hearsay] under the prompt outcry exception.").

[21] There is a wealth of case law and statutes demonstrating that New York State treats children differently. *See, e.g.*, N.Y. CRIM. PROC. LAW § 190.32(2) (McKinney 2013) (authorizing prosecutors to use videotaped examinations of children in lieu of direct testimony in grand juries); N.Y. CRIM. PROC. LAW § 65.20(2), (7) (McKinney 2013) (stating that a child witness deemed vulnerable may not be compelled to testify in court, but may be allowed to testify via closed circuit television); *see also* People v. Morris, 461 N.E.2d 1256, 1260 (N.Y. 1984) (holding that an indictment need not always set out an exact time to allege when the crime occurred especially when the victim is a child; factors to consider when determining whether an indictment could be made more specific through reasonable efforts include the age of the victim, the surrounding circumstances, and the nature of the offense); People v. Keindl, 502 N.E.2d 577, 582 (N.Y. 1986) ("The statutory definition of [endangering the welfare of a child] . . . does not necessarily contemplate a single act. Hence, a defendant may be guilty of this crime by virtue of a series of acts, none of which may be enough by itself to constitute the offense, but each of which when combined make out the crime." (footnote omitted) (citing Cowley v. People, 83 N.Y. 464, 472 (1881))).

[22] *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 186–88 (1997) (describing the importance of "descriptive richness" and the general right a party has to prove its case in the way it chooses).

[23] Doris Stevens & Lucy Berliner, *Special Techniques for Child Witnesses*, *in* THE SEXUAL VICTIMOLOGY OF YOUTH, *supra* note 18, at 246, 248.

hearsay rule, which allows the "fact of a complaint" to be admitted into evidence,[24] the exception is insufficient to adequately protect child victims and effectively prosecute perpetrators of child abuse. In order for a child's entire story to be told, this exception must be broadened to include delayed disclosures, as well as the contents of the disclosure statement.

This article proposes a change to the New York State law concerning outcries of abused children. Part II discusses current New York State law about disclosures made by child victims of sexual abuse. Part III discusses child abuse disclosure law in other United States jurisdictions and how it can inform advances in New York State law. Finally, Part IV proposes a new law for New York State that is consistent with the jurisprudential trend in the United States and will more adequately protect child victims from prejudicial exclusion of evidence in sex abuse trials.

II. NEW YORK STATE LAW AND CHILD ABUSE DISCLOSURES

A. Prompt Outcry and Its Requirements

The prompt outcry exception has its roots in English common law.[25] Under English common law, victims of violent crimes were required to raise a "hue and cry" (*hutesium et clamor*) in order for the crime to be prosecuted:[26]

> When a felony is committed, the hue and cry (*hutesium et clamor*) should be raised. If, for example, one comes upon a dead body and omits to raise the hue, one commits an amerciable offence, besides laying oneself open to ugly suspicions . . . . The neighbours should turn out with the bows, arrows, knives, that they are bound to keep and, besides much shouting, there will be horn-blowing; the 'hue' will be 'horned' from vill to vill.[27]

By the 1700s, courts learned that the hue and cry rule was largely ineffective because it did not help capture the perpetrator and even an accomplice could raise a cry, distracting authorities from finding the perpetrator.[28] Ironically, the courts continued to require a hue

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[24] *See, e.g.*, *McDaniel*, 611 N.E.2d at 269 (finding that the accompanying details are not admissible, only "the fact of a complaint").

[25] 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 576–77 (2d ed. 1895).

[26] *See id.*; Commonwealth v. Bailey, 348 N.E.2d 746, 750 n.7 (Mass. 1976).

[27] POLLOCK & MAITLAND, *supra* note 25, at 576–77 (footnotes omitted).

[28] 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION

and cry in rape cases.[29] The rationale for treating rape cases differently was the belief that "after becoming the victim of [sexual] assault against her will, . . . [the victim] should have spoken out. That she did not, that she went about as if nothing had happened, was in effect an assertion that nothing violent had been done."[30] If no cry was raised, the jury was instructed to draw a negative inference about the veracity of the victim's allegation.[31]

American courts treated a victim's failure to make a prompt outcry similar to an inconsistent statement—if a victim did not promptly outcry, her lack of an outcry was at odds with her in-court testimony about the rape.[32] Therefore, to prove its case, the prosecution was permitted to introduce evidence of a fresh complaint from witnesses.[33]

In a classic exposition of the original reasoning underlying the prompt outcry rule, the New York Court of Appeals stated:

> 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.[34]

FROM 1750, at 27 (1957).

[29] *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 954–55 (2004).

[30] 4 JOHN HENRY WIGMORE, EVIDENCE § 1135, at 219 (3d ed. 1940).

[31] *See, e.g.*, State v. Thomas, 174 S.W.2d 337, 345 (Mo. 1943) ("[T]he defendant is entitled to a proper cautionary instruction advising the jury that the failure of the prosecutrix to make a complaint seasonably after the assault is a circumstance for their consideration along with the other facts in evidence.").

[32] WIGMORE, *supra* note 30, § 1135, at 219.

[33] *Id.*

[34] People v. O'Sullivan, 10 N.E. 880, 882 (N.Y. 1887). In *O'Sullivan*, disclosure made eleven months after the commission of the alleged rape was too remote to qualify as a prompt

The rule still exists in New York State.[35] In New York State, the fact that a victim of sexual abuse made a complaint may be entered into evidence if the complaint was made "promptly" after the crime took place.[36] Generally, a complaint is timely for the purposes of the prompt outcry exception if it was made "at the first suitable opportunity."[37] New York courts have found that complaints made as late as two months after the crime occurred were sufficiently prompt.[38]

Generally, if the court finds that the complaint was promptly made, the prosecution may introduce into evidence the fact that a complaint was made, but not the details of the complaint.[39] Although some courts have been more liberal in their application of the rule by admitting some of the contents of the complaint,[40] as a general rule, only the fact that the complaint was made is admissible.[41]

The prosecution may call any witness who heard the victim's statements to testify as to the promptness of the complaint and the

outcry. *Id.* at 881–82.

[35] *See* People v. McDaniel, 611 N.E.2d 265, 268–69 (N.Y. 1993)

[36] *Id.* at 268.

[37] *Id.* at 269 (quoting *O'Sullivan*, 10 N.E. at 882) (internal quotation marks omitted).

[38] *In re* Gregory AA., 799 N.Y.S.2d 830, 832, 833 (App. Div. 3d Dep't 2005) (finding that two months is sufficiently prompt where the child was afraid to tell his mother for fear of getting into trouble); People v. Vanterpool, 625 N.Y.S.2d 38, 39 (App. Div. 1st Dep't 1995) (holding that a victim who disclosed three weeks after rape made a prompt complaint because of her young age and her expressed fear of serious punishment). Furthermore, in at least two cases, the First Department has held that allowing a disclosure that did not qualify as a prompt outcry was harmless error. In *People v. Leon*, the First Department held that allowing an insufficiently prompt outcry was harmless error, mostly because of the reliability of the child. People v. Leon, 619 N.Y.S.2d 3, 4 (App. Div. 1st Dep't 1994). The court stated:

> Considering the age of the child, the fear which [the] defendant had instilled in her if she informed on him, her shame, and, especially, her vulnerability, which was underscored when her grandmother testified on [the] defendant's behalf, we find no basis to doubt the essential reliability of the outcry.

Id. In *People v. Parada*, the First Department held that merely admitting an insufficiently prompt outcry, along with a prompt outcry, was harmless error. People v. Parada, 889 N.Y.S.2d 159, 161 (App. Div. 1st Dep't 2009). Furthermore, appellate courts in New York have held insufficiently prompt disclosures to be harmless error numerous times when there was overwhelming evidence of guilt. *See* People v. Phillips, 865 N.Y.S.2d 787, 790 (App. Div. 3d Dep't 2008); People v. Downing, 777 N.Y.S.2d 480, 481–82 (App. Div. 1st Dep't 2004); People v. Robinson, 630 N.Y.S.2d 505, 506 (App. Div. 2d Dep't 1995); People v. Teixeira, 592 N.Y.S.2d 757, 758 (App. Div. 2d Dep't 1993); People v. McDaniel, 577 N.Y.S.2d 669, 670 (App. Div. 2d Dep't 1991), *rev'd*, 611 N.E.2d 265 (N.Y. 1993).

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

[40] *See* People v. Farwell, 893 N.Y.S.2d 421, 424 (Sup. Ct. 2009) ("[I]t is also recognized that the witness can go beyond merely acknowledging that a complaint was made. The prosecutor can also elicit the nature of the complaint sufficiently to clarify that the complaint concerned the offense at issue and its essential nature.").

[41] *McDaniel*, 611 N.E.2d at 269.

circumstances under which the complaint was made.[42] Evidence of the prompt outcry is entered not for the truth of the matter asserted in the outcry, but for the non-hearsay purpose of showing that a disclosure was made.[43] In order to introduce the content of the complaint, the complaint itself must fall into one of the traditional hearsay exceptions, like the excited utterance exception,[44] the spontaneous declaration exception,[45] or the prior consistent statement offered to rebut a claim of recent fabrication exception.[46]

B. Avenues for Admission of Delayed Disclosures Under Other Hearsay Exceptions

Even if the outcry is insufficiently prompt, it may be admitted for a non-hearsay purpose.[47] One possible avenue for admitting delayed disclosures is the non-hearsay purpose of "information acted upon."[48] The jury needs to know why the defendant was arrested years after the alleged molestation.[49] The disclosure completes the narrative: the child was afraid to tell the mother for years, he eventually told the mother, the mother told law enforcement, and law enforcement acted by arresting the defendant.[50] There are several cases that support admissibility through this avenue.[51]

For example, in the case of *People v. Gregory*, the victim disclosed the abuse nearly a year after the last alleged molestation.[52] The trial court—over defense counsel's objection—allowed a police officer to testify that he became aware of the incident through a child abuse hotline and that the child told him that abuse had

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[42] *See* RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE, § 8-615, at 652 (11th ed. 1995) (citing *Rice*, 554 N.E.2d at 1266).

[43] *See McDaniel*, 611 N.E.2d at 269.

[44] *E.g.*, People v. Torres, 572 N.Y.S.2d 269, 270 (App. Div. 4th Dep't 1991).

[45] *See, e.g.*, People v. Knapp, 527 N.Y.S.2d 914, 915 (App. Div. 4th Dep't 1988).

[46] *See, e.g.*, People v. Fagan, 483 N.Y.S.2d 489, 493 (App. Div. 4th Dep't 1984).

[47] *See, e.g.*, People v. Spicola, 947 N.E.2d 620, 622, 625–27 (N.Y. 2011); People v. Gregory, 910 N.Y.S.2d 295, 297 (App. Div. 3d Dep't 2010).

[48] *See generally* People v. Brown, 883 P.2d 949, 950–51 (Cal. 1994) (stating that the fresh complaint doctrine is not overruled, but that complaints that are not promptly reported may be admitted into evidence for non-hearsay purposes); *Gregory*, 910 N.Y.S.2d at 296–97 (admitting testimony to explain why a criminal investigation did not begin until more than a year after the alleged conduct occurred).

[49] *See Brown*, 883 P.2d at 958–59 (stating evidence that a complaint was not promptly made could be relevant to the jury's determination of whether the alleged offense actually happened or not).

[50] *See, e.g.*, *Spicola*, 947 N.E.2d at 622, 625–27.

[51] *See id.* at 626–27; *Gregory*, 910 N.Y.S.2d at 297.

[52] *Gregory*, 910 N.Y.S.2d at 297; *see id.* at 296.

occurred.[53] The court admitted the testimony for the non-hearsay purpose of explaining an officer's actions and the sequence of events in an investigation.[54] The Third Department upheld the trial court's decision.[55]

Outcries from child abuse victims are prior consistent statements—they are statements made before trial, typically not under oath, that the prosecution would offer as statements consistent with their trial testimony.[56] However, only if the defense alleges that the complaining witness has a recent reason to lie may the outcry be offered as evidence that the present allegations existed before the alleged motive to lie.[57] Often, the only defense for a person accused of child abuse is that the child is lying.[58] But this defense might become apparent at different points in the trial—in defense's opening,[59] during cross examination of the People's witnesses,[60] during direct examination of any possible defense witnesses, or even during the defense's closing.[61] If the defense alleges that the complaining witness is lying at a point during the trial when the prosecution does not have the opportunity to enter the victim's disclosure to rebut the charge of recent fabrication, the prosecution loses one of the few opportunities it has to admit this important information.[62] Even more problematic is the Court of Appeals' narrow construction of the prior consistent statements exception.[63] The Court of Appeals held in *People v. McDaniel*:

[N]ot every inconsistency developed on cross-examination

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[53] *Id.* at 297.

[54] *Id.*

[55] *Id.*

[56] *See, e.g.*, People v. McDaniel, 611 N.E.2d 265, 268–69 (N.Y. 1993) (providing an illustrative example of the use of a child's prompt outcry).

[57] People v. Fagan, 483 N.Y.S.2d 489, 493 (App. Div. 4th Dep't 1984).

[58] *See, e.g.*, People v. Rosario, 958 N.E.2d 93, 101 (N.Y. 2011) ("Fabrication may have been an obvious (indeed, the only) defense here, as is often the case where a claim of sexual abuse is contested.").

[59] *See id.*

[60] *See, e.g.*, *McDaniel*, 611 N.E.2d at 270 ("[A]s [the] defendant conceded at trial, his cross-examination of [the complainant] went beyond mere impeachment and sought to establish that her story was fabricated.").

[61] *See, e.g.*, *id.*

[62] *See Rosario*, 958 N.E.2d 105–06 (Smith, J., dissenting) (criticizing the majority view that the prosecution could not offer rebuttal evidence until after the defense proffered a recent fabrication defense, even though the majority appeared to concede that such a defense was a "certainty").

[63] *See* People v. McClean, 508 N.E.2d 140, 142 (N.Y. 1987) (holding testimony by accomplices to a robbery was inadmissible because their hope for lenient treatment, and their concomitant motive to fabricate, arose prior to their statements to the police implicating the defendant).

> implies that the witness' testimony is perjurious. "Mere impeachment by proof of inconsistent statements does not constitute a charge that the witness' testimony is a fabrication." Moreover, in applying the exception, it is important to identify when the motive to fabricate arose. In some cases, the motive may exist from the outset, and thus rehabilitation with consistent statements may be impossible.[64]

In order for a prior consistent statement to be admissible, it must be clear that the defense is at least implying that the complainant fabricated the story.[65] *McDaniel* shows that courts are reluctant to say that defendants are charging fabrication; therefore, there are extremely limited opportunities to enter prior consistent statements into evidence in New York State.

C. Why the Prompt Outcry Requirement Is Insufficient

First, the prompt outcry rule is insufficient because it is theoretically unsupportable. A prompt outcry is admissible for a non-hearsay purpose.[66] It is admissible to show that a disclosure was in fact made, and that it was made promptly.[67] Yet, as other jurisdictions and academics are admitting, the timeliness of the complaint is not really dispositive on this issue of the victim's credibility or the veracity of the complaint.[68] Acknowledging this fact, courts justify the rule today by pointing to its ability to neutralize juror bias.[69] A juror expects that a victim must have disclosed the assault at some point if the defendant is on trial for that assault.[70] Without the prompt outcry exception, the juror would not learn of the disclosure at trial and would wonder about its absence.[71] In light of this contemporary justification for the rule,

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[64] *McDaniel*, 611 N.E.2d at 270 (quoting *McClean*, 508 N.E.2d at 141) (other internal citations omitted).

[65] *See Rosario*, 958 N.E.2d at 101.

[66] *Id.* at 99 (citations omitted).

[67] *See id.*

[68] *See, e.g.*, Commonwealth v. King, 834 N.E.2d 1175, 1181 (Mass. 2005); People v. Brown, 883 P.2d 949, 950–51 (Cal. 1994); Marks, *supra* note 12, at 214; Yun, *supra* note 12, at 1760.

[69] *See, e.g.*, Battle v. United States, 630 A.2d 211, 217 (D.C. 1993); State v. Hill, 578 A.2d 370, 377 (N.J. 1990).

[70] *See, e.g.*, *Battle*, 630 A.2d at 217; *Hill*, 578 A.2d at 377.

[71] *Brown*, 883 P.2d at 951–52 (quoting the prosecutor who, speaking to the trial judge, responded to a defendant's objection to the outcry testimony: "If I'm not allowed to ask this witness who she finally disclosed to, it's going to be a huge mystery to the jury how we're sitting here today other than that she told her friend and told her friend not to tell anybody"); *Battle*, 630 A.2d at 217; *Hill*, 578 A.2d at 377.

it does not stand to reason that a disclosure should only be admissible when it is promptly made. Presumably, if a juror would wonder about (and be biased by) the lack of evidence about a prompt disclosure, that juror will also wonder about (and be biased by) the lack of evidence about a delayed disclosure. If an outcry is not admitted because it was made in an untimely fashion, the inconsistency in the rule will lead jurors to infer that no outcry was made at all.

Second, the prompt outcry rule is insufficient because it prohibits the prosecution from telling the jury the entire story of the crime. The narrative of disclosure is extremely important when a victim accuses a defendant of abuse that occurred several years ago. The jury needs to know why the case is being brought now,[72] many years after the incident. A defendant will certainly attack the prosecution's case based on the fact that there was a delay between the abuse and the disclosure by arguing defects in memory, lack of physical evidence, or other similar defenses.[73] Furthermore, if the defendant is denying the abuse entirely, the defendant's argument is necessarily that the child is lying at the time of trial.[74] The disclosure, its attendant circumstances, and the appearance of the victim *at the time* of the disclosure are all relevant to the charges and the victim's credibility at trial.[75]

D. Testimonial Constraint on Hearsay Statements

Hearsay statements are constrained by the Sixth Amendment of the U.S. Constitution which requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[76] The U.S. Supreme Court held in *Crawford v. Washington*[77] that out-of-court testimonial statements by witnesses are barred under the Confrontation Clause, unless

[72] *See, e.g.*, People v. Arredondo, 642 N.Y.S.2d 630, 632 (App. Div. 1st Dep't 1996) ("The witness's testimony as to her efforts to notify the proper authorities [of alleged sexual abuse of victim] . . . constituted proper background information describing what led to [the] defendant's arrest." (citations omitted)). *But see* People v. Barrieau, 645 N.Y.S.2d 350, 351 (App. Div. 3d Dep't 1996) (holding that testimony from victim's mother concerning her state of mind and why she went to the police was inadmissible hearsay).

[73] *See, e.g.*, People v. Spicola, 947 N.E.2d 620, 623, 628 (N.Y. 2011).

[74] *See* People v. Allen, 787 N.Y.S.2d 417, 423 (App. Div. 3d Dep't 2004).

[75] *See, e.g.*, *Spicola*, 947 N.E.2d at 622, 625 (noting the victim's mother and examining nurse testified that the victim appeared nervous, withdrawn, and sad when disclosing the abuse).

[76] U.S. CONST. amend. VI.

[77] Crawford v. Washington, 541 U.S. 36 (2004).

witnesses are unavailable and defendants had prior opportunity to cross-examine the witnesses.[78] The Supreme Court also addressed out-of-court testimonial statements of child abuse victims in several cases.[79] In *Coy v. Iowa*,[80] the Supreme Court held that the Confrontation Clause provides criminal defendants with the right to confront witnesses giving evidence against them face-to-face at trial.[81] The Court also held that the statements of a child who was deemed unavailable could not be introduced through the residual exception because their introduction violated the defendant's right to confrontation.[82]

The Supreme Court further defined testimonial statements in *Davis v. Washington*[83] and *Michigan v. Bryant*[84] as those statements that are procured with the primary purpose of creating an out-of-court substitute for trial testimony.[85] The New York Court of Appeals said in *People v. Rawlins*:[86]

> The question of testimoniality requires consideration of multiple factors, not all of equal import in every case. And while it is impossible to provide an exhaustive list of factors that may enter into the mix, two play an especially important role in this determination: first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses defendant of criminal wrongdoing. The purpose of making or generating the statement, and the declarant's motive for

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[78] *Id.* at 53–54.

[79] The cases were all decided under the *Ohio v. Roberts* standard which was abrogated by *Crawford*. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36 ("[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'").

[80] Coy v. Iowa, 487 U.S. 1012 (1988).

[81] *Id.* at 1016 (citing Kentucky v. Stincer, 482 U.S. 730, 748, 749–50 (1987) (Marshall, J., dissenting)). The case centered around an Iowa statute that allowed the child victim to testify from behind a screen. *Id.* at 1014. The Supreme Court later determined that the face-to-face right is not an absolute right. *See* Maryland v. Craig, 497 U.S. 836, 840–41, 855 (1990) (allowing the defendant to be placed in separate room with a one-way closed circuit television while the child-complainant testifies, if state shows important interest for protecting the complainant).

[82] Idaho v. Wright, 497 U.S. 805, 817, 827 (1990).

[83] Davis v. Washington, 547 U.S. 813, 826–27 (2006).

[84] Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011).

[85] *See id.* ("When, as in *Davis*, the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.").

[86] People v. Rawlins, 884 N.E.2d 1019 (N.Y. 2008).

doing so, inform these two interrelated touchstones.[87]

This standard might be more stringent than the standard announced under *Davis* and *Bryant*.[88] It is unclear whether or not a child's statements relating instances of abuse to a mother, friend, or teacher, would be considered testimonial in New York State. Some states have held that those statements are not considered testimonial.[89] New York courts have held—prior to *Davis* and *Bryant*—that a declarant must testify unless the defendant has had prior opportunity to cross-examine the witness.[90] Therefore, any change in New York State law on the admissibility of child victims' disclosures would likely have to include a requirement that the child declarant must testify.[91]

E. Seeds of Change in the New York Court of Appeals

Two decisions from the New York Court of Appeals show that the Court is ready for a change to the prompt outcry rule.[92] In one decision the court appeared to passively endorse a change to the prompt outcry rule.[93]

1. *People v. Spicola*

In *People v. Spicola*, the child victim was abused from March 1999

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[87] *Id.* at 1033.

[88] *See Bryant*, 131 S. Ct. at 1155; *Davis*, 547 U.S. at 826–27.

[89] *See, e.g.*, Herrera-Vega v. State, 888 So. 2d 66, 67 (Fla. Dist. Ct. App. 2004) ("[T]hree-year-old D.H. spontaneously told her mother, as she was putting on the child's underpants, that . . . [the defendant] had placed his tongue in her 'private parts.'"); Bishop v. State, 982 So. 2d 371, 372, 375 (Miss. 2008) (holding that a four-year-old girl's spontaneous and unsolicited comment to her mother was not testimonial); State v. Shafer, 128 P.3d 87, 88–89 (Wash. 2006) (finding that a statement made by a three-year-old rape victim to her mother was properly admitted into evidence).

[90] *See, e.g.*, People v. Robinson, 679 N.E.2d 1055, 1059–60 (N.Y. 1997) ("[W]hen parties have sought to admit former testimony, . . . [New York courts] have held that it is the full and fair opportunity for cross examination . . . that serves as a baseline indicator for reliability." (internal citations omitted)).

[91] There are circumstances under which the prior testimony of a declarant may be entered into evidence. *See, e.g.*, N.Y. CRIM. PROC. LAW § 670.10(1) (McKinney 2013) (providing that former testimony may be introduced if it was given at one of three particular kinds of proceedings: a previous criminal trial, a preliminary hearing, or a conditional examination). In order to use former testimony, the People must make a showing that the necessary witness is unavailable for a reason relating to "death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court." *Id.*

[92] *See* People v. Rosario, 958 N.E.2d 93 (N.Y. 2011); People v. Spicola, 947 N.E.2d 620 (N.Y. 2011).

[93] *See Spicola*, 947 N.E.2d at 622, 624 (allowing testimony from a child's mother and nurse regarding sexual abuse that occurred years earlier).

through November 2000.[94] The victim disclosed the abuse for the first time to his mother on May 15, 2006, "seven years after the first and almost six years after the last instance of alleged molestation."[95] After the child disclosed the abuse to his mother, she brought him to a child advocacy center where he again disclosed the abuse to a nurse practitioner.[96] At trial, the People sought to introduce testimony from both the mother and the nurse practitioner.[97] The trial court allowed the nurse's testimony over defense counsel's objection.[98] The nurse testified as to what the victim said had happened to him and how the victim appeared when he said this to her—that he was nervous and uncomfortable.[99] The Court of Appeals upheld the admission of this testimony.[100]

While the court's admission of the nurse's testimony and refusal to overturn the admission of a delayed disclosure was interesting, it is actually the admission of the mother's testimony that is most indicative of a shift in the jurisprudence of the court. At trial, the victim's mother was allowed to testify fully to the narrative of the initial disclosure, including how she had sensed something was wrong during a visit from the defendant, how she had told her son that he should tell her if someone ever touched him in a wrong way, how her son initially denied any abuse, and how her son finally disclosed the abuse after watching a video in school about sexual predators.[101] The mother further testified about how she brought the incidents to the attention of others, including the police, and how her son's demeanor changed after he disclosed the abuse to her.[102] Even the grandmother and father were permitted to testify about the boy's demeanor after the mother told them about the disclosure.[103]

Neither outcry was prompt. The disclosures were made more than six years after the last alleged incident of abuse.[104] Yet, the Court of Appeals held that the nurse practitioner's testimony was

[94] *Id.* at 621.
[95] *Id.* at 622.
[96] *Id.* at 622, 624.
[97] *Id.* at 621–22, 624.
[98] *Id.* at 624.
[99] *Id.* at 625.
[100] *Id.* at 626–27.
[101] *Id.* at 621–22.
[102] *See id.* at 622.
[103] *Id.* It is unclear whether defense objected to the testimony of the mother, father, or grandmother at trial. The defense did not appeal the admission of their testimony.
[104] *Id.*

properly admitted.[105] More importantly, neither defense counsel nor the Court of Appeals objected to the mother's testimony on appeal. Although it was not a holding of the case, the court appears to have validated the admission of the testimony *sub silentio*.

The *Spicola* court wrote a detailed opinion upholding a decision where witnesses testified to the entire narrative of a course of child abuse despite the fact that the disclosure was made over six years later.[106] The trial court allowed—and the Court of Appeals affirmed—the admission of testimony as to the relationship, the abuse, the denials from the victim and the perpetrator, the victim's disclosures, the victim's sadness and regret after those disclosures, and the victim's demeanor during those disclosures.[107] The Court of Appeals wrote a twenty-two page opinion about hearsay, bolstering, and expert witnesses.[108] Even if defense counsel never raised the point on appeal, the Court of Appeals would have been free to raise *sua sponte* the fact that the mother, grandmother, or the father should not have been allowed to testify to the boy's demeanor or to events as they unfolded.[109]

The testimony of the mother, father, grandmother and nurse all provided a narrative and showed the victim's state of mind. The Court of Appeals did not hold that the testimony was inadmissible hearsay. Their testimony was not offered for the truth of the matter asserted—that the boy was sad, or even that what he said was true. The court justified the admissibility of the nurse's testimony by stating that her "testimony rounded out the narrative of the immediate aftermath of the boy's disclosure to his mother."[110]

2. *People v. Rosario*

Although *Spicola* gave some hope about prosecutors being able to admit prior statements of child abuse victims, *People v. Rosario*,[111] addressed the issue more directly. While the court in *Rosario* did not recognize a change to the prompt outcry rule, the majority seemed to invite a future change and the dissent explicitly called for

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[105] *Id.* at 626–27.

[106] *See id.* at 621–27.

[107] *See id.*

[108] *See id.* at 621–37.

[109] *See id.* at 632–37; *see also* N.Y. CRIM. PROC. LAW § 470.35 (McKinney 2013) (noting that the Court of Appeals may adjudicate issues not raised at the appellate division).

[110] *Spicola*, 947 N.E.2d at 626.

[111] People v. Rosario, 958 N.E.2d 93 (N.Y. 2011). For a discussion of the *Rosario* case—and the prompt outcry rule—from the perspective of dissenting Judge Smith, see Robert S. Smith, *How the Prompt Outcry Rule Protects the Guilty*, 76 ALB. L. REV. 1445 (2013).

such a change.[112]

The complainant in *Rosario*, who was sixteen at the time of trial,[113] said that her father sexually abused her from age nine until age fourteen.[114] The abuse allegedly ended when the complainant resisted her father in January 2004 and told him that it would never happen again.[115] She did not tell anyone until May 2004, when she told her boyfriend through a written note.[116] The boyfriend kept the note, unbeknownst to the complainant.[117] Then, in late June 2005, the complainant had a fight with her father about whether she could go to the movies with her boyfriend.[118] She went to the movies anyway, and she went to see the police on her way home.[119] The father also called the police.[120] It was at this time she disclosed the alleged abuse to the police officers because "she was tired of 'all of the stuff that went on in [her] house' and did not want to be molested anymore."[121] The note to the boyfriend was introduced over defense's objection at trial.[122] The defense summed up its case in closing by saying that the complainant had made it all up because her father was harsh with her.[123]

The defendant appealed the admission into evidence of the note.[124] The appellate division held that too much time had passed between the end of the abuse and the disclosure to the boyfriend,[125] and the Court of Appeals affirmed because the disclosure was delayed by "as long as five months."[126] The Court of Appeals also dismissed the People's argument that the note was offered as a prior consistent statement to rebut a claim of recent fabrication.[127] The People argued that the defense implied in their opening statement that the complainant made the story up as a response to her father's refusal to let her go to the movies with her boyfriend.[128]

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[112] *See Rosario*, 958 N.E.2d at 102 (Smith, J., dissenting)
[113] *Id.* at 95 (majority opinion).
[114] *Id.*
[115] *Id.*
[116] *Id.* at 96.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 96–97.
[120] *Id.* at 96.
[121] *Id.* at 97.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 100.
[127] *Id.* at 100–01.
[128] *Id.* at 101.

Although the court recognized that quite often the only defense available to alleged child abusers is that the child lied,[129] the court held that the defense did not explicitly state that the victim was lying in its opening statement.[130]

As a result, it was an error for the People to be allowed to introduce the note in their direct case.[131] Recognizing the prejudicial effect of the *McDaniel* rule in this instance, Judge Smith stated in his dissent that the jurors could not have possibly missed the connection that defense counsel was attempting to make in its opening statement.[132] However, the majority held that "it was not obvious from defense counsel's opening statement that the note predated [the] complainant's alleged motive to lie."[133]

The majority addressed Judge Smith's dissent in a lengthy footnote:

> Judge Smith suggests that we should also expand our traditional prompt outcry rule, as several other states have done . . . . But [the] defendant[] and the People disputed only whether the outcry was, in fact, sufficiently prompt under New York law; the People did not ask the trial court to broaden the rule. . . . [T]he . . . Supreme Judicial Court of Massachusetts . . . sua sponte . . . reexamined and prospectively revised its traditional fresh complaint doctrine only after soliciting and receiving numerous amicus briefs discussing whether modification or elimination was in order.[134]

The majority seemed to be implying that this outcome might have been different if the People *had* asked the trial court or the Court of Appeals to directly address the rule.

Judge Smith, in his dissent, would have changed the rule through case law without any invitation from the People or amicus briefs.[135] Judge Smith admitted that the note was not a prompt outcry, but stated that the rule has become "obsolete."[136] He said that child abuse cases are entirely about whether the victims are telling the truth, and juries should be permitted to assess evidence that would

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[129] *Id.*
[130] *Id.*
[131] *See id.* at 101.
[132] *Id.* at 106 (Smith, J., dissenting).
[133] *Id.* at 101 n.6 (majority opinion).
[134] *Id.* at 100 n.4 (citing Commonwealth v. King, 834 N.E.2d 1175, 1194 n.16 (Mass. 2005)).
[135] *See Rosario*, 958 N.E.2d at 102 (Smith, J., dissenting).
[136] *Id.*

help them determine whether these victims are telling the truth.[137] He would adopt a rule that would "permit[] the jury to know of any disclosure made by the victim about the crime before the crime was reported to the authorities."[138]

Judge Smith gave several reasons why the rule should be adopted: juries need to hear the full story or else they will get an incorrect picture,[139] the arguments against bolstering are inapplicable to prompt outcry,[140] the original rationale for the rule is outdated,[141] and other states have changed their law to address these recognized insufficiencies in the law.[142]

Judge Smith's main argument was that juries needed to hear the full story.[143] He said it is unfair to the People, to the victim, and to the juries to leave out such an important piece of evidence.[144] Judge Smith compares the story without the victim's note in *Rosario* to the story with the note.[145] If the jury were not told about the note, Judge Smith reasoned, they would have thought that the victim merely made up the abuse as retribution against her father because he was stern with her when she wanted to go to the movies.[146] "But a juror who voted to acquit for that reason would have been grossly misled."[147] The truth was that the complainant had told her boyfriend months earlier, when she had no motive to lie.[148] As Judge Smith said, "[t]here is no common sense reason for keeping this evidence from the jury."[149]

Judge Smith admitted that this could be viewed as bolstering.[150] However, he dismissed that argument because "the reason generally given for the exclusion of prior consistent statements is that 'an untrustworthy statement is not made more trustworthy by repetition.'"[151] Judge Smith argued that this was not a good justification because jurors know that repetition of a statement does

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137 *Id.*
138 *Id.*
139 *See id.*
140 *Id.* at 104.
141 *Id.* at 102, 104.
142 *Id.* at 105.
143 *See id.* at 102.
144 *Id.* at 102, 103.
145 *Id.* at 103.
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.* at 104.
151 *Id.* (quoting People v. McClean, 508 N.E.2d 140, 141 (N.Y. 1987)).

not make it more trustworthy.[152] Instead, he said that this argument is inapplicable in sex abuse cases because the "most cogent" reason for excluding bolstering testimony in cases where the defendant is not accused of abuse is that it wastes time, and that entering prior consistent statements in abuse cases helps a fact finder learn the truth.[153] Judge Smith stated that courts are often willing to relax the rule prohibiting prior consistent statements when they assist a fact finder in ascertaining the truth;[154] therefore, the rule should be relaxed for disclosures in sex abuse cases.[155]

Judge Smith also addressed the fact that the rationale behind the original rule has changed.[156] He quoted from one of the original explanations of the rule, also quoted by the majority, which stated that "[a] disclosure in a case of rape has no legal value whatever unless it is the natural result of the horror and sense of wrong which would prompt every virtuous female to make outcry at the first suitable opportunity."[157] The judge pointed out that no one would agree with that statement today.[158] However, he noted that it is actually a reason to expand the rule because juries will still question if the victim ever complained.[159] If the victim did complain, the jury should hear it.[160]

Finally, Judge Smith noted that other jurisdictions that formerly used the prompt or fresh complaint standard have changed the standard because they "[r]ecogniz[ed] the importance of disclosure evidence in sexual abuse cases."[161]

Judge Smith concluded by restating his proposed rule and the reasons behind it:

> I propose that we join those states in recognizing that contemporary understanding of the complexities of reporting sex crimes calls for a broader exception to the hearsay rule. The rule I would adopt is a simple one: 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

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[152] *Rosario*, 958 N.E.2d at 104.
[153] *Id.*
[154] *Id.*
[155] *Id.* at 105.
[156] *Id.* at 104.
[157] *Id.* (alteration in original) (quoting People v. O'Sullivan, 10 N.E. 880, 884 (N.Y. 1887)) (internal quotation marks omitted).
[158] *Rosario*, 958 N.E.2d at 104.
[159] *Id.* at 104–05.
[160] *Id.* at 105.
[161] *Id.*

> 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. To me, the good that such a rule can do is obvious, and I do not see how it can do any harm.[162]

3. *People v. Parada*

The Court of Appeals decided *People v. Parada* in the same decision as *Rosario*.[163] The complainant in *Parada* alleged that the defendant abused her from mid-2002 until early 2004.[164] The complainant was six or seven years old when the abuse took place and eleven years old at the time of trial.[165] The defendant was a friend of the complainant's mother's ex-boyfriend who had babysat the complainant after school.[166]

The complainant made a disclosure to her female cousin who was one year older while the defendant was still babysitting her (and still abusing her).[167] The complainant told her cousin that defendant had "put his front private part in[to her butt]."[168] "[The c]omplainant made her cousin 'pinky promise' not to tell anyone because she 'thought they wouldn't believe [her].'"[169]

The defendant stopped babysitting the complainant in early 2004 because her mother and defendant's friend broke up.[170] The "mother moved in with her brother and sister-in-law, whose children included the cousin in whom [the] complainant had earlier confided."[171] The complainant saw defendant one more time in early 2005 when he came to visit the complainant and take her on a trip to the Museum of Natural History.[172] The complainant told her cousin that "she 'did not want to go alone,'" and therefore the complainant's cousin joined them on the trip.[173] The complainant told her mother after the museum visit "that she did not want to see

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[162] *Id.*

[163] *Id.* at 95 (majority opinion). For a discussion of *Parada* from the perspective of concurring Judge Smith, see Smith, *supra* note 111.

[164] *Rosario*, 958 N.E.2d at 97.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 98.

[168] *Id.* (alterations in original) (internal quotation marks omitted).

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

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *See id.*

defendant again."[174]

In May 2006, the complainant told her paternal aunt about the abuse, but also asked her not to tell anyone.[175] A month later, in June 2006, the complainant's mother had a conversation with the complainant about boys and told her never to let anyone touch her.[176] The complainant said "that 'someone' had already touched her."[177] After her mother mentioned the names of two adult males, the complainant "'broke down and started crying' and 'said it was [the defendant].'"[178] "[The c]omplainant's mother contacted the police the next day . . . ."[179]

At trial, the People were permitted to enter both disclosures made by the complainant into evidence.[180] The defense objected to the admission of both outcries as insufficiently prompt.[181] The appellate division held that the disclosure to the cousin was sufficiently prompt because it was made while the defendant was still abusing the complainant.[182] The court held that the disclosure to the aunt was erroneously admitted but that it was harmless error.[183] The Court of Appeals reasoned:

> [It was t]rue, [that] this case rest[s] on the testimony of an 11-year-old witness . . . recounting events that . . . occurred several years [before]. But [the] complainant described the events in age-appropriate terms and provided details that she could not have gleaned from watching television or movies, as defense counsel suggested.[184]

It is interesting that *Rosario* and *Parada* were decided together; the differences between the cases and how they were decided are illustrative of the larger problem. The Court of Appeals held that allowing the disclosure into evidence in *Rosario* was error but that the first disclosure in *Parada* was not error and the second

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.* (stating that the prosecution was granted its motion to bring in evidence of statements made to the victim's cousin and aunt about the sexual abuse).
[181] *Id.*
[182] *Id.* at 99 (citing People v. Parada, 889 N.Y.S.2d 159, 160 (App. Div. 1st Dep't 2009), *aff'd sub. nom Rosario*, 958 N.E.2d 93).
[183] *Rosario*, 958 N.E.2d at 99. The Court of Appeals agreed that the admission of the victim's statement to the aunt was a harmless error. *Id.* at 102.
[184] *Id.* at 102.

disclosure was harmless error.[185] Both the complainants told someone they trusted—a boyfriend in *Rosario*,[186] and a female cousin in *Parada*.[187] Both the complainants made these disclosures months before the police investigated either defendant.[188] The difference, according to the court's rulings, is that the complainant in *Parada* made her disclosure while the defendant was still abusing her.[189] The complainant in *Rosario* was out of luck because she waited to disclose until five months after her defendant father stopped abusing her.[190]

The implication of these two decisions, taken together, is that a child, or any victim, is more likely to tell the truth while they are still being abused. There is no research to support this.[191] There is simply no reason to assume that the complainant in *Parada* was more likely to be telling the truth. The majority cited the complainant's age in *Parada* and her use of child-friendly terms.[192] But these are factors that go to weight, not admissibility.[193] They are issues of credibility for a jury to decide.[194]

As Judge Smith pointed out, the jury needs to hear all of the disclosures.[195] The complainant's disclosure in *Rosario* to her boyfriend may illustrate to the jury that the complainant was gaining courage and was ready to tell people. A juror will also have the opportunity to weigh the fact that the complainant disclosed the abuse to her boyfriend and then disclosed it to the police when her boyfriend was with her.[196]

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[185] *Id.* at 102 (concluding in *Parada* that the complainant telling her cousin about being anally sodomized a few weeks after the incident was not error, while disclosures made to her aunt was harmless error).

[186] *Id.* at 96.

[187] *Id.* at 98.

[188] *Id.* at 96–97, 98.

[189] *Id.* at 102.

[190] *Id.* at 100.

[191] *See* Yun, *supra* note 12, at 1756–57. *See also* Prager, *supra* note 12, at 72 ("[M]ore than ninety percent of all child molestations apparently go unreported . . . ."); *see also* Andrew, *supra* note 15, at 1853 n.7 (referring to a U.S. Department of Justice, Juvenile Offenders and Victims 2000 report "finding that 84% of all confirmed cases of child sexual abuse occur in child's own home and that 96% of all confirmed cases of child sexual abuse are perpetrated by adults related to child or within child's circle of trust" so children are often unwilling to come forward (emphasis omitted)).

[192] *Rosario*, 958 N.E.2d at 102.

[193] *See id.* 103–04 (Smith, J., dissenting) (indicating that jurors should hear the testimony of witnesses in order to determine the truth of a child's statements of sexual abuse).

[194] *See id.*

[195] *Id.* at 102 (asserting that a jury should be aware of every disclosure a victim made prior to reporting the crime to the police).

[196] *See id.* at 103.

The second disclosure in *Parada* was made about a year and a half after the last instance of abuse, and only a month before the complainant's mother went to the police.[197] Yet, the Court of Appeals held that this disclosure was harmless error[198] because the child had already disclosed to her cousin in age-appropriate terms and in sufficient details.[199] These are exactly the factors that a court *should* consider when admitting *any* outcry. The court's decision implies that because the complainant disclosed once while still being abused, the delayed disclosure was not prejudicial, had similar guarantees of trustworthiness, and was not inadmissible bolstering.[200] It is illogical to find this admission of a delayed disclosure to be harmless error and the *Rosario* note to be inadmissible hearsay and improper bolstering.

The New York prompt outcry rule sacrifices truth in the name of formality. Any victim who does not disclose while being abused, or soon thereafter, will be out of luck and their credibility will be unjustifiably undermined at trial, leading to potentially unjust outcomes.[201]

F. The Meaning of Spicola *and* Rosario

Without *Rosario*, *Spicola* seemed a possible avenue for prosecutors to argue that the Court of Appeals had *sub silentio* done away with the promptness or freshness requirement. Taken with *Rosario*, it seems more likely that the two decisions are evidence that the Court of Appeals is ready for an explicit change. Footnote four of the majority's opinion in *Rosario* does not dismiss the idea that the Court of Appeals would accept a new rule, but it states that other high courts have adopted a new rule only after they had been petitioned to do so by the People or after requesting amici briefs.[202] The *Rosario* dissent called for an outright change through case law[203] and the *Spicola* court admitted evidence that could have been excluded under the current law.[204] The recent jurisprudence from

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[197] *Id.* at 97, 98 (majority opinion).

[198] *Id.* at 102.

[199] *Id.*

[200] *Id.* at 98, 99–100 (noting that one of the reasons for allowing the prompt outcry disclosure is for veracity).

[201] *See id.* at 100.

[202] *Id.* at 100 n.4.

[203] *Id.* at 102 (Smith, J., dissenting).

[204] People v. Spicola, 947 N.E.2d 620, 622, 627 (N.Y. 2011) (allowing testimony about a sexual abuse victim's disclosure when the disclosure occurred six to seven years after the abuse).

the Court of Appeals suggests that the court is ready for a change.

II. CHILD ABUSE DISCLOSURE LAW IN OTHER U.S. JURISDICTIONS

A. Prompt Outcry / Fresh Complaint Rule

New York and Virginia are the only two states that still utilize the prompt outcry rule (also known as the fresh complaint rule) for child abuse victims. Virginia has codified the rule.[205] The statute reads:

> Notwithstanding any other provision of law, in any prosecution for criminal sexual assault, . . . the fact that the person injured made complaint of the offense recently after commission of the offense is admissible . . . for the purpose of corroborating the testimony of the complaining witness.[206]

Unlike New York, however, Virginia courts have created exceptions to the rule to admit complaints that were not so prompt. The Virginia Court of Appeals stated in 1994: "the 'only time requirement [under the prompt complaint rule] is that the complaint have been made without a delay *which is unexplained or is inconsistent with the occurrence of the offense*.'"[207] Virginia courts have used this holding to admit complaints into evidence that were made months or even years after the abuse ended.

For instance, in *Brown v. Commonwealth*,[208] the Virginia Court of Appeals held that a victim's complaint to her stepmother nearly two years after the alleged sexual incident was sufficiently prompt under Virginia's "recent complaint" rule.[209] The child victim testified that she did not tell anyone because her grandfather, the defendant, told her not to tell anyone, that she was scared, and that she felt threatened by the defendant.[210] The court held that this sufficiently explained the victim's delay in reporting.[211]

Similarly, in *Terry v. Commonwealth*,[212] the twelve-year-old victim complained to her mother ten months after the rape occurred

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[205] VA. CODE ANN. § 19.2-268.2 (2012).

[206] *Id.*

[207] Woodard v. Commonwealth, 448 S.E.2d 328, 330 (Va. Ct. App. 1994) (quoting MCCORMICK ON EVIDENCE § 297, at 859 (Edward W. Cleary ed., 3d ed. 1984)).

[208] Brown v. Commonwealth, 554 S.E.2d 711 (Va. Ct. App. 2001).

[209] *Id.* at 712, 713.

[210] *Id.* at 712.

[211] *Id.* at 713.

[212] Terry v. Commonwealth, 484 S.E.2d 614 (Va. Ct. App. 1997).

and the court sustained the admission of the outcry.[213] The victim testified that she was afraid that her mother would not believe her, that she feared that her father would hurt the defendant and that her father would end up in jail, and that she had felt responsible for the rape.[214] The court held that these reasons sufficiently explained the victim's delay and admitted evidence of the outcry.[215]

Virginia's rule ends up functioning in the same way as many other states—or perhaps even better. The research shows that children do not disclose promptly because their abusers are often people close to them, whom the children trust.[216] Often, abusers tell them not to tell anyone.[217] The children do not think they will be believed.[218] They are afraid.[219] These are reasons that children do not disclose immediately, and these are the same reasons that Virginia courts have held that delayed complaints may be admitted because the delay could be explained.

B. First Complaint Rule

Both the majority and dissent in *Rosario* refer to Massachusetts as an example of a state that changed its position on admission of child abuse outcries. Massachusetts had employed the prompt complaint doctrine, but in 2005, it changed its position. In *Commonwealth v. King*,[220] the court decided to reexamine its position on prompt outcry.[221] As the majority in *Rosario* pointed out,[222] the Massachusetts Supreme Judicial Court "solicited and received numerous amicus briefs on whether to modify or eliminate the fresh complaint doctrine."[223]

In *King*, the six-year-old complainant had informed her mother apparently only a day after the incident.[224] However, the indictment stated that the incident happened anywhere from a

[213] *Id.* at 615.
[214] *Id.* at 618.
[215] *Id.*
[216] *See supra* notes 16–17 and accompanying text (noting that a child's failure to report child abuse relates to the fact the abusers are people whom the child trusts).
[217] *See generally supra* note 17 and accompanying text (noting that intimidation is a factor in a child not reporting abuse).
[218] *See supra* note 17 and accompanying text.
[219] *See generally supra* note 16–17 and accompanying text (inferring that a child would be fearful as an additional factor when they are intimidated and afraid of not being believed).
[220] Commonwealth v. King, 834 N.E.2d 1175 (Mass. 2005).
[221] *Id.* at 1181.
[222] People v. Rosario, 958 N.E.2d 93, 100 n.4 (N.Y. 2011).
[223] *King*, 834 N.E.2d at 1193 n.16.
[224] *Id.* at 1181, 1182, 1191.

week to two years before the outcry.[225] Massachusetts's courts had for some time been lenient with the "promptness" requirement for prompt outcry, allowing outcries delayed as long as twenty-one months[226] and thirty-four months.[227]

The Massachusetts Supreme Judicial Court acknowledged the "'sexist,' 'outmoded' and 'invalid' origins of the fresh complaint rule,"[228] but stated in *King* that it had adhered to the doctrine nevertheless because of concerns about juror bias.[229] The *King* court reasoned that children are different:

> "With regard to child victims, our fresh complaint jurisprudence has adopted the [theory that] a child's circumstances commonly make it difficult, if not impossible, for the child to make a prompt complaint of sexual assault and, contrary to the theoretical justification for the doctrine, a child's much later report of sexual assault is admitted as 'fresh complaint' whenever there is a reasonable explanation for the child's failure to make a prompt complaint."[230]

The court explained that it had reviewed the research on victim behavior and that the research suggested that victims "often do not promptly report or disclose the crime for a [variety] of reasons, including shame, fear, or concern they will not be believed."[231] The court also recognized that juror bias persists even towards child complainants,[232] but stated that no rule of evidence is particularly effective in removing juror bias.[233] The court examined the prior consistent statement exception among other exceptions to the hearsay rule.[234] The court criticized the prompt complaint rule, stating that:

> [D]elaying testimony about the existence of the prior complaint until after the defendant has damaged the victim's credibility with the "humiliating intimation that . . . [she] agreed to the attack or dreamt it up" can cause unwarranted prejudice to the Commonwealth. It would wrest from a

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[225] *Id.* at 1182, 1191.

[226] *See* Commonwealth v. Fleury, 632 N.E.2d 1230, 1231 (Mass. 1994).

[227] *See* Commonwealth v. McKinnon, 620 N.E.2d 792, 794 (Mass. App. Ct. 1993).

[228] *King*, 834 N.E.2d at 1188 (citing Commonwealth v. Licata, 591 N.E.2d 672, 674 (Mass. 1992); Commonwealth v. Lavalley, 574 N.E.2d 1000, 1004 n.7 (Mass. 1991)).

[229] *King*, 834 N.E.2d at 1188–89.

[230] *Id.* at 1189 (alterations in original) (quoting Commonwealth v. Montanez, 788 N.E.2d 954, 965 (Mass. 2003) (Sosman, J., concurring)).

[231] *King*, 834 N.E.2d at 1194 (footnote omitted) (citations omitted).

[232] *Id.* at 1194–96.

[233] *Id.* at 1196.

[234] *Id.*

> prosecutor the circumstances in which the evidence of the complaint is introduced.[235]

Taking all of these factors into account, the court held that the fresh complaint doctrine no longer "adequately reflect[ed] current knowledge about victims' reactions to sexual assault, and . . . [no longer fulfilled] the underlying purposes of the doctrine."[236]

The court cogently summarized the problems with the prompt requirement doctrine in its rejection of the rule:

> [A] requirement of "promptness" or "freshness" no longer withstands scrutiny as a cure to the problem of juror stereotyping in cases of sexual assault. To the contrary, it may exacerbate the very misunderstandings the rule aims to counteract—that those victims who report "freshly" are inherently more credible than those who report at a later time—and contradicts our present understanding that victims often do not promptly report a sexual assault for a variety of reasons that have nothing to do with the validity of the claim of assault. The "promptness" rule thus benefits only those victims whose complaints are "fresh," while reinforcing discredited notions that victims will "naturally" promptly disclose the assault. At a minimum, the promptness requirement places the imprimatur of the court on the misimpression that most "real" victims raise an immediate "hue and cry." At worst, the rule rewards perpetrators who are especially brutal or threatening during and after an assault, and thereby successfully procure their victims' prolonged silence.[237]

In place of the prompt complaint rule, the court announced a new doctrine that would "be applied only in sexual assault cases."[238] Under the new doctrine, the first person to whom a complainant cried out may testify about the fact of the complaint, the circumstances surrounding it, and the details of the complaint.[239] Other disclosure witnesses may not testify.[240] The complainant may testify to why there was delay and may also testify to the details of the complaint.[241] Timing of the complaint does not disqualify it,

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[235] *Id.* (quoting Commonwealth v. Bailey, 348 N.E.2d 746, 752 (Mass. 1976)).
[236] *King*, 834 N.E.2d at 1196–97.
[237] *Id.* at 1197 (citations omitted).
[238] *Id.* at 1181.
[239] *Id.*
[240] *Id.*
[241] *Id.*

"but is a factor the jury may consider in [determining] . . . [a] complainant's credibility or reliability."[242]

Six other states recognize the "first complaint" exception to the hearsay rule. Some states recognize an exception for the first complaint, but limit testimony about the complaint to the fact that the complaint was made, excluding the details of the complaint.[243] These states justify the first complaint exception as merely corroboration of the complainant's story.[244] Other states, including Massachusetts, allow testimony about the details of the complaint.[245]

1. First Complaint Doctrine v. Prompt Complaint

States that embrace the first complaint doctrine do not impose a time limit on when the complaint must be made to ensure its admission into evidence.[246] Therefore, evidence of a victim's complaint will not be excluded merely because it was not made in a timely fashion. As the Massachusetts Supreme Judicial Court explained in *King*, the promptness rule implies that victims who promptly outcry are more credible than victims who do not—but the research does not support this inference.[247] New York could easily adopt the first outcry exception, and this would end inconsistent outcomes like that of *Rosario* and *Parada*.

C. Tender Years Exception

The majority of states have adopted a "tender years" exception to remedy some of the issues associated with excluding disclosures of

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[242] *Id.*

[243] *See, e.g.*, Greenway v. State, 626 P.2d 1060, 1061 n.4 (Alaska 1980) ("Testimony from either the victim or witnesses pertaining to 'details' of the victim's complaint is generally not admissible."); State v. Troupe, 677 A.2d 917, 928 (Conn. 1996) ("[A] person to whom a sexual assault victim has reported the assault may testify only with respect to the fact and timing of the victim's complaint . . . ."); State v. Stanton, 710 A.2d 240, 242 (Me. 1998) ("The first complaint rule 'admits only the bare fact that a complaint has been made but not further details.'" (quoting State v. Dube, 598 A.2d 742, 744 (Me. 1991))); Dawkins v. State, 551 S.E.2d 260, 262 (S.C. 2001).

[244] *See, e.g.*, *Troupe*, 677 A.2d at 929 ("[S]uch evidence is admissible only to corroborate the victim's testimony and not for substantive purposes.").

[245] *See* LA. CODE EVID. ANN. art. 801(D)(1)(d) (2012) (stating that a statement is not hearsay if it is "[c]onsistent with the declarant's testimony and is one of initial complaint of sexually assaultive behavior"); *see* TEX. CODE CRIM. PROC. ANN. art. 38.072 (West 2011); *see also* Molina v. State, 971 S.W.2d 676, 683 (Tex. Ct. App. 1998) (discounting a child's earlier, undetailed statements in favor of a later, more detailed statement).

[246] *See* Commonwealth v. King, 834 N.E.2d 1175, 1191 (Mass. 2005).

[247] *Id.* at 1188, 1194.

child abuse victims.[248] The exception varies by jurisdiction, but typically the exception allows for testimony about the fact that a child[249]—and sometimes an adult lacking competence[250]—complained about an incident of abuse—sexual, non-sexual, or both, depending on the state[251]—to be admitted into evidence if the judge determines that there is a certain level of trustworthiness or reliability in the statement.[252] This determination is done outside of

[248] Thirty states have adopted the exception. ALA. CODE § 15-25-31 (2012); ARK. R. EVID. 803(25); CAL. EVID. CODE § 1228 (West 2012); COLO. REV. STAT. § 13-25-129(1) (2012); DEL. CODE ANN. tit. 11, § 3513 (2012); FLA. STAT. ANN. § 90.803(23) (West 2012); GA. CODE ANN. § 24-3-16 (2013); HAW. R. EVID. 804(b)(6); IDAHO CODE ANN. § 19-3024 (2012); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2012); IND. CODE ANN. § 35-37-4-6(c)(1) (West 2012); KAN. STAT. ANN. § 60-460(dd) (West 2012); MD. CODE ANN., CRIM. PROC. § 11-304(b) (LexisNexis 2012); MICH. R. EVID. 803A(1); MINN. STAT. ANN. § 595.02(3) (West 2012); MISS. R. EVID. 803(25); MO. ANN. STAT. § 491.075 (West 2012); NEV. REV. STAT. ANN. § 51.385 (West 2011); N.J. R. EVID. 803(c)(27); N.M. STAT. ANN. § 10-234 (West 2012); N.D. R. EVID. 803(24); OHIO R. EVID. 807; OKLA. STAT. ANN. tit. 12, § 2803.1 (West 2012); OR. REV. STAT. ANN. § 40.460(24) (West 2012); 42 PA. CONS. STAT. ANN. § 5986 (West 2012); S.D. CODIFIED LAWS § 19-16-38 (2012); UTAH R. CRIM. P. 15.5; VT. R. EVID. 804a; WASH. REV. CODE § 9A.44.120 (2012); WIS. STAT. ANN. § 908.08(3)(a) (West 2012).

[249] Some jurisdictions merely state that the child must be of "tender age." *See, e.g.*, MISS. R. EVID. 803(25) (stating the requirement of "a child of tender years"). Other jurisdictions have specific age requirements ranging from as old as ten to as old as sixteen. *See, e.g.*, ARK. R. EVID. 803(25) (applying only if the child was under ten years old at time statement was made); CAL. EVID. CODE § 1228(a) (asserting that the child must have been under the age of twelve at the time of the alleged assault and statement); GA. CODE ANN. § 24-8-820 (applying the exception to the statement of a child under the age of fourteen); HAW. R. EVID. 804(b)(6) (requiring that the child must have been under the age of sixteen when he or she made the statement); WASH. REV. CODE ANN. § 9A.44.120 (requiring "[a] statement made by a child when under the age of ten").

[250] *See, e.g.*, OR. REV. STAT. § 40.460(18a)(b) (2011) (applying to an individual who is "chronologically or mentally" less than twelve); VT. R. EVID. 804a(a) (disallowing the exclusion of "[s]tatements by a person who is a child 12 years of age or under or who is a person with a mental illness as defined in 18 V.S.A. § 7101(14) or developmental disability as defined in 18 V.S.A. § 8722(2) at the time the statements were made").

[251] *See, e.g.*, GA. CODE ANN. § 24-8-820 (describing an incident of abuse as "any act of sexual contact or physical abuse performed with or on the child of another"); IND. CODE § 35-37-4-6(a) (listing offenses such as sex crimes, battery upon a child, kidnapping and confinement, incest, or neglect); MD. CODE ANN., CRIM. PROC. § 11-304(b)(2) (emphasizing incidents such as child abuse, sexual offenses against a child, and abuse and neglect proceedings); OHIO R. EVID. 807(A)(3) (requiring evidence of sexual acts or acts of physical violence); WASH. REV. CODE ANN. § 9A.44.120 (asserting that the abusive incident involve "sexual contact . . . or . . . physical abuse of the child by another that results in substantial bodily harm").

[252] *See, e.g.*, ARK. R. EVID. 803(25)(A) (admitting the statement if that court "finds that the statement offered possesses a reasonable guarantee of trustworthiness considering the competency of the child both at the time of the out of court statement and at the time of the testimony"); GA. CODE ANN. § 24-3-16 (permitting admittance of such statements if the child is available to testify and if "the court finds that the circumstances of the statement provide sufficient indicia of reliability"); HAW. R. EVID. 804(b)(6) (requiring the court to determine "that the time, content, and circumstances of the statement provide strong assurances of trustworthiness"); IND. CODE § 35-37-4-6(e)(1)(B) (requiring the court to find "that the time, content, and circumstances of the statement or videotape provide sufficient indications of

the hearing of the jury.[253] Typically the prosecution must provide notice if it intends to use the exception.[254]

Generally, courts are to look at the "time, content and circumstances" under which the statement was made to determine if it has "sufficient indicia of reliability."[255] Several states provide guidelines for courts to determine admissibility. For example, the comment to Mississippi Rule of Evidence 803(25)[256] states that a trial court should consider the following non-exhaustive factors:

> (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and

reliability"); KAN. STAT. ANN. § 60-460(dd)(2) (requiring a finding that "the child is disqualified or unavailable as a witness, the statement is apparently reliable, and the child was not induced to make the statement falsely by use of threats or promises"); MICH. R. EVID. 803A(2)–(3) ("[T]he statement [is reliable if it] is shown to have been spontaneous and without indication of manufacture; [and] either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective [sic] circumstance."); NEV. REV. STAT. § 51.385(1)(a) (requiring that a statement have "sufficient circumstantial guarantees of trustworthiness" based on its "time, content and circumstances"); N.J. R. EVID. 803(c)(27)(b) ("[A statement is admissible where] the court finds, in a hearing, . . . that on the basis of the time, content, and circumstances of the statement, there is a probability that the statement is trustworthy."); N.D. R. EVID. 803(24)(a) ("[T]he time, content, and circumstances of the statement [must] provide sufficient guarantees of trustworthiness."); OHIO R. EVID. 807(A)(1) (admitting a statement if it appears to be "at least as reliable" as one which would be admitted under another exception, based on "particularized guarantees of trustworthiness" gleaned from "the totality of the circumstances" at the time, where such circumstances show that the child making the statement "establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement").

[253] *See, e.g.*, CAL. EVID. CODE § 1228(f); COLO. REV. STAT. § 13-25-129(1)(a); FLA. STAT. ANN. § 90.803(23)(a)(1).

[254] *See, e.g.*, CAL. EVID. CODE § 1228(f) (requiring ten days notice prior to hearing or trial); FLA. STAT. ANN. § 90.803(23)(b) (requiring ten days notice prior to trial); MICH. R. EVID. 803A (requiring "in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement").

[255] *See, e.g.*, MINN. STAT. ANN. § 595.02(3)(a) (West 2012); MO. ANN. STAT. § 491.075(1.)(1) (West 2012); 42 PA. CONS. STAT. § 5986(a)(1) (2012); TEX. CODE CRIM. PROC. ANN. art. 38.072(2)(b)(2) (West 2012); VT. R. EVID. 804a(a)(4); WASH. REV. CODE ANN. § 9A.44.120(1).

[256] MISS. R. EVID. 803(25).

> Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Id.

> the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated.[257]

Several other states provide similar guidelines, which are also not exhaustive.[258]

California formerly employed the prompt outcry exception, but now utilizes the tender years exception. Before adopting the statutory exception, the California Supreme Court addressed the issue of whether the prompt outcry exception was still valid in 1994. In *People v. Brown*,[259] the complaining witness testified that her mother's ex-boyfriend, the defendant, had abused her for several years, during which time she never told anyone.[260] The complainant[261] further testified that a few months after she and her mother moved away from the defendant, she confided in a woman with whom she was staying.[262] The woman in whom the complainant confided also testified to the outcry.[263] The trial court allowed both testimonies over defense counsel's objection[264] and after his conviction, defendant appealed the admission of the outcry.[265]

The court examined the history of the prompt outcry exception[266] and admitted that the historic premise of the doctrine has been

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[257] *Id. at* 803 cmt. 25.

[258] *See, e.g.*, DEL. CODE ANN. tit. 11, § 3513(e) (2012) (listing thirteen different factors); FLA. STAT. ANN. § 90.803(23)(a); HAW. R EVID. 804(b)(6); MICH. R. EVID. 803A (applying only if "[t]he statement is shown to have been spontaneous and without indication of manufacture; . . . either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective [sic] circumstance; and . . . the statement is introduced through the testimony of someone other than the declarant"); OHIO R. EVID. 807(A): OR. REV. STAT. ANN. § 40.460(18a)(b) (West 2012).

[259] People v. Brown, 883 P.2d 949 (Cal. 1994). This case was also referenced in *People v. Rosario*. People v. Rosario, 958 N.E.2d 93, 105 (N.Y. 2011) (Smith, J., dissenting) (citing *Brown*, 883 P.2d at 951).

[260] *Brown*, 883 P.2d at 951.

[261] *Id.* at 950, 951 (stating that the complainant was twelve years old at the time of trial and was seven years old when the abuse began).

[262] *Id.* at 951.

[263] *Id.* at 952.

[264] *Id.* at 951–52.

[265] *Id.* at 953.

[266] *See id.* at 953–55.

discredited.[267] The court acknowledged that courts and academics have questioned its continued use,[268] and compared the admissibility of disclosures to the admissibility of testimony on the circumstances of other crimes.[269] After its review, the court said:

> [A]lthough one of the premises upon which the fresh-complaint doctrine historically has rested has been substantially eroded in recent times, our more recently acquired knowledge does not logically support a rule that would compel the exclusion of all evidence relating to the circumstances under which an alleged sex-offense victim complained of, or disclosed, the alleged offense, but instead calls for revision of the contours of the doctrine to reflect more accurately the basis upon which the admissibility of such evidence should be evaluated. We conclude, for the reasons discussed above, that evidence of the fact of, and the circumstances surrounding, an alleged victim's disclosure of the offense may be admitted in a criminal trial for nonhearsay purposes under generally applicable evidentiary principles, provided the evidence meets the ordinary standard of relevance.
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> . . . Thus, the admissibility of such evidence does not turn invariably upon whether the victim's complaint was made immediately following the alleged assault or was preceded by some delay, nor upon whether the complaint was volunteered spontaneously by the victim or instead was prompted by some inquiry or questioning from another person. Rather, these factors simply are to be considered among the circumstances of the victim's report or disclosure that are relevant in assisting the trier of fact in assessing the significance of the victim's statements in conjunction with all of the other evidence presented.[270]

The court held that the outcry in *Brown* was probative and relevant.[271] The court said that the circumstances of the outcry were probative of the child's credibility, explained why she took so

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[267] *Id.* at 957 ("[O]ne of the historic premises of the fresh-complaint doctrine--namely, that it is 'natural' for the victim of a sexual offense to disclose promptly the commission of the offense in the event it did occur--largely has been discredited.").

[268] *Id.* at 950, 956–57 (citing Battle v. United States, 630 A.2d 211, 217 (D.C. 1993); Commonwealth v. Licata, 591 N.E.2d 672, 674 (Mass. 1992); State v. Hill, 578 A.2d 370, 377–78 (N.J. 1990)).

[269] *Brown*, 883 P.2d at 957–58.

[270] *Id.* at 959 (citations omitted).

[271] *Id.* at 960.

long to disclose, and "tended to forestall any erroneous inferences that might have arisen in the absence of that evidence."[272]

Although this case did not create the tender years exception, it helped to set the stage for the exception's adoption in California, and highlights why the exception is important. The tender years exception does not turn on whether the child made a prompt outcry—that is merely one factor for the court to consider.[273] As the California Supreme Court pointed out, the original rationale for prompt outcry has been discredited, and research suggests that the rule should be expanded to include outcries that are not prompt.[274]

A few states only allow evidence of the complaint under the tender years exception if the child is unavailable to testify.[275] Some examples of the exception allow admission of evidence of the outcry only if the child testifies or even if the child is unavailable to testify.[276] This raises Confrontation Clause problems, which are not addressed in this article.[277] The problems are complex, but could be addressed by carefully drafting a rule or statute in accordance with this article's suggestion that either the New York courts or the New York Legislature adopt a new rule for child abuse hearsay.

D. The "Residual" Exception

The "tender years" exception is a codified use of the "residual" exception. The language "equivalent circumstantial guarantees of trustworthiness" in many of the tender years statutory exceptions[278] is culled from the residual exception.[279]

The residual exception is codified in Rule 807 of the Federal Rules of Evidence. The rule states:

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[272] *Id.*

[273] *Id.* at 959.

[274] *Id.* at 956.

[275] *See, e.g.*, HAW. R. EVID. 804(b)(6); KAN. STAT. ANN. § 60-460(dd) (West 2012).

[276] *See, e.g.*, CAL. EVID. CODE § 1360(a)(3) (Deering 2012); COLO. REV. STAT. § 13-25-129(1)(b) (2012); DEL. CODE ANN. tit. 11, § 3513(b) (2012); FLA. STAT. ANN. § 90.803(23)(a)(2) (LexisNexis 2012); IND. CODE ANN. § 35-37-4-8(d) (LexisNexis 2012); MD. CODE ANN., CRIM. PROC. § 11-304(d)(1) (LexisNexis 2012); MINN. STAT. ANN. § 595.02(3)(b) (West 2012); MISS. R. EVID. 803(25); MO. ANN. STAT. § 491.075(1.)(2) (West 2012); NEV. REV. STAT. ANN. § 51.385(1)(b) (LexisNexis 2012); N.J. R. EVID. 803(27); N.D. R. EVID. 803(24)(b); OR. REV. STAT. ANN. § 40.460(18a)(b) (West 2012); 42 PA. CONS. STAT. ANN. § 5986(a)(2) (West 2012); WASH. REV. CODE ANN. § 9A.44.120(2) (LexisNexis 2012).

[277] *See supra* Part I.D.

[278] *See, e.g.*, DEL. CODE ANN. tit. 11, § 3513(e); HAW. R EVID. 804(b)(8) ("A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . . .").

[279] *See* FED. R. EVID. 807(a)(1) (providing a hearsay exception if "the statement has equivalent circumstantial guarantees of trustworthiness").

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted [without fair notice to the opposing party].[280]

The residual exception has been used in many federal cases to admit child abuse hearsay.[281]

Most states model their rules of evidence on the Federal Rules of Evidence.[282] Many of these states have also codified the residual exception,[283] and the exception has been used in many state cases to admit child abuse hearsay.[284] The residual exception is useful in child abuse prosecution. It is more inclusive than the prompt outcry exception because the exception does not turn on whether the child cried out promptly.[285] The court merely weighs the child's spontaneity and timing as one of several factors to determine whether or not the evidence has circumstantial guarantees of

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[280] *Id.* at 807.

[281] *See, e.g.*, Stuart v. Wilson, 442 F.3d 506, 521 (6th Cir. 2006); United States v. Peneaux, 432 F.3d 882, 891, 892 (8th Cir. 2005); *see also* United States v. Thunder Horse, 370 F.3d 745, 746, 747, 748 (8th Cir. 2004) (holding admission of a child's hearsay statements to forensic interviewer was not abuse of discretion because there were circumstantial guarantees of trustworthiness); United States v. Dorian, 803 F.2d 1439, 1443–44 (8th Cir. 1986); Williams v. Gov't of the V.I., 271 F. Supp. 2d 696, 705 (D. V.I. 2003).

[282] *See, e.g.*, ARIZ. R. EVID.; ARK. R. EVID.; HAW. R. EVID.; IOWA R. EVID.; LA. CODE. EVID.; MICH. R. EVID.; MONT. R. EVID.; NEB. REV. STAT. ANN. § 27-1103 (stating that it could be cited as NEB. R. EVID.); N.H. R. EVID.; N.J. R. EVID.; N.D. R. EVID.; OHIO R. EVID.; OR. EVID. CODE; VT. R. EVID.; W. VA. R. EVID.; WYO. R. EVID. This list is exemplary but not exhaustive.

[283] *See, e.g.*, ARIZ. R. EVID. 807; IOWA R. EVID. 5.807; MONT. R. EVID. 803(24); NEB. REV. STAT. ANN. § 27-803(23) (LexisNexis 2012); N.H. R. EVID. 803(24); N.C. R. EVID. 803(24); R.I. R. EVID. 803(24); W. VA. R. EVID. 803(24); WYO. R. EVID. 803(24). Although Arizona and Iowa are the only two states to name the code as the "residual exception," the other codes referred to are nearly identical in language. *See, e.g.*, ARIZ. R. EVID. 807; IOWA R. EVID. 5.807; MONT. R. EVID. 803(24); NEB. REV. STAT. ANN. § 27-803(23) (LexisNexis 2012); N.H. R. EVID. 803(24); N.C. R. EVID. 803(24); R.I. R. EVID. 803(24); W. VA. R. EVID. 803(24); WYO. R. EVID. 803(24).

[284] *See, e.g.*, People v. Katt, 662 N.W.2d 12, 14, 23 (Mich. 2003); State v. Jagielski, 467 N.W.2d 196, 200 (Wis. Ct. App. 1991).

[285] *Compare* FED. R. EVID. 807, *with* People v. Brown, 883 P.2d 949, 956 (Cal. 1994) (emphasizing that the *Brown* court all but discredited the modern use of the prompt outcry exception).

trustworthiness.[286] Courts have said that there is no mechanical test for determining trustworthiness, but factors to be weighed include, "spontaneity and consistent repetition; the mental state of the declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate."[287] Child abuse disclosures are frequently admissible under the residual exception because it is often the only evidence that the abuse has occurred.[288] Therefore, if trustworthy, the statement is more probative than any other evidence on the point for which it is offered.[289]

New York courts have declined to create a residual exception.[290] The residual exception focuses on reliability, and is amorphous.[291]

E. No Special Exception

Two states explicitly exclude any evidence of a child's disclosure unless it fits under "traditional" hearsay exceptions.[292] Kentucky and Tennessee have no hearsay exceptions for victims of child abuse.

Kentucky has neither a residual exception nor does it have an exception for victims of sexual abuse. The Supreme Court of Kentucky has held that any hearsay concerning a child abuse victim's disclosure may be admitted through one of the traditional hearsay exceptions—such as the prior consistent statement exception,[293] or statements for the purpose of medical treatment or

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[286] *Katt*, 662 N.W.2d at 25; *Jagielski*, 467 N.W.2d at 198.

[287] Williams v. Gov't of the V.I., 271 F. Supp. 2d 696, 705 (D. V.I. 2003) (citing Idaho v. Wright, 497 U.S. 805, 820–22 (1990)).

[288] *See, e.g.*, Stuart v. Wilson, 442 F.3d 506, 524 (6th Cir. 2006); United States v. Peneaux, 432 F.3d 882, 890, 892 (8th Cir. 2005); United States v. Dorian, 803 F.2d 1439, 1443–44, 1445 (8th Cir. 1986); *Williams*, 271 F. Supp. 2d at 703–04, 706.

[289] *See* FED. R. EVID. 807.

[290] *See, e.g.*, People v. Nieves, 492 N.E.2d 109, 112 (N.Y. 1986) ("[W]e are not prepared at this time to abandon the well-established reliance on specific categories of hearsay exceptions in favor of an amorphous 'reliability' test, particularly in criminal cases where to do so could raise confrontation clause problems."); *see also* People v. Wlasiuk, 821 N.Y.S.2d 285, 290 n.4 (N.Y. App. Div. 3d Dep't 2006) ("While the People also seek to invoke the 'residual exception' to the hearsay rule, we note that no such exception exists under New York law." (citing *Nieves*, 492 N.E.2d at 112)).

[291] *See Nieves*, 492 N.E.2d at 112.

[292] *See, e.g.*, State v. Livingston, 907 S.W.2d 392, 395 & n.3 (Tenn. 1995) (mentioning "excited utterance, statement of existing mental, emotional, or physical condition, or statement for purposes of medical diagnosis and treatment" as specific, particularized hearsay exceptions).

[293] *See, e.g.*, Noel v. Commonwealth, 76 S.W.3d 923, 927–28, 929 (Ky. 2002); Smith v. Commonwealth, 920 S.W.2d 514, 516–17 (Ky. 1995) (holding admission of child's prior consistent statement to be reversible error where the motive to fabricate existed before the prior statement).

diagnosis.[294]

Tennessee has a fresh complaint doctrine for victims of rape,[295] but the Supreme Court of Tennessee held that the fresh complaint doctrine does not apply to child victims of sexual abuse in *State v. Livingston*.[296] The *Livingston* court reached a decision at odds with what the California Supreme Court decided in *Brown*[297]: the *Livingston* court held that since children are different from adults, the rule should not be applied to child victims.[298]

These two states do not address the research that suggests that jurors are even more likely to believe that children will lie,[299] and that it is even more likely that children are less likely to promptly cry out.[300]

IV. CONCLUSION

The original rationale for the prompt complaint rule was that women were expected to raise a "hue and cry" soon after a sexual offense.[301] The rule existed in New York State for female victims of rape, and it was extended to child victims of sexual abuse without considering whether the two groups were similar enough for the same exception.[302] Not only has the rule been discredited on those

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[294] May v. Commonwealth, No. 2010-SC-000052-MR, 2011 WL 5316761, at *6 (Ky. Oct. 27, 2011).

[295] State v. Kendricks, 891 S.W.2d 597, 600–01 (Tenn. 1994).

[296] *Livingston*, 907 S.W.2d at 394.

[297] *See* People v. Brown, 883 P.2d 949, 950, 951 (Cal. 1994).

[298] *Livingston*, 907 S.W.2d at 394. The *Livingston* court presumed that jurors do not believe that children would lie or complain immediately, that child abuse cases "give[] special consideration to the natural fear, ignorance, and susceptibility to intimidations that is unique to a young child's make-up." *Id.* at 394, 395 (quoting Commonwealth v. Fleury, 632 N.E.2d 1230, 1233 (Mass. 1994)).

[299] David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1198–99, 1272, 1321 (1997) (reviewing decades of research on rape prosecutions and concluding most research supports "finding that acquaintance cases, especially those with nontraditional victims, are more difficult for the prosecution than stranger cases"); Lynda Olsen-Fulero & Solomon M. Fulero, *Commonsense Rape Judgments: An Empathy–Complexity Theory of Rape Juror Story Making*, 3 PSYCHOL. PUB. POL'Y & L. 402, 402, 418 (1997) (reviewing twenty-five years of research and empirical studies regarding juror decision-making in rape cases, and concluding "our work and [the] recent work of others have supported the notion that jurors come to the rape judgment situation with preconceptions and attitudes that lead them to entertain particular stories about what may have happened . . . and that these stories are then used to arrive at a legal decision or verdict").

[300] Marks, *supra* note 12, at 229–30; *see* Bryden & Lengnick, *supra* note 299, at 1220–23.

[301] *See supra* notes 28–30 and accompanying text.

[302] *See generally* Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. REV. 441, 459–62 (1996) (explaining that prompt reporting requirement for sexual assault is rooted in mythology and applied to both women and minor victims).

grounds for adult victims of abuse, but research shows that reasoning is particularly inapplicable to child victims of abuse.[303] Research now shows that children are very different—they are more likely to be raped by someone they trust, they might not understand that it is wrong, they will be confused and blame themselves, and they will not tell others because they are afraid of the consequences.[304]

New York courts have said that the rationale for the prompt outcry exception today "is that some jurors would inevitably doubt the veracity of a victim who failed to promptly complain of a sexual assault,"[305] and declined to extend the rule to delayed disclosures "because 'our judicial process cannot remove from every juror all subtle biases or illogical views of the world.'"[306] But these are not reasons to adhere to the old rule—they are reasons to expand it. A witness's credibility is for the jury to decide.[307] The prompt complaint rule takes that province away from the jury and allows a judge to decide merely on the grounds of whether the complainant's outcry happened quickly enough to satisfy the rule.[308] If some jurors really do doubt the veracity of a victim who failed to promptly comply, keeping out evidence of a delayed outcry merely exacerbates that prejudice. If jurors doubt the credibility of those children who do not promptly cry out, surely they will doubt those who remain silent even more. Keeping late outcries out of evidence is unfair to those children—the jury should be left to decide whether they believe the child.

Twenty-five years ago, one scholar noted that the prompt outcry rule is "founded upon a distrust of rape complainants and a fear of false accusations. However, despite its outdated and unsound premises, this vestigial doctrine survives today in New York's rules of evidence, even in the wake of state and nationwide rape law reform."[309] If the prompt outcry rule was outdated in 1988, it is ancient today. The rule is based on sexist notions, and is applied to child victims for the same reasons as it was originally applied to

303 *See* Marks, *supra* note 12, at 214–15; Prager, *supra* note 12, at 72.

304 Yun, *supra* note 12, at 1756–57.

305 People v. McDaniel, 611 N.E.2d 265, 269 (N.Y. 1993) (citing People v. Rice, 554 N.E.2d 1265, 1266 (N.Y. 1990); People v. O'Sullivan, 10 N.E. 880, 881–82 (N.Y. 1887)).

306 *McDaniel*, 611 N.E.2d at 269 (quoting State v. Hill, 578 A.2d 370, 377 (N.J. 1990)).

307 5 ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 6:28, at 505–06 (2001).

308 *See McDaniel*, 611 N.E.2d at 268–69.

309 Dawn M. DuBois, Note, *A Matter of Time: Evidence of A Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1087, 1088 (1988).

women.[310] The prompt outcry rule is illogical for child abuse victims (and likely adult victims).[311]

Child abuse cases are frequently about determining who is telling the truth. Jurors need to hear the entire story—they want to know why the child only came forward years later, why they kept it to themselves for so long, and how they came to tell someone.[312] If a child told someone, the circumstances under which that statement was made are extremely probative and highly relevant.

New York now stands among a very small minority of states that will either not admit a child's statements concerning child abuse unless they fit under a traditional exception or will only admit it if the child cried out promptly.[313] A large majority of states have case law or statutes that provide for admission of a child's outcry that do not turn on the timeliness of the statement.[314] New York should join those states in fighting the national epidemic of child abuse.

New York should adopt the first complaint exception similar to the one adopted in Massachusetts.[315] The first complaint exception does not exclude disclosure statements merely because they were not made promptly after the abuse ended.[316] New York should also allow the details of the complaint into evidence, as Massachusetts does, because it is not offered as evidence that the abuse occurred, but "either supports or fails to support the complainant's own testimony about the crime."[317] The length of time may affect the jury's evaluation of the complainant's credibility, but it will be one of several factors that the jury will weigh.

Advocates for the protection of children from sexual abuse should call for New York State to duplicate the changes made in states like Massachusetts. Advocates should seize the opportunity created by the jurisprudence in *Spicola* and *Rosario* to call for a change to the outdated and ineffective prompt outcry rule in New York State.

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310 *See* Stanchi, *supra* note 302, at 459–64.

311 *See id.*

312 *See, e.g.*, People v. Brown, 883 P.2d 949, 952 (Cal. 1994) ("If I'm not allowed to ask this witness who she finally disclosed to, it's going to be a huge mystery to the jury how we're sitting here today other than that she told her friend and told her friend not to tell anybody." (internal quotation marks omitted)).

313 *See supra* Part I.A–B.

314 *See supra* Part II.

315 *See supra* Part II.B.

316 Commonwealth v. King, 834 N.E.2d 1175, 1191 (Mass. 2005).

317 *Id.* at 1200–01.