A CALL FOR REFORM: WHAT AMY COOPER'S 911 CALL REVEALS ABOUT THE "EXCITED UTTERANCE" EXCEPTION

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I. INTRODUCTION: THE CALL

It's early on a Monday morning when Amy Cooper dials 911. "I'm sorry," she says to the operator, "I'm in the Ramble and there is a man, African American, he has a bicycle helmet, he is recording me and threatening me and my dog." She pauses briefly to listen to the dispatcher, then takes a breath and repeats herself, her voice slightly louder, her pitch slightly higher. "There is an African American man, I am in Central Park, he is recording me and threatening myself and my dog." Another beat passes as she wrangles the collar of her cocker spaniel, her phone cradled between her head and her shoulder. With her voice ragged as though she's out of breath and with her pitch escalating in distress, she repeats her story a third time, pleading, "I'm sorry, I can't hear you either! I am being threatened by a man in the Ramble! Please send the cops immediately!"[1]

As she pleads with the dispatcher, Amy Cooper is standing in the Ramble, a serene slice of New York's Central Park that features winding paths, thick foliage, and dappled sunlight. She is a white woman, dressed in athleisure, who is illegally walking her dog off-leash. The African American man she refers to in her 911 call is Christian Cooper (no relation), who is in the Ramble to bird watch, as he does on a regular basis. Contrary to Amy Cooper's desperate pleas for help, Christian Cooper is not threatening her. He is asking her to stop breaking park rules.[2]

As accounts from both Mr. Cooper[3] and Amy Cooper[4] later reveal, the incident began when Mr. Cooper asked Amy Cooper to leash her dog, as park rules require. When Amy Cooper refused, Mr. Cooper began recording the interaction, infuriating Ms. Cooper, who demanded that he stop. When Mr. Cooper declined to do so, Amy Cooper spit out the most potent threat a white woman can make against a Black man. "I'm taking a picture and I'm calling the cops," she taunted. "I'm going to tell them there's an African American man threatening my life." She emphasized "African American." When Mr. Cooper did not retreat in the face of her racist threat, Amy Cooper followed through with it, placing the 911 call described above.

The aftermath of that ill-fated 911 call is, by now, a well-known story. Mr. Cooper eventually stopped recording and returned to his birdwatching, walking out of the park free and unharmed. The cell phone video was shared on social media and picked up by the press. Amy

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[1] Sarah Maslin Nir, *White Woman Is Fired After Calling Police on Black Man in Central Park*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/26/nyregion/amy-cooper-dog-central-park.html.

[2] *See id.*; *see also* N.Y. CITY PARK RULES AND REGS. § 1-04(h)(i); *Visiting with Your Dog*, CENT. PARK CONSERVANCY, https://www.centralparknyc.org/activities/dogs (last visited Aug. 10, 2020).

[3] Christian Cooper, FACEBOOK (May 25, 2020, 9:34 AM), https://m.facebook.com/story.php?story_fbid=10158742137255229&id=671885228.

[4] Amy Cooper, *Statement from Amy Cooper on Central Park Incident*, PR NEWSWIRE (May 26, 2020, 3:57 PM), https://www.prnewswire.com/news-releases/statement-from-amy-cooper-on-central-park-incident-301065492.html.

Cooper was swiftly fired and widely condemned.[5] And the incident became one of the many racially charged sparks that ignited a national reckoning around racial justice following the killing of George Floyd at the hands of a white police officer in Minneapolis.

But I invite you to imagine a different ending. Imagine that Mr. Cooper had not filmed the encounter. Imagine that the police had responded and that, although Mr. Cooper was lucky enough to survive his arrest[6] for the crime of menacing,[7] he was unlucky enough to become one of the 36,627 Black New Yorkers who have already been arrested by NYPD in the first six months of this year.[8] And imagine, further, that Mr. Cooper, knowing the truth about what happened, maintained his innocence, refused to plead guilty, and instead exercised his constitutional right to a fair trial. And finally, imagine that when the day for his fair trial comes, the prosecutor plays Amy Cooper's call to the jury and then argues that her story must be true because you can hear it in her voice, in the ragged way that she breathes, in the high pitch of her words, in her cries for help. The woman who made that phone call, the prosecutor continues, was clearly panicked; she was scared; and she was threatened by "that man." As the prosecutor points accusingly toward the defendant's chair, she doesn't mention that Mr. Cooper is a Black man or that the alleged victim is a white woman. She does not have to. Even if Amy Cooper never appears at trial, her 911 call speaks for itself.[9]

II. THE DEBATE: SHOULD AMY COOPER'S CALL BE ADMITTED AS AN EXCITED UTTERANCE AT TRIAL?

A. The Ban on Hearsay

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[5] *See* Nir, *supra* note 1.

[6] Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. 16793, 16793–98 (2019), https://www.pnas.org/content/pnas/116/34/16793.full.pdf (finding that Black men are more likely than any other demographic group to be killed by police and that a Black man's risk of being killed by police is 2.5 times higher than a white man's); *see also The Counted: People Killed by Police in the U.S.—Database*, THE GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (last visited June 20, 2020) (reporting that 253 Black men were killed by police in 2016).

[7] N.Y. Penal Law §120.15 (McKinney 2020) (A person is guilty of menacing in the third degree "when, by physical menace, he or she intentionally places or attempts to place another person in fear of death, imminent serious physical injury or physical injury.").

[8] *NYPD Arrest Data (Year to Date)*, NYC OPEN DATA, https://data.cityofnewyork.us/Public-Safety/NYPD-Arrest-Data-Year-to-Date-/uip8-fykc/data (last visited June 20, 2020).

[9] Although the ending I am asking you to imagine is, in this case, a hypothetical, it is not unrealistic or even uncommon. *See* Eliza Ortiz, *I'm a Public Defender in Manhattan. The Central Park Video is All Too Familiar.*, WASH. POST: OPINIONS (May 26, 2020, 6:48 PM), https://www.washingtonpost.com/opinions/im-a-public-defender-in-manhattan-the-central-park-video-is-all-too-familiar/2020/05/26/73c3de60-9f99-11ea-81bb-c2f70f01034b_story.html.

If the prosecutor played Amy Cooper's 911 call at trial, she would be presenting a statement made out of court, and she would be asking the jury to believe that it is true—that an African American man had been threatening Amy Cooper. Such statements, called "hearsay," are ordinarily prohibited at trial because they are generally deemed insufficiently reliable.[10] Their unreliability stems from the fact that the person making the statement (the "declarant") did not take an oath prior to making it, the declarant was not aware of the gravity of the proceedings in which it would be used, the jury cannot observe the demeanor of the declarant as she makes the statement, and the opposing party does not have an opportunity to cross-examine the declarant at the time the statement is made.[11]

Despite the fact that most hearsay is not permitted at trial, the prosecutor, in this case, likely *would* be able to play this 911 call at trial because there are exceptions to the rule against hearsay.[12] Prosecutors (and, occasionally, defense attorneys) around the country regularly introduce 911 calls in criminal trials by claiming that they fall into the hearsay exception known as the "excited utterance" exception.[13] Using Amy Cooper's phone call as a lens, this article examines when and how they should be allowed to do so.

B. The Excited Utterance Exception

Under the Federal Rules of Evidence, hearsay statements are considered "excited utterances" if the following conditions are met: "(i) that the statement was in reaction to a truly startling event; (ii) that the statement was made under the stress of excitement caused by that event; and (iii) that the statement relates to the event."[14] If all three conditions are met, courts consider the hearsay statement reliable enough to admit at trial under the theory that someone who is excited by a startling event does not have the time to reflect or fabricate or be coached --

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[10] *See* Montana v. Egelhoff, 518 U.S. 37, 42 (1996) ("Hearsay rules, see Fed. Rule Evid. 802, similarly prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable.").

[11] Williamson v. United States, 512 U.S. 594, 598 (1994).

[12] *See, e.g.*, FED. R. EVID. 803 (exceptions to the rule against hearsay that apply regardless of whether the declarant is available to testify at trial); *see generally*, FED. R. EVID. 804 (exceptions to the rule against hearsay that only apply when the declarant is unavailable).

[13] *See, e.g.*, United States v. Boyce, 742 F.3d 792, 796 (7th Cir. 2014). The excited utterance exception, set forth in Federal Rule of Evidence 803(2), is not the only hearsay exception that can be used to introduce hearsay statements made during 911 calls. Two of the most common alternatives are the present sense impression exception, FED. R. EVID. 803(1), and the "Then-Existing Mental, Emotional, or Physical Condition" exception, FED. R. EVID. 803(3). Although this article focuses on the excited utterance exception, similar critiques can be levied against both of those exceptions and similar reforms should be enacted.

[14] Brunsting v. Lutsen Mountains Corp., 601 F.3d 813, 817–18 (8th Cir. 2010) (citing Glen Weissenberger & James J. Duane, WEISSENBERGER'S FED. EVIDENCE § 803.8 (5th ed. 2006)).

all the person can do at that moment, according to this theory, is spontaneously and truthfully react.[15]

C. The Problems that Plague the Excited Utterance Exception

Criticisms of the excited utterance exception already abound. Some skeptics focus on questions of timing, exploring how soon after the startling event the excited utterance must be made[16] and whether someone can become "re-excited" after the initial stress of the event has worn off.[17] Others question the very foundation of the rule, arguing that the psychological assumption on which it rests has no basis in science.[18] Each of these criticisms, particularly the last, is cause for concern. However, Amy Cooper's 911 call requires that we confront a different, though equally urgent, problem with the excited utterance exception: the risk that the declarant fabricated the startling event itself or, at best, misperceived it.[19]

i. Fabrication

Amy Cooper's call is a troubling example of an excited utterance that, despite being fabricated, would have been admitted at trial. Remember that a judge listening to her 911 call could easily have found that it met all three of the conditions required for excited utterances: 1) according to what she told the dispatcher, she was experiencing what she perceived to be a startling event (an unknown Black man threatening her in Central Park); 2) she made the call while still under the stress of that event (she uses the present progressive tense throughout the call, indicating that this emergency is ongoing; in addition, alterations in her voice, pitch, and breathing suggest that she is becoming increasingly desperate); and 3) her statements related to the startling event (she describes the perpetrator, his actions, and the location of the incident). Thus, under the existing framework, Amy Cooper's 911 call would have been deemed

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[15] Idaho v. Wright, 497 U.S. 805, 820 (1990) (citing 6 J. WIGMORE, EVIDENCE §§ 1745–1764 (J. Chadbourn rev. 1974); 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(2)[01] (1988); FED. R. EVID. 803(2) advisory committee's note to 1972 proposed rules).

[16] *See* Angela Conti & Brian Gitnik, *Federal Rule of Evidence 803(2): Problems with the Excited Utterance Exception to the Rule on Hearsay*, 14 ST. JOHN'S J. LEGAL COMMENT. 227, 250-51 (1999).

[17] *See* Colin Miller, *A Shock to the System: Analyzing the Conflict Among Courts over Whether and When Excited Utterances May Follow Subsequent Startling Occurrences in Rape and Sexual Assault Cases*, 12 WM. & MARY J. WOMEN & L. 49, 50-51 (2005).

[18] *See* Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U. L. REV. 111, 111 (2017); Conti & Gitnik, *supra* note 16, at 247.

[19] *See* Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 735, 741 (2015) (identifying fabrication and misperception as two major vulnerabilities of the excited utterance exception).

sufficiently reliable to admit at trial. And yet we know that it was not. Thanks to the video, *we* know that Amy Cooper's 911 call was verifiably false. *We* know that she made up the startling event and fabricated her excitement. But in this alternative ending, the judge reviewing the 911 call and, more importantly, the jurors charged with deciding Christian Cooper's fate, would not.

ii. Misperception

Fabrication is not the only threat to the reliability of excited utterances. Misperception is equally possible and just as problematic. Here, again, Amy Cooper provides us with a useful example. In her public apology to Mr. Cooper, she characterizes her actions as "misassumptions," explaining, "When Chris began offering treats to my dog and confronted me in an area where there was no one else nearby and said, 'You're not going to like what I'm going to do next,' I assumed that we were being threatened when all he had intended to do was record our encounter on his phone."[20] For the purposes of this example, I ask that you credit her after-the-fact version of events. Assume that she did place the call out of a genuine fear that, despite evidence to the contrary, this Black man birdwatching in Central Park was angry, menacing, and a potential threat to her safety. Would her fear—rooted in centuries of racist teachings and racist portrayals of Black men in popular culture[21]—solve the problem and make her 911 call reliable evidence? Surely it would not. Regardless of whether someone believes themselves to be experiencing a startling event or feels genuine fear, too many other variables can diminish the reliability of their interpretations and reactions. Chief among those variables is implicit bias,[22] as illustrated by this example. But also of concern are the person's age and any physical, mental, or

[20] Cooper, *supra* note 4.

[21] *See* Christopher D. Geist & Angela M.S. Nelson, *From the Plantation to Bel-Air: A Brief History of Black Stereotypes*, *in* POPULAR CULTURE: AN INTRODUCTORY TEXT 262, 262–76 (Jack Nachbar & Kevin Lause eds., 1992) (reviewing the history of Black stereotypes in popular culture, including the rise of the image of Black people as threatening); Andrew R. Todd, Kelsey C. Thiem & Rebecca Neal, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCHOL. SCI. 384 (2016) (confirming in multiple studies that participants were more likely to select threatening objects and threatening words if the objects and words were preceded by the face of a young Black boy as opposed to a young white boy); Rachel D. Godsil & Alexis McGill, *Transforming Perception: Black Men and Boys*, AMERICAN VALUES INSTITUTE (2013) (placing a broad spectrum of studies in conversation with one another to illustrate how harmful misperceptions of Black men and boys are propagated and circulated).

[22] *See* Gregory Mitchell*, An Implicit Bias Primer*, 25 VA. J. SOC. POL'Y & L. 27, 32 (2018); *Understanding Implicit Bias*, OHIO ST. KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY (2015), http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ (last visited August 12, 2020) ("[I]mplicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control.").

emotional infirmities that might impair their ability to see, hear, perceive, or interpret an incident.

D. Proposal for Reform

What the Cooper call makes abundantly clear is that the excited utterance exception is broken. The gatekeeping role it is meant to play in the quest to admit reliable hearsay is too easily thwarted by fabrication and too often undermined by misperception, misunderstanding, and bias. The fact that the jury can weigh the evidence and decide whether to believe the excited utterance does not justify its automatic admission under the current standard. Because defendants rarely have access to exculpatory evidence like Christian Cooper's video, excited utterances have the potential to be too damaging to admit without greater assurance that they are reliable.

To safeguard against the alternative ending described above—the one in which Mr. Cooper sits accused of a crime that he did not commit and yet powerless to prevent the prosecutor from playing Amy Cooper's damning 911 call—procedural and substantive changes must be made to the excited utterance exception.

i. Procedural Changes

The process that governs the admission of excited utterances must be reformed in two ways: 1) the party that seeks to introduce the evidence (the "hearsay proponent") must provide pretrial notice; and 2) if an excited utterance is admitted at trial, the court should provide a tailored jury instruction.

Turning first to the issue of pretrial notice: under the Federal Rules of Evidence, no formal process governs the introduction of hearsay under the excited utterance exception.[23] The hearsay proponent can simply present the hearsay at trial, which leaves the opposing party (the "hearsay opponent") with no recourse other than a mid-trial objection that often results in a lengthy delay as the parties argue to the court about the admissibility of the evidence outside the presence of the jury. There is no requirement that a hearing be held, or that a pretrial ruling be made, or even that the hearsay proponent give the other side notice of its intention to introduce the statement. By contrast, other rules of evidence *are* subject to procedural safeguards. For example, Federal Rule of Evidence 609(b), which governs the admission of defendant's prior crimes that are 10 years or older, and Federal Rule of Evidence 807, which governs admission of hearsay offered under the "residual hearsay exception," both require that the evidence proponent

[23] Although the Federal Rules of Evidence govern only federal courts, many states have adopted or modeled their own evidence codes after the federal rules. *See* Tom Lininger, *Should Oregon Adopt the New Federal Rules of Evidence?*, 89 OR. L. REV. 1407, 1408 (2001) (citing Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence T-1* (Joseph M. McLaughlin ed., 2d ed. 2011)). As a result, the critiques and proposals set forth in this article apply with equal force to state rules of evidence modeled after Federal Rule 803(2).

give the other side notice prior to trial.[24] Pretrial notice is beneficial because it provides the opponent an opportunity to attack the trustworthiness of the statement[25] and reduces mid-trial delays that inconvenience the parties, the court, and the jury.

The need to reduce surprise, promote early resolution of the issue, and reduce delay is no less great when parties seek to introduce hearsay under the excited utterance exception.[26] As Amy Cooper's call reveals, statements that may be admitted as excited utterances can be forceful and damning, even if they are not true. Requiring notice would ensure that the hearsay opponent would have a meaningful opportunity to prepare its defense and, if necessary, file a motion to exclude the evidence (a "motion *in limine*") prior to trial. And by considering that motion prior to trial, the court would have an opportunity to review the evidence, hear arguments, and make a fully informed decision without the pressures and time constraints that might arise mid-trial. Thus, adding a notice requirement would increase not only the efficiency of the trial but also the integrity of the proceeding.[27]

Turning next to the post-trial jury instruction: courts already instruct jurors on how to consider testimonial evidence and assess witness credibility.[28] Because excited utterances act as quasi-testimony, a similar jury instruction is needed. In that instruction, the court should draw the jurors' attention to the hearsay statement and explain that the proponent has introduced the statement as evidence that the content of that statement was true. The court should then tailor the instruction to the statement itself, laying out what exactly the proponent is suggesting is true. Finally, the court should remind the jurors that, as with all evidence, they can decide for themselves whether the statement supports the proposition for which it was admitted. In making that determination, they can consider any matter in evidence that may help them decide the truth

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[24] FED. R. EVID. 609(b) ("Evidence of the conviction is admissible only if . . . (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use."); FED. R. EVID. 807(b) ("Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement . . .").

[25] *See* Piva v. Xerox Corp., 654 F.2d 591, 596 (9th Cir. 1981).

[26] *See* Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159, 213, 217 (1997) (including pretrial notice as one of many proposed changes to the excited utterance exception and noting that such notice "protects against any last-minute surprises for the accused").

[27] At least one state, Massachusetts, already embraces the practice of providing pretrial notice of excited utterances. However, that practice arises from Massachusetts's general preference for pretrial hearings, rather than any specific requirement related to excited utterances. *See Section103(f): Rulings on Evidence, Objections, and Offers of Proof*, MASS. GUIDE TO EVID., https://www.mass.gov/guide-to-evidence/article-i-general-provisions#section-103-rulings-on-evidence-objections-and-offers-of-proof (last updated Jan. 1, 2020) ("Where the issue can reasonably be anticipated, a motion *in limine* should be filed prior to trial.").

[28] *See* Sand, MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL ¶ 7.01, Instr. 7-1 (2019).

and the importance of the statement, including the circumstances under which the statement was made, the declarant's apparent mental state, the declarant's motive to lie or specific bias against the opponent party, and sources of possible misperception, such as age, mental or physical infirmities, and implicit or explicit bias. Similar to the witness credibility instruction, this instruction will ensure that jurors consider the excited utterance for its proper purpose and receive the guidance they need to evaluate its weight.[29]

ii. Substantive Changes

Turning to the question of substantive changes: once the hearsay proponent has provided pretrial notice and the hearsay opponent has filed a motion *in limine*, how should the court structure its analysis? And what factors should the court consider? Unlike the procedural concerns addressed above, questions concerning courts' analytical processes cannot be easily answered with adjustments to the text of the rule. Instead, if uniform implementation of the rule is to be ensured, appellate courts and advisory committees on the rules of evidence must adopt specific analytical frameworks that trial judges can then easily employ. To reduce the risk of fabrication or misperception, I propose the following framework for analyzing the admissibility of an excited utterance. First, as a threshold matter, the court must consider whether the proffered hearsay meets the definition of excited utterance using the three-pronged analysis currently employed. In other words, the court must decide whether (1) the statement was made in reaction to a truly startling event; (2) the statement was made under the stress of excitement caused by the startling event; and (3) the statement relates to the startling event.[30]

If the answer to each of those three threshold questions is yes, then the hearsay meets the definition of excited utterance. However, the court's job would no longer end there. The court must next consider whether that excited utterance is admissible. To determine admissibility, the court must answer: does the source of the excited utterance or other circumstances surrounding the event demonstrate sufficient indicia of trustworthiness? If yes, then the statement may be admitted, subject to the other rules of evidence, including Federal Rule of Evidence 403, which governs the admission of relevant evidence. If not, then the statement must be excluded. Courts are well-equipped to answer this question. They have been answering a version of it for years as part of their required analysis under the hearsay exceptions concerning business records and public records.[31] Just as trustworthiness is an enumerated factor under those exceptions, trustworthiness must also be included as an enumerated factor under the excited utterance

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[29] *See id.*

[30] *See* Brunsting v. Lutsen Mountains Corp., 601 F.3d 813, 817–18 (8th Cir. 2010); *see also* United States v. Water, 413 F.3d 812, 818 (8th Cir. 2005); United States v. Wesela, 223 F.3d 656, 662 (7th Cir. 2000); United States v. Hall, 165 F.3d 1095, 1108 (7th Cir. 1999); United States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998).

[31] *See* FED. R. EVID. 803(6)(E) (hearsay exception for regularly conducted activity (a.k.a. "business records")); FED. R. EVID. 803(7)(C) (hearsay exception concerning the absence of a business record); FED. R. EVID. 803(8)(B) (hearsay exception for public records).

exception to ensure that unreliable statements like Amy Cooper's call are not introduced at trial.[32]

Careful readers will note that the standard I propose for excited utterances (whether "the source of the excited utterance or other circumstances surrounding the event demonstrate sufficient indicia of trustworthiness") is similar, but not identical, to the analogous provisions under the exceptions related to business records and public records (e.g. "the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness").[33] The slight difference is deliberate. The business and public records hearsay exceptions place the burden of showing a lack of trustworthiness on the hearsay opponent. In the context of business records and public records, that makes sense. Business records and public records are considered trustworthy because they are systematically prepared and are regularly produced.[34] The orderliness with which they are created makes it possible for the hearsay opponent to investigate the circumstances surrounding their creation and identify oddities or inconsistencies that may call their reliability into question. Excited utterances are exactly the opposite. They are spontaneous verbal statements uttered in response to one-off startling events. There is no process for an opponent to investigate and generally no prior example that can be used as a comparison. Thus, when dealing with excited utterances, none of the same rationales exist for placing the burden of proving that trustworthiness (or lack thereof) on the opponent. For that reason, the burden under the proposed framework remains on the hearsay proponent to show that the source of the excited utterance or other circumstances surrounding it demonstrate sufficient indicia of trustworthiness.

One final question remains: what counts as "sufficient"? In other words, what factors should the court consider when deciding whether an excited utterance is sufficiently trustworthy? And how should the court weigh those factors? A few courts and scholars have already attempted to answer this question by creating their own unique lists of potentially relevant factors and then offering no guidance on how to balance them.[35] In an effort to promote a uniform standard that is comprehensive but also workable, I propose that courts consider the

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[32] *See* Liesa Richter, *Goldilocks and the Rule 803 Hearsay Exceptions*, 59 WM. & MARY L. REV. 897 (2018) (calling for the application of the trustworthiness considerations embedded within Rules 803(6)-(8) to all Rule 803 hearsay exceptions).

[33] FED. R. EVID. 803(7)(C).

[34] Rock v. Huffco Gas & Oil Co., 922 F.2d 272, 279 (5th Cir. 1991) (citing ROBERT P. MOSTELLE, MCCORMICK ON EVIDENCE § 306 at 872 (3d ed. 1984)).

[35] *See* United States v. Rivera, 43 F.3d 1291, 1296 (9th Cir. 1995) (considering the timing of the utterance and "other factors, including the age of the declarant, the characteristics of the event and the subject matter of the statements"); United States v. Delvi, 275 F. Supp. 2d 412, 415 (S.D.N.Y. 2003) (considering the temporal gap, as well as "the characteristics of the event; the subject matter of the statement; whether the statement was made in response to an inquiry; and the declarant's age, motive to lie and physical and mental condition"); Williams, *supra* note 19, at 759 (recommending a comprehensive, but unwieldy list of thirteen factors and providing no information on how judges should balance them).

following five factors: 1) time lapse between the startling event and the statement; 2) the declarant's motive to lie; 3) consistency within the statement itself and across any other statements made by the declarant that may exist; 4) sources of possible misperception, including, but not limited to, age, mental or physical infirmities, and implicit or explicit bias; 5) the nature and strength of evidence that corroborates the declarant's statement. If, after considering all five of these factors, the court is convinced that the indicia of trustworthiness outweigh any competing indicia of unreliability, then the excited utterance would be admissible. If, on the other hand, the court determines that the indicia of trustworthiness do not outweigh competing indicia of unreliability, then the evidence must be excluded.

The fifth factor, the nature and strength of corroborating evidence, deserves elaboration. On its face, it might appear that a lack of corroborating evidence weighs in favor of admitting the excited utterance because the proponent has no other way to introduce that same information. And it is possible to imagine sympathetic scenarios that would seem to support that position. Imagine a young man is violently shoved to the ground by a classmate who calls him a homophobic slur before running off. The young man is uninjured, and the incident was neither observed by witnesses nor captured on surveillance video. The only corroborating evidence comes from his mother who plans to testify that immediately after the incident the young man called her deeply upset and told her that his classmate just assaulted him for being gay. It is tempting to say that the young man's excited utterance should be admitted at trial because, without it, the prosecutor might be unable to meet her burden, which would mean that the hateful assault would go unpunished. Our instinct is that a party's need for an excited utterance increases its probative value and should therefore enhance its chances of admission. And indeed, that logic is exactly what courts employ when considering whether to exclude relevant evidence under Federal Rule of Evidence 403 or evidence of prior bad acts under Federal Rule of Evidence 404(b).[36]

However, Federal Rules of Evidence 403 and 404(b) are animated by a very different concern than the rules of hearsay. Whereas Federal Rules of Evidence 403 and 404(b) seek to balance the probative value of relevant evidence against any undue prejudicial effect,[37] the

[36] Old Chief v. United States, 519 U.S. 172, 182–83 (1997); United States v. Benally, 500 F.3d 1085, 1090–91 (10th Cir. 2007).

[37] FED. R. EVID. 403 advisory committee's notes to 1972 proposed rules (explaining that Rule 403 allows for the exclusion of relevant evidence after "balancing the probative value of and need for the evidence against the harm likely to result from its admission"); FED. R. EVID. 404 advisory committee's notes to 1972 proposed rules (explaining that the Rule 404(b) allows for the admission of character evidence relating to the defendant's other crimes or bad acts if the court determines "the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403").

hearsay rules are designed to exclude evidence that is *unreliable*.[38] That distinction is critical.[39] While the fact that the proponent has no other way to introduce the information contained in the excited utterance may increase the statement's probative value, it does not make the statement more reliable. To the contrary, a lack of corroborating evidence *undermines* the statement's reliability and thus must weigh against its admission. Although probative evidence may sometimes be excluded as a result, Amy Cooper's call demands that we strengthen, not dilute, the hearsay rules' protection against unreliable evidence.

III. CONCLUSION

Had Christian Cooper been prosecuted, as so many Black men have, for "threatening" a white woman, Amy Cooper's 911 call would have likely been introduced as *truth* against him. That untenable outcome confirms that the current three-prong standard is not enough; the risk that excited utterances will be the result of fabrication or misperception can no longer be ignored. To date, courts have dismissed calls to outright abolish the excited utterance exception, even when confronted with evidence that the exception rests on outdated psychological theory.[40] Their reticence to take such drastic action stems largely from the fact that the exception is "firmly rooted" in jurisprudence. [41] While the debate surrounding abolishment continues, real reform must be made. The procedural and substantive changes set forth above would allow courts to preserve the "firmly rooted" excited utterance exception but reduce the enormous risk of admitting damaging, unreliable evidence.

[38] *See Egelhoff*, 518 U.S. at 42.
[39] *See* James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203, 242–43 (1995).
[40] White v. Illinois, 502 U.S. 346, 356 n.8 (1992); Idaho v. Wright, 497 U.S. 805, 821 (1990*)*; United States v. Boyce, 742 F.3d 792, 796 (7th Cir. 2014).
[41] *White,* 502 U.S. at 356 n.8; *Wright*, 497 U.S. at 821; *Boyce*, 742 F.3d at 796.