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Res Gestae, The Present Sense Impression Exception and Extrinsic Corroboration Under Federal Rules of Evidence 803(1) and Its State Counterparts

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RES GESTAE, THE PRESENT SENSE IMPRESSION EXCEPTION AND EXTRINSIC CORROBORATION UNDER FEDERAL RULE OF EVIDENCE 803(1) AND ITS STATE COUNTERPARTS

I. Introduction

The present sense impression exception to the hearsay rule is being robbed of its utility. The exception is burdened with an unnecessary additional requirement of extrinsic corroboration. *Res gestae*,[1] a term regarded with disdain by many evidence scholars,[2] may present a solution to this difficult problem which arises in the application of the Federal Rules of Evidence and its state analogues. The disdain surrounding *res gestae* is due primarily to its vague and inaccurate usage.[3] Federal Rules of Evidence 803(1),[4] (2),[5] and (3)[6] share a

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1. *Res gestae* was defined over 100 years ago in the following manner:

> Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged . . . from its inception to its consummation or final completion, or its prevention or abandonment . . . and whatever may be said by either of the parties during the continuance of the transaction, with reference to it . . . form part of the principle transaction and may be given in evidence as part of the *res gestae*.

Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gesta*, 14 AM. L. REV. 817, 822-23 (1881). The important characteristic of *res gestae*, for the purposes of this Note, is the immediacy and close proximity of the declaration to the principal event or condition. For a modern definition of *res gestae* see *infra* note 36.

2. "A term that cannot be defined should be dropped." Thayer, *supra* note 1, at 827; *see also* Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 231 (1922) [hereinafter Morgan]; E. FISCH, FISCH ON NEW YORK EVIDENCE § 1003, at 583-84 (1977) [hereinafter FISCH]. The term has been described as not only "entirely useless, but even positively harmful." 6 J. WIGMORE, EVIDENCE § 1767, at 255 (Chadbourne rev. 1976) [hereinafter WIGMORE].

3. Morgan, *supra* note 2, at 229.

4. The present sense impression exception is reflected in Federal Rule of Evidence 803(1): "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: *Present sense impression*. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FED. R. EVID. 803(1).

5. Rule 803(2) provides the following pertinent provision: "*Excited Utterance*. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FED. R. EVID. 803(2).

6. Declarations of present mental states and bodily conditions are covered in Rule 803(3):

> *Then existing mental, emotional, or physical condition*. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact

common theoretical root, as all three evolved from the ancient doctrine of *res gestae*. Thus, uniform standards of corroboration and extrinsic proof should be applied to all three rules.[7] Such consistency would improve and simplify the way courts apply the most troublesome of these three sibling hearsay exceptions—the present sense impression exception of Rule 803(1).[8]

This Note proposes that the present sense impression exception should be treated uniformly with its two companion rules. This is not to suggest a single standard for the admissibility of the hearsay exceptions that arose from the doctrine of *res gestae*. Rather, these hearsay exceptions in general, and the present sense impression exception in particular, should be applied as codified in the Federal Rules of Evidence. Unless there is a substantial showing that additional requirements for admissibility are required,[9] such additional requirements

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remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

FED. R. EVID. 803(3). Rule 803(3) is a special case of Rule 803(1) and was designed to restrict it. FED. R. EVID. 803(3) advisory committee's note 4. The aspects of 803(3) regarding execution of a will are beyond the scope of this Note.

7. All three of the hearsay exceptions discussed are based on *res gestae* and have similar justifications for admission in spite of the rule against hearsay. C. MCCORMICK, MCCORMICK ON EVIDENCE § 288, at 836 (Cleary 3d ed. 1984) [hereinafter MCCORMICK]. Treating these exceptions uniformly avoids "repugnancies between the reasoning upon which one exception is founded and that by which another is justified . . . ." Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 19 (1937) (discussing hearsay exceptions in general) [hereinafter *Hearsay Rule*]. See, *e.g.*, *infra* notes 118-22 and accompanying text for a discussion of the incongruities between rules 803(1) and 803(2).

8. *Id.*; see also *infra* notes 58-63 for a discussion of some of the difficulties in applying Rule 803(1).

9. One such instance, where an additional requirement of extrinsic corroboration is reasonable, is the so-called *Hillmon II* statement. A *Hillmon II* statement is a statement of intent which not only reflects the state of mind of the declarant (used inferentially to prove future conduct in harmony with that state of mind, *see infra* note 140) but also purports to show the state of mind of another, which might be used inferentially to prove conduct consistent with that state of mind. This is clearly distinct from the *Hillmon* doctrine, because this statement of intention requires the actions of *others* if it is to be fulfilled. *See, e.g.*, United States v. Astorga-Torres, 682 F.2d 1331, 1335-36, 1336 n.2 (9th Cir. 1982), *cert. denied*, 459 U.S. 1108 (1983) (statement of defendant that he intended to bring guards with him admitted subject to limiting instruction that statement be used to show defendant's state of mind and not that of supposed guards); United States v. Pheaster, 544 F.2d 353, 376-80 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977) (witness' statement, "I am going to meet Angelo in the parking lot to get a pound of grass," admitted to prove meeting occurred). The *Pheaster* court noted that the Federal Rules of Evidence incorporated a limitation that the statement only be admitted to prove the declarant's conduct and not the conduct of another. *Id.* at 379. The Second Circuit has adopted the view that *Hillmon II* statements may be admitted against a non-declarant when there is independent evidence connecting the statement and the activities of the non-declarant. United States v. Delvecchio, 816 F.2d 859, 863 (2d Cir. 1987). In *Delvecchio*, there was no independent evidence of the non-declarant's presence at the

should be abandoned. This argument is based on the rationale that the Rule 803(1) present sense impression exception to the hearsay rule carries with it substantial reliability[10] and therefore should be accorded uniform treatment with Rules 803(2) and (3). Part II of this Note presents an overview of the hearsay rule and its general historical development, as well as background on the history of the *res gestae* doctrine to provide a clearer understanding of the Federal Rules discussed. Part III examines the current analysis of these three Rule 803 hearsay exceptions, and compares the requirements of external corroboration of hearsay statements under each of Rules 803(1), (2) and (3) to illustrate some inconsistencies in the application of these rules. Part III concludes that it is essential that a concise and historically consistent method of applying the present sense impression exception be used, and suggests an approach that harmonizes Federal Rules 803(1), (2) and (3), without adding an additional requirement of corroboration.

II. History of the Hearsay Rule and *Res Gestae*

The historical evolution of the hearsay exclusionary rule, and of the resulting exceptions to the rule, has had an influence on the manner in which hearsay exceptions are applied today.[11]

A. Development of the Hearsay Rule

Hearsay evidence[12] is generally excluded because out of court state-

meeting. Thus, the declarant's statement should have been excluded. *Id.* at 863. Where such independent evidence is available, *Hillmon II* statements are admitted. United States v. Sperling, 726 F.2d 69, 74 (2d Cir.), *cert. denied*, 467 U.S. 1243 (1984) (eyewitness testimony of Drug Enforcement Agency agents linked defendant's conduct to the declarant's statement). This additional requirement of extrinsic corroboration seems reasonable. One of the primary reasons for considering *Hillmon* statements reliable enough to admit over the hearsay rule is the unique perception the declarant has of her own state of mind. This element is wholly lacking in attempting to divine the intentions of another. *See infra* note 144.

10. *See* MCCORMICK, *supra* note 7, § 253, at 753.

11. *See infra* notes 38-41 and accompanying text.

12. The hearsay rule declares inadmissible as evidence any statement other than that made by a witness while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. *See* FED. R. EVID. 801(c). The "statement" can be oral, written, or even non-verbal conduct if intended as an assertion. FED. R. EVID. 801(a). The "declarant" is the person who makes the statement. FED. R. EVID. 801(b). The rationale for the rule against admitting hearsay evidence is that the credibility of the witness is a critical factor in weighing the truth of his statement. When the statement is made out of court, without the usual benefit of cross-examination and without the witness's demeanor being subject to evaluation by the trier of fact, it does not bear the requisite indicia of veracity. WIGMORE, *supra* note 2, § 1766, at 250-52. McCormick notes: "A definition cannot, in a sentence or two, furnish ready answers to all the complex

ments are believed to lack reliability.[13] Credibility of hearsay testimony, as of all testimony, depends upon a witness' perception, memory, narration and sincerity.[14] The rule against admitting hearsay evidence is designed to ensure compliance with the "traditional guarantors of credibility."[15] These guarantors are the taking of an oath, the witness' personal presence at trial, and submission of the witness to cross-examination.[16]

The hearsay exclusionary rule is ancient, and probably owes its emergence to the development of the jury system.[17] Testimony in court was permitted only by witnesses who had personal knowledge

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problems of an extensive field, such as hearsay. It can, however, furnish a helpful general focus and point of beginning." MCCORMICK, *supra* note 7, § 246, at 729. McCormick then uses Rules 801(a)-(c) as his starting point. A standard definition is provided in the following:

> [Hearsay is] [e]vidence not proceeding from the personal knowledge of the witness, but from the mere repetition of what he has heard others say. That which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity.

BLACK'S LAW DICTIONARY 649 (5th ed. 1979).

13. *See* MCCORMICK, *supra* note 7, § 245, at 726-29. McCormick states that the out-of-court statement is not subject to the "ideal conditions" to which in-court testimony is subject. *See infra* note 15. "As the utterer is not under oath and is not subject to cross examination, his testimony is ordinarily deemed too untrustworthy to be received." Morgan, *supra* note 2, at 231. Distinct from constitutional considerations there are three reasons to exclude hearsay evidence as unreliable. *See infra* note 29. First, the declarant cannot be cross-examined on the verity of his statement. Second, the declarant's statement was not made under oath or threat of perjury sanctions. Finally, the demeanor of the declarant is hidden from the trier of fact. MCCORMICK, *supra* note 7, § 245, at 727-28.

14. MCCORMICK, *supra* note 7, § 245, at 726. These factors influence all testimony: (1) *Perception*: Did the witness perceive the event and perceive it accurately? (2) *Memory*: Has the witness' memory altered his impression of his perception? (3) *Narration*: Does the witness' language convey his impression accurately? (4) *Sincerity*: Is the witness consciously misrepresenting his perception of the event? *Id.*; *see* Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974) [hereinafter Tribe]. In order to minimize the deleterious effect of these factors upon testimony, Anglo-American courts developed three guarantors—oath, personal presence at trial, and cross-examination. MCCORMICK, *supra* note 7, § 245, at 726-27.

15. MCCORMICK, *supra* note 7, § 245, at 726-27. These guarantors are oath, personal presence at trial, and cross-examination. The oath or affirmation is "calculated to awaken his conscience and impress his mind with his duty to [testify truthfully]." FED. R. EVID. 603. Personal presence at trial allows in-court observation of the declarant's demeanor, and protects against errors in the reporting of her out of court statement. MCCORMICK, *supra* note 7, § 245, at 727. Cross-examination is the main justification for the exclusion of hearsay. *Id.* at 728. Cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 WIGMORE, *supra* note 2, § 1367, at 32.

16. *See* MCCORMICK, *supra* note 7, § 245, at 726-28.

17. *See, e.g.*, 5 WIGMORE, *supra* note 2, § 1364, at 12-14. Morgan, however, chose to

of the facts about which they were testifying, and not by witnesses who merely recounted what others had told them.[18] Originally, the jury was really nothing more than a collection of state-appointed witnesses who passed judgment on the accused.[19] Today, the functions of the jury and witnesses are separate, and the split between the functions of the jury and witnesses led to a strict hearsay rule.[20] It became necessary to ensure that testimony, which the jury would weigh as the finder of fact, bore at least minimal reliability.[21] As soon as the rule excluding hearsay developed,[22] however, it was clear that not all evidence that could conceivably be called "hearsay" should be excluded.[23] Accordingly, numerous exceptions to the hearsay exclusionary rule evolved.[24] The modern trend is to be "less afraid"

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view the hearsay rule as a product of the adversarial system. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 257-58 (1937).

18. J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 519 (1898). Testimony was only permitted by witnesses with knowledge of the underlying event and "not by witnesses who only knew what some one else had said to them." *Id.*

19. *Id.* at 19-21.

20. *Id.* at 519. "The contrast between the function of the jury and that of witnesses . . . has led to a steady and rigid adherence to this general doctrine of hearsay prohibition." *Id.*

21. *See id.* at 85-101. Hearsay testimony was disparaged as "a story out of another man's mouth" and as a "tale of a tale." 5 WIGMORE, *supra* note 2, § 1364, at 19 n.32. Cross-examination would allow the trier of fact to examine the witness' memory, perception, narration, and sincerity. MCCORMICK, *supra* note 7, § 245, at 726-27.

22. The rule against hearsay became part of the English common law in the late seventeenth century. 5 WIGMORE, *supra* note 2, § 1364, at 25.

23. THAYER, *supra* note 18 at 519-20. "But there came a large and miscellaneous number of so-called 'exceptions.' . . . For example . . . dying declarations of persons killed were reported and acted on in judicial proceedings. We find these used by a complaint witness as far back as 1202, and used in evidence to the jury in 1721." *Id.* (footnotes omitted).

24. *Id*; *see, e.g.*, FED. R. EVID. 803(1)-(24). The exceptions share two common requirements: necessity and trustworthiness. Necessity in the case of the 803 exceptions lies in the fact that the hearsay statement is likely to be more reliable than the declarant's testimony. Trustworthiness is supplied by the circumstances under which the hearsay statement was made, and serves as a substitute for cross-examination. *Hearsay Rule*, *supra* note 7 at 11-12; FED. R. EVID. 803 advisory committee notes. Courts and commentators have argued that the hearsay rule should be relaxed. "The exceptions are not . . . static, but may be enlarged from time to time if there is no material departure from the reason of the general [hearsay] rule." Snyder v. Massachusetts, 291 U.S. 97, 107 (1934) (citations omitted). The modern trend is to ignore labels such as "present sense impression," and concentrate on two factors that underlie most exceptions to the hearsay rule: (1) the necessity of accepting hearsay testimony rather than direct testimony subject to cross-examination; and (2) the circumstantial probability of the trustworthiness of the hearsay statement. Chestnut v. Ford Motor Co., 445 F.2d 967, 972 n.5 (4th Cir. 1971) (discussing excited utterance exception); *see* Morgan, *The Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 218 (1948). Morgan cynically noted that "it is a bit difficult to explain to a layman why [hearsay exceptions function so strangely] [b]ut laymen are so dumb anyway!" *Hearsay Rule*, *supra* note 7 at 16; Tribe,

of a jury's ability to weigh evidence properly than in the past,[25] and to strike a balance between the probative value of the evidence and its possible prejudicial effect on the jury.[26]

Exceptions to the hearsay rule developed as soon as the rule itself did,[27] but Rule 803[28] hearsay exception cases may implicate important constitutional rights quite apart from any strictly evidentiary considerations.[29] The most important of these constitutional rights is

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supra note 14, at 974 (suggesting more flexible approach to hearsay rules and that hearsay categories be used as illustrations only). Others have maintained that existing hearsay exceptions be narrowed. *See e.g.*, Waltz, *Present Sense Impressions and the Residual Exceptions: A New Day for "Great" Hearsay?*, 2 LITIGATION 22 (1975) (calling for additional requirements for admission of evidence under the "sleeper exception" of Rule 803(1)) [hereinafter Waltz I].

25. Thayer, Bedingfield's case—Declarations as a Part of Res Gesta, 15 AM. L. REV. 71 at 91 [hereinafter Thayer]. These sentiments were present even in the "modern" 1880's:

> Judges are, in general, less afraid of juries now than they used to be; one is reminded . . . of . . . Reg. v. Birmingham, 1 B. & S. 763 (1861) : 'People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence and discuss its weight.'

Id. (footnote omitted).

26. *See* FED. R. EVID. 403 & advisory committee's note.

27. *Hearsay Rule*, *supra* note 7, at 11-12. The initial exceptions, however, were not arrived at in a coherent manner.

> [T]here never has been a time when all hearsay was rejected; and it is difficult to tell upon what basis the courts proceeded, when they began to discriminate between that which should be received and that which should be excluded. The early opinions reveal very little except that the judges were not doing much more than applying their own rough notions of psychology, and the generally accepted idea that litigants should produce the best available evidence. . . .
>
> The assertion is ventured that the hearsay rule in its present form is the result of a conglomeration of conflicting considerations modified by historical accident.

Id.

28. The title of Rule 803 indicates that the "[a]vailability of [the] [d]eclarant [is] [i]mmaterial." This admissibility requirement is important both at the evidentiary level and the constitutional level. FED. R. EVID. 803; *see infra* note 29.

29. Hearsay evidence may offend a criminal defendant's constitutional right of confrontation. The sixth amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. The sixth amendment is made binding on the states by the fourteenth amendment. States may not deny this right. Pointer v. Texas, 380 U.S. 400, 403 (1965). By its very nature, hearsay testimony may not allow the accused to confront the declarant. As hearsay testimony is, by definition, testimony outside the present proceeding, the right of the accused to confront the witness against him is implicated. *See generally* MCCORMICK, *supra* note 7, § 252, at 749-52.

The right of confrontation operates in four crucial ways which parallel the reasons cited regarding the admissibility of hearsay testimony. *See supra* note 15. Indeed, they have similar underpinnings. MCCORMICK, *supra* note 7, § 252, at 750-52. First, it ensures that the accused has a proper opportunity for effective cross-examination. California v. Green, 399 U.S. 149, 158 (1970); *Pointer*, 380 U.S. at 406-07. It allows the accused to

a criminal defendant's right of confrontation.[30] This countervailing consideration supports a narrow construction of the present sense impression exception in certain cases.[31] Other than these crucial constitutional concerns, under the categorical approach of the Federal Rules of Evidence, relevance,[32] probative value[33] and personal knowledge[34] are the guideposts to admissibility of evidence.[35]

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probe the motivations of the witness and discover inconsistencies. Cross-examination is "an inviolable, indispensable element of confrontation." Long v. State, 694 S.W.2d 185, 188 (Tex. Ct. App. 1985), *aff'd*, 742 S.W.2d 302 (Tx. Sup. Ct. 1986), *cert. denied*,108 S. Ct. 1301 (1987); Chambers v. Mississippi, 410 U.S. 284, 295 (1973). The cross-examiner is permitted to test the witness' story, veracity, perceptions and memory. United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979). Denial of this right to test a witness before the triers of fact would be "constitutional error of the first magnitude." Davis v. Alaska, 415 U.S. 308, 318 (1974) (quoting Brookhart v. Javis, 384 U.S. 1, 3 (1966)). Second, the right of confrontation ensures testimony under oath, impresses the witness with the seriousness of the matter and guards against perjury. *Green*, 399 U.S. at 158. Third, it is the literal right to confront an adverse witness face to face that forms the core of this sixth amendment right. The accused should be given the opportunity to react to testimony produced against him. Mattox v. United States, 156 U.S. 237, 244 (1895). Fourth, the right enables the jury to observe the subtle nuances of the behavior and demeanor of the witness. There are subtle nuances in a witness' demeanor that give the jury clues as to the veracity of testimony. MCCORMICK, *supra* note 7, § 245, at 727. Care must be used in evaluating potential hearsay testimony, as the Federal Rules and the confrontation clause are not co-extensive. While "the [s]ixth [a]mendment's [c]onfrontation [c]lause and the evidentiary hearsay rule stem from the same roots [the] Court has never equated the two." Dutton v. Evans, 400 U.S. 74, 86 (1970). Where does this leave our analysis? The Supreme Court has broadly held that a hearsay statement must possess sufficient "indicia of reliability" to be allowed before the jury. *Dutton*, 400 U.S. at 89 (1970). If the statement, however, is within a "firmly rooted" hearsay exception, it is assumed to possess sufficient reliability. *Green*, 399 U.S. at 161. The exception presented here, arguably of the "firmly rooted" variety, should withstand constitutional inspection. In non-criminal cases a less rigorous standard is applied. State v. Williams, 144 Ariz. 479, 698 P.2d 724 (1985). The sixth amendment is subject to exceptions which do not interfere with its spirit, and "[s]uch exceptions were obviously intended to be respected." *Mattox*, 156 U.S. at 243.

30. *Mattox*, 156 U.S. at 243; *see* MCCORMICK, *supra* note 7, § 252, at 749-52.

31. *See* California v. Green, 399 U.S. 149, 155, 161 (1970); Stein v. New York, 346 U.S. 156, 196 (1953) (confrontation clause is not mere codification of hearsay rule).

32. Rule 401 defines relevant evidence: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

33. This intention is clear from Rules 402 and 403. Rule 402 provides: "All relevant evidence is admissible, except as otherwise provided . . . ." FED. R. EVID. 402. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." FED. R. EVID. 403.

34. Rule 602—Lack of Personal Knowledge, states the following: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony . . . ." FED. R. EVID. 602. It is clear that it is the hearsay *declarant* who must have personal knowledge of the event. The in-court wit-

B. The Doctrine of *Res Gestae* and the Common Law History of Rules 803(1), (2) and (3)

The common law doctrine of *res gestae*[36] has fallen into disrepute primarily because of its use as a substitute for exact analysis by courts and practitioners.[37] *Res gestae* has been used to describe statements so spontaneous as to be considered part of a transaction rather than merely a witness' account of it.[38] Often the phrase was used to admit evidence in a common-sense, if somewhat inexact fashion.[39] One commentator has noted that the phrase *res gestae* has "done nothing but bewilder and perplex."[40] Scholars have attempted to dissipate the confusion and ease analysis by categorizing the separate classes of possible *res gestae* exceptions to the hearsay rule.[41]

Today, the *res gestae* doctrine is divided into at least four discrete areas:[42] (1) declarations of present sense impressions;[43] (2) excited utterances;[44] (3) declarations of present bodily conditions;[45] and (4)

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ness normally only has personal knowledge of the declarant's statements. J. WEINSTEIN, WEINSTEIN'S EVIDENCE, ¶ 602[01] (1987) [hereinafter WEINSTEIN] (citing United States v. Stratton, 779 F.2d 820, 829-30 (2d Cir. 1985) (hearsay rule requires declarant have personal knowledge of events recounted)). Personal knowledge may "appear from [the] statement or be inferable from circumstances." FED. R. EVID. 803 advisory committee's note.

35. *See* FED. R. EVID. 403, *supra* note 33. For a recent application Rule 403 "balancing" analysis, see United States v. Driggs, 823 F.2d 52, 54 n.2 (3d Cir. 1987) (citing United States v. Schwartz, 790 F.2d 1059, 1061 (3d Cir. 1986)).

36. In order to form part of the *res gestae* a statement must form "a part of the transaction, occurrence, or event that it describes." B. JONES, EVIDENCE § 10:1, at 251 (Gard 6th ed. 1972). The common characteristic of such statements is their spontaneity. MCCORMICK, *supra* note 7, § 290 at 838; see *supra* note 1 and accompanying text for a more detailed definition.

37. Morgan, *supra* note 2, at 229. As Morgan puts it:

> The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in decisions dealing with the admissibility of evidence as "res gestae." It is probable that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking.

Id.

38. *See* Travelers Ins. Co. v. Mosely, 75 U.S. 397, 401 (1869) (statements of insured, as to bodily condition, admitted to prove he had fallen down stairs).

39. *See, e.g.*, FISCH, *supra* note 2, § 1003, at 583-84.

40. Morgan, *supra* note 2, at 229.

41. *Id.* at 231-39.

42. MCCORMICK, *supra* note 7, § 288, at 835. Morgan, however, would argue for seven subdivisions. *See* Morgan, *supra* note 2.

43. MCCORMICK, *supra* note 7, § 298, at 860; see *supra* note 4 for a description of the present sense impression exception and Rule 803(1).

44. MCCORMICK, *supra* note 7, § 297, at 854; see *supra* note 5 for a description of the excited utterances exception and Rule 803(2).

declarations of present mental states.[46] Today's present sense impression exception is found in Federal Rule of Evidence 803(1)[47] and its many state analogues. This rule has a firm historical foundation and, although it was somewhat unfamiliar when the Federal Rules were introduced, it was not a mere invention of the drafters.[48] The hearsay exception for excited utterances[49] is codified at Rule 803(2).[50] The last two remnants of *res gestae*, hearsay exceptions for declarations of present bodily conditions and mental states, are found in Rule 803(3).[51]

Courts still occasionally speak in terms of *res gestae* rather than one of the more specific subsets of the doctrine.[52] The historical confusion surrounding the *res gestae* exceptions has led some to call for a more

45. MCCORMICK, *supra* note 7, § 291, at 838; see *supra* note 6 for a description of the present bodily conditions exception and Rule 803(3). This aspect of Rule 803(3) is not later referenced. The present mental states exception of Rule 803(3) is sufficient for the purposes of this Note.

46. MCCORMICK, *supra* note 7, § 295, at 846; see *supra* note 6 for a description of the present mental states exception of Rule 803(3).

47. *See supra* note 4 and accompanying text.

48. *See supra* note 4. Morgan's sixth type of exception has essentially the same characteristics:

> *(6) Cases in which the utterance is contemporaneous with a non-verbal act, independently admissible, relating to that act and throwing some light upon it.* Here the utterance is offered to prove its truth and is obnoxious to the hearsay rule. Is there any justification for admitting it? . . . First, it is in essence a declaration of a presently existing state of mind, for it is nothing more than an assertion of his presently existing sense impressions. As such it has the quality of spontaneity . . . . Second, since the statement is contemporaneous with the event, it is made at the place of the event. Consequently, the event is open to perception by the senses of the person to whom the declaration is made, and by whom it is usually reported on the witness stand.

Morgan, *supra* note 2, at 236 (footnotes omitted, emphasis in original).

49. Morgan classified such statements as the following:

> *(7) Cases in which the utterance is made concerning a startling event by a declarant laboring under such a stress of nervous excitement, caused by that event, as to make such utterance spontaneous and unreflective.* . . . . Its sole guaranty of trustworthiness lies in its spontaneity. . . . [P]rior to 1880 . . . contemporaneousness rather than spontaneity was emphasized, although the latter was clearly recognized as highly important. . . . [I]t is only since the publication of Dean Wigmore's work that this exception to the hearsay rule has gained wide recognition.

Id. at 238 (footnotes omitted, emphasis in original).

50. *See supra* note 5 and accompanying text.

51. *See supra* note 6 and accompanying text.

52. Cooper v. State, 765 P.2d 1211, 1214 (Okla. Cr. 1988); People v. Ayala, 142 A.D.2d 147, 534 N.Y.S.2d 1005, 1016 (2d Dep't 1988); People v. Sauer, 177 Ill. App. 3d 870, 127 Ill. Dec. 117, 532 N.E.2d 946 (2d Dep't 1988); MCCORMICK, *supra* note 7, § 288, at 835.

narrow interpretation of the current exceptions.[53] There is little reason, however, to permit the past misuse of the inexact doctrine of *res gestae* to influence how the present sense impression exception is applied.[54]

III. Rule 803: Current Case Analysis—Internal Inconsistencies

The present sense impression exception to the hearsay rule has been the subject of debate and controversy.[55] Certain of these polemics are founded in the apparent novelty of the exception, while others emanate from inconsistencies among the present sense impression, the excited utterance, and the state of mind exceptions.[56] A coherent method for evaluating these three hearsay exceptions can be developed by analyzing the derivation of the exceptions.[57]

A. Rule 803(1) and the Question of Corroboration

The present sense impression exception to the hearsay rule is not new or novel.[58] Its roots date back to the early common law,[59] although some courts relied on the exception without explicit reference to it.[60] Today, at least twenty-nine states recognize the present

53. *See, e.g.*, Waltz I, *supra* note 24, at 22 (calling for additional requirements for admission of evidence under "sleeper exception" of Rule 803(1)).

54. *See infra* notes 151-55.

55. *See infra* notes 58, 88 and accompanying text.

56. *See infra* notes 114-48 and accompanying text.

57. See *infra* notes 160-85 for a suggested approach.

58. The exception was approved by McCormick, although Wigmore might disagree:

> Although [present sense impression] statements lack whatever assurance of reliability there is in the effect of an exciting event, other factors offer safeguards. First, since the report concerns observations being made at the time of the statement it is safe from any error caused by a defect of the declarant's memory. Second, a requirement that the statement be made contemporaneously with the observation means that there will be little or no time for calculated misstatement. Third, the statement will usually have been made to a third person . . . who, being present at the time and scene of the observation, will probably have an opportunity to observe the situation himself and thus provide a check on the accuracy of the declarant's statement, *i.e.*, furnish corroboration. Moreover, since the declarant himself will often be available for cross-examination, his credibility will be subject to substantial verification before the trier of fact.

MCCORMICK, *supra* note 7, § 298, at 860 (footnotes omitted).

59. One of the earliest references to the present sense impression exception was made by James Bradley Thayer. Thayer, *supra* note 25. It apparently fell into disuse, probably because of a misunderstanding of its theoretical underpinnings. Thayer pointed, with some disdain, to cases spanning 1693 to 1869 to support the existence of this exception. *See, e.g.*, Insurance Co. v. Mosley, 75 U.S. (8 Wall) 397 (1868).

60. Emens v. Lehigh Valley R. Co., 223 F. 810 (N.D.N.Y. 1915), *cert. denied*, 242 U.S. 627 (1916) (question was whether train had signaled before collision between car and train). Witness' statement, "Why don't the train whistle?," *Id.* at 825, was disinter-

sense impression exception to the hearsay rule in their codified rules of evidence, most of which have been patterned after the Federal Rules of Evidence.[61] The elements required for a statement to be admitted as a present sense impression under the Federal Rules are: (1) the declarant must have personally witnessed the event described;[62] (2) the declaration must be an explanation or description of the event;[63] and (3) the declaration must be contemporaneous with the event.[64] The rationale for the present sense impression exception is that substantial contemporaneousness "negative[s] the likelihood of deliberate or conscious" misstatement.[65] A perfect example of a present sense impression is a radio announcer's play-by-play description of a baseball game.[66] In essence, the declarant is merely a conduit for

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ested, spontaneous, and relevant, and therefore became part of the *res gestae*. *Id.* at 824-26.

61. *See, e.g.*, ALASKA R. EVID. 803(1); ARIZ. R. EVID. 803(1); ARK. R. EVID. 803(1); CAL. EVID. CODE § 1241; COLO. R. EVID. 803(1); FLA. EVID. CODE § 90.803(1); HAWAII R. EVID. 803(b)(1); IDAHO R. EVID. 803(1); IOWA R. EVID. 803(1); KAN. CODE CIV. P. § 60-460(d)(1); ME. R. EVID. 803(1); MINN. R. EVID. 801(d)(1)(D); MONT. R. EVID. 803(1); NEV. REV. STAT. tit. 4, § 51.085; N.H.R. EVID. 803(1); N.J.R. EVID. 63(4)(a); N.M.R. EVID. 803(1); N.C.R. EVID. 803(1); N.D.R. EVID. 803(1); OHIO R. EVID. 803(1); OKLA. EVID. CODE § 2803(1); S.D.R. EVID. § 19-16-5; TEX. R. EVID. 803(1); UTAH R. EVID. 803(1); VT. R. EVID. 803(1); WASH. R. EVID. 803(a)(1); W. VA. R. EVID. 803(1); WIS. R. EVID. 908.03(1); WYO. R. EVID. 803(1). Colorado's rule requires precise contemporaneity and deletes the words "or immediately thereafter" found in the Federal Rule. Florida and Ohio add language that a present sense impression is admissible unless the statement is made under circumstances that indicate its lack of trustworthiness. FLA. EVID. CODE § 90.803(1); OHIO R. EVID. 803(1). Minnesota defines its present sense impression as non-hearsay. MINN. R. EVID. 801(d)(1)(D). An express provision that the substance of the statement be corroborated is not found among these statutes.

62. Zenith Radio Corp. v. Matsushita Electric Indus. Corp., 505 F. Supp. 1190, 1228 n.48 (E.D. Pa. 1980) (no mention of corroboration requirement).

63. *Id.*

64. *Id.*; *see also In re* Japanese Electronic Prod., 723 F.2d 238, 303 (3d Cir. 1983).

65. FED. R. EVID. 803, advisory committee's note. *See* United States v. Narisco, 446 F. Supp. 252, 288 (D.C. 1977). Courts focus on the "substantial contemporaneity" of the event and statement as a guarantor of veracity. *See, e.g.*, United States v. Peacock, 654 F.2d 339, 350 (5th Cir. 1981), *quoted in* United States v. Andrews, 765 F.2d 1491, 1501 (11th Cir. 1985).

66. The baseball analogy helps explain several important aspects of the present sense impression:

> If you turn on your radio during a baseball game, you will be inundated by present sense impressions. The utterances of the sportscaster describing and explaining what he observes on the playing field as it is taking place are quintessential present sense impressions. But the sportscaster's between-innings or post-game analysis would not qualify for this hearsay exception, for want of contemporaneity.
>
> If a present sense impression is made under stress of excitement from the event or condition that it describes or explains, then it overlaps with the exception for an excited utterance. . . . This is often the case. For example, if a

his immediately preceding sense impressions.

One point of controversy is whether statements of present sense impression also require corroboration[67] by an "equally percipient witness,"[68] or some other corroboration of the *substance* of the declaration before allowing its admission into evidence.[69] Congress chose not to include an express corroboration provision under Rule 803(1), although the advisory committee comments do mention the *possibility* of an equally percipient witness.[70] Several courts, however, have determined that some corroboration is necessary,[71] although

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sportscaster is excited by the sporting event that he is watching, his play-by-play description qualifies both as a present sense impression and an excited utterance. If he is bored by it, his description qualifies only as a present sense impression.

D. BINDER, HEARSAY HANDBOOK 89-90 (2d ed. 1983).

67. MCCORMICK, *supra* note 7, § 298, at 863 n.24. It has been noted that corroboration is an added assurance of accuracy; this does not, however, make it a requirement. "The legal mind is on occasion seemingly unable to resist the temptation to drive in one more nail, albeit it be a crooked one." *Id.* The theoretical foundation of 803(1) renders it reliable enough that corroboration not be required. "[I]ts underlying rationale offers sufficient assurances of reliability without the superaddition of a further requirement of corroboration." *Id.* at 862. *Cf.* E. MORGAN, BASIC PROBLEMS OF EVIDENCE 340-41 (1962) (explaining how requirements of admission as present sense impression provide reliability, and how witness may be cross-examined as to circumstances surrounding declarant's statement, which enables trier of fact to put "fair value" (*i.e.*, weight) upon declarant's statement).

68. An "equally percipient witness" is one who was present at the time and place that the statement was uttered. In other words, such a witness is one "who would have equal opportunities to observe and hence check a misstatement." Houston Oxygen v. Davis, 139 Tex. 1, 6, 161 S.W.2d 474, 477 (1942); *see* Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 883 (1981) [hereinafter Waltz II].

69. *See* Waltz II, *supra* note 68, at 885.

70. Congress included express corroboration provisions in Rules 803(24) and 804(b)(3). FED. R. EVID. 803(24), 804(b)(3). For instance Rule 804(b)(3), statements against interest, explicitly states that a hearsay statement "is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3). Furthermore, adding this sort of requirement to the present sense impression exception would be a "radical departure" from the general pattern of exceptions to the hearsay rule. Booth v. State, 306 Md. 313, 329-30, 508 A.2d 976, 983-84 (1986).

71. *See* Commonwealth v. Blackwell, 343 Pa. Super. 201, 217-18, 494 A.2d 426, 434-35 (1985) (victim's statements over phone to police dispatcher, describing his abduction, robbery and abandonment were not within present sense impression exception as they were not made in presence of another person); Jones v. State, 65 Md. App. 121, 123-25, 499 A.2d 511, 512-13 (1985), *rev'd*, 311 Md. 23, 532 A.2d 169 (1987) (testimony of fellow officer of defendant as to his overhearing truckdriver's radio conversation not admitted); Hewitt v. Grand Trunk Western R.R. Co., 123 Mich. App. 309, 316-17, 333 N.W.2d 264, 267 (1983) (wrongful death action; officer's record of statement of witness that decedent had jumped in front of train, held not admissible as present sense impression, as officer, who was not present at time of accident, could not corroborate truth of witness' statements); State v. Case, 100 N.M. 714, 717-18, 676 P.2d 241, 244-45 (1984) (statement,

others have dispensed with the requirement entirely.[72] A recent New York case, *People v. Luke*,[73] achieved notoriety[74] by raising a new issue with respect to hearsay in New York. In *Luke*, the court answered the question of whether a telephone conversation can supply reliability sufficient to admit the declarant's telephonic statement.[75] The court answered in the affirmative.[76] This type of "boot-strap" argument has been accepted in excited utterances cases.[77] In *Luke*, a burglary case, the state sought to introduce as evidence two tape recordings between a citizen and a 911 emergency operator.[78] Applying the present sense impression exception, the court allowed admission of the evidence,[79] but found both the excited utterance[80] and the busi-

"There goes Nancy Mitchell," made several days after her supposed murder, excluded because declarant had not seen her, and statement was of questionable nature).

72. *See* Duke v. American Olean Tile Co., 155 Mich. App. 555, 570-71, 400 N.W.2d 677, 684 (1986) (decedent's statements during telephone conversation approximately three minutes after slip and fall, "The floor was wet, my feet went out from under me, and I fell," admitted as present sense impression; whether conversation took place as plaintiff remembered, or as other witnesses did was question of fact for jury); State v. Flesher, 286 N.W.2d 215, 216-18 (Iowa 1979) (testimony of victim's husband concerning telephone conversation with victim shortly before murder was admissible as a present sense impression); People v. Slaton, 135 Mich. App. 328, 334-35, 354 N.W.2d 326, 330 (1984) (murder victim's taped emergency phone call containing pleas for help and mercy admissible as both present sense impression and excited utterance); State v. Rendon, 148 Ariz. 524, 528, 715 P.2d 777, 781 (Ct. App. 1986) (police recording of neighbor's description of burglary in progress admissible as present sense impression; stressed contemporaneity); Commonwealth v. Coleman, 458 Pa. 112, 117-19, 326 A.2d 387, 390 (1974) (testimony of murder victim's mother regarding phone call with her daughter ten minutes prior to her being found dead held admissible). *Cf.* Booth v. State, 306 Md. 313, 330-31, 508 A.2d 976, 984-85 (1986) (content of murder victim's statement, identifying woman in apartment, to witness over phone, offered sufficient evidence that victim was describing events as he perceived them, thus they were admissible as present sense impression).

73. 136 Misc. 2d 733, 519 N.Y.S.2d 316 (Sup. Ct. 1987).

74. People v. Luke, 136 Misc. 2d 733, 519 N.Y.S.2d 316 (Sup. Ct. 1987). The case was commented upon in the *New York Law Journal*. 198 N.Y.L.J. 46, Sept. 3, 1987, at 1, col. 2 (case incorrectly referred to as *People v. Duke*). It was also noted in the *ABA Journal*. *Trends in the Law: Ring My Bell*, ABA J., Dec 1, 1987, at 108, col. 1 (same incorrect reference).

75. *Luke*, 136 Misc. 2d at 739, 519 N.Y.S.2d at 320 (dictum). The issue presented in the *Luke* case was "whether a telephone conversation can ever supply an indicia of reliability sufficient to support an inference that what was reported by the declarant reflects the sense of what confronted him." *Id.*

76. *Luke*, 136 Misc. 2d at 739, 519 N.Y.S.2d at 320.

77. United States v. Moore, 791 F.2d 566, 570 (7th Cir. 1986) (excited statement itself can qualify as excited utterance under Rule 803(2)). *See infra* notes 131-33 and accompanying text.

78. *Luke*, 136 Misc. 2d at 739, 519 N.Y.S.2d at 320.

79. *Id.* at 136 Misc. 2d 734-35, 519 N.Y.S.2d at 317-20.

80. See *supra* note 5 and accompanying text, for a description of the excited utterance exception to the hearsay rule.

ness records[81] exceptions inapplicable.[82]

The courts of New York had considered the corroboration issue only once prior to *Luke*.[83] In *People v. Watson*,[84] the prosecution sought to introduce statements made in a telephone conversation with the deceased the evening before her body was discovered.[85] The trial court admitted the non-excited statement of the victim indicating that the superintendent was at the door to place the accused at the scene of the crime.[86] The appellate division reversed on the grounds that the present sense impression was inapplicable because the witness was not present to observe the event described by the declarant.[87] Although the court did not decide the issue, it is arguable that if the declaration had been excited, and thus admissible as an excited utterance, the case would not have been reversed. The result reached in *Watson* is an excellent example of how a requirement of corroboration can be used to weaken the present sense impression exception, while such a re-

81. *See* FED. R. EVID. 803(6).

82. *Luke*, 136 Misc. 2d at 734, 519 N.Y.S.2d at 317.

83. People v. Watson, 109 Misc. 2d 71, 437 N.Y.S.2d 1016, *rev'd* 100 A.D.2d 452, 474 N.Y.S.2d 978 (2d Dep't 1984) (in homicide prosecution, trial court admitted testimony regarding telephone conversation that witness had with murder victim). The appellate division reversed, stating that the testimony did not come within the present sense impression because the *witness was not present* to observe the event described by the victim and there were no other indicia of the statement's reliability. People v. Watson, 100 A.D.2d 452, 463-66, 474 N.Y.S.2d 978, 986-87. Further, admission into evidence of such statement was an error of constitutional dimension, in violation of defendant's right of confrontation. *Id.*

84. *Watson*, 109 Misc. 2d 71, 437 N.Y.S.2d 1016, *rev'd*, 100 A.D.2d 452, 474 N.Y.2d 978.

85. *Watson*, 109 Misc. 2d at 71-72, 437 N.Y.S.2d at 1017. During a phone conversation indicating that the victim was preparing some codfish and potatoes, her doorbell rang. She returned and said, "[T]he super is at the door. I am going to let him in, so call me back if you have time." The victim's bathtub had a leak and the super was to come and check it. The victim's body was found the next day, and there was an uneaten plate of codfish and potatoes. Watson denied that he had even been in the victim's apartment that day. The trial court admitted the conversation for its truth to place Watson at the scene of the crime. *Id.* at 72-73, 78-79, 437 N.Y.S.2d at 1017, 1020-21.

86. *Watson*, at 72-73, 437 N.Y.S.2d at 1017-21.

87. *Watson*, 100 A.D.2d at 464-66, 474 N.Y.S.2d at 986-87. The court noted that unless a hearsay exception is "firmly rooted," additional indicia of reliability are required before admission of evidence and the present sense impression exception is not "firmly rooted." *Id.*; Ohio v. Roberts, 448 U.S. 56, 66 (1980). The excited utterance, however, is in this category. State v. Yslas, 139 Ariz. 60, 65, 676 P.2d 1118, 1123 (1984); State v. Daniels, 380 N.W.2d 777, 785-86 (Minn. 1986); State v. Bawdon, 386 N.W.2d 484, 487 (S.D. 1986); Penry v. State, 691 S.W.2d 636, 647 (Tex. Crim. App. 1985). Given the common origin of these two exceptions, and their comparable though distinct elements, it is odd that one class and not the other be considered "firmly rooted." Perhaps it was Wigmore's concentration on excitement as a guarantor of reliability. *See infra* notes 123-25 and accompanying text.

quirement is not applied to its companion rules.[88]

Two of the early modern cases relying on the present sense impression exception are *Houston Oxygen v. Davis*,[89] and *Tampa Electric Co. v. Getrost*.[90] In their application of the present sense impression exception, both cases stress the concurrent nature of the statement and the event, and the lack of time for a calculated misstatement.[91] The analysis in these two cases retains the notion, present in the concept of *res gestae*, that the statement is so closely connected with the event it describes that it should be considered part of the event.[92] These factors, of themselves, give the present sense impression its reliability.[93]

At the federal level, several recent cases have outlined the requirements for admission of evidence under Rule 803(1). The district court in *United States v. Obayagbona*[94] expressly rejected the requirement that the *substance* of the declarant's statement be corroborated.[95] Confusion, however, still arises from the standard espoused by the *Houston Oxygen* court, that "the statement will *usually* be made to another . . . who would have equal opportunities to observe and hence to check a misstatement."[96] It remains unclear whether this phrase means that the veracity of a present sense impression must be supported by corroboration before it can be admitted into evidence, or merely that the existence of such support is an additional guarantee of

88. That New York has decided to weaken the present sense impression exception is shown by the shifting of this exception from 803(1), in the 1980 version of the New York Proposed Code of Evidence, to 804(b)(1) in the 1982 version of the code. *Compare* N.Y. CODE EVID. Rule 803(1) (Proposed Draft 1980) *with* N.Y. CODE EVID. Rule 804(b)(1) (Proposed Draft 1982).

89. 139 Tex. 1, 161 S.W.2d 474 (1942). *Houston Oxygen* was an automobile accident case, where defendant's car passed witness's car four miles before the accident. The issue was whether to admit testimony relating to a statement made by the witness that "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up." *Id.* at 5, 161 S.W.2d at 476. The court determined, as a matter of law, that the evidence was admissible, and that the trial court had erred in excluding the testimony. *Id.* at 8, 161 S.W.2d at 477. The court determined that "[t]here was no time for a calculated statement." *Id.* at 6, 161 S.W.2d at 476.

90. 151 Fla. 558, 10 So. 2d 83 (1942) (unexcited statement of deceased power lineman that he had called to have power turned off).

91. Houston Oxygen v. Davis, 139 Tex. 1, 6, 161 S.W.2d 474, 476 (1942); Tampa Electric Co. v. Getrost, 151 Fla. 558, 563-64, 10 So. 2d 83, 84-85 (1942).

92. *See supra* notes 1, 36.

93. FED. R. EVID. 803(1) advisory committee's note.

94. 627 F. Supp. 329 (E.D.N.Y. 1985) (tape of drug enforcement agent's exultant post-arrest statement held admissible under both 803(2) and 803(1)).

95. *Obayagbona*, 627 F. Supp. at 339 (citing United States v. Blakey, 607 F.2d 779, 785 (7th Cir. 1979)). The court stated that "[u]nder the Federal Rules a present sense impression need not be corroborated, but where corroborating circumstances or witnesses are available, the hearsay gains in trustworthiness and probative force." *Id.*

96. *Houston Oxygen*, 139 Tex. at 6, 161 S.W.2d at 477 (emphasis added).

trustworthiness.[97] Courts have muddled the issue further by misconstruing the work of commentators,[98] and by applying obsolete analyses of the requirements of Rule 803(1).[99]

Similarly, a recent Seventh Circuit case, *United States v. Blakey*,[100] gives rise to needless confusion. The court applied an analysis that focuses on whether an equally percipient[101] witness must corroborate the out-of-court statement,[102] rather than on whether the declarant and his statement satisfy the three basic requirements for a statement to be admitted as a present sense impression.[103] The court entangled the analysis further by suggesting that the need for a corroborating witness is "somewhat reduced" when the declarant's statement is tape recorded, thus leaving little room for uncertainty as to its content.[104]

The Federal Rules provide mechanisms, however, that deal more precisely with the type of evidence used in *Blakey*.[105] These devices include the requirements that: (1) the evidence be relevant;[106] (2) the probative value of the evidence outweigh any prejudice the opponent might suffer;[107] and (3) the declarant be speaking from "personal knowledge."[108] This type of approach does not abandon the "categor-

97. *Obayagbona*, 627 F. Supp. at 339.

98. *See, e.g.*, People v. Luke, 136 Misc. 2d 733, 519 N.Y.S.2d 316, 319 (Sup. Ct. 1987). The court cited Waltz II, *supra* note 68, as support for the proposition that there need only be corroborative evidence that the statement was in fact made. *Luke*, 136 Misc. 2d at 737, 519 N.Y.S.2d at 319. Waltz, however, was disagreeing with the "brief and murky" reasoning of the *Houston Oxygen* court. Waltz II, *supra* note 68, at 885. In the subsequent pages it becomes painfully apparent that Waltz intended exactly the opposite reading of his article. Waltz "strongly suggests more than simple corroboration that such a statement was made" is required before admissibility. *Id.* Furthermore, he urges that what is meant by corroboration is "an assessment of [the statement's] *factual accuracy* as an observation." *Id.* (emphasis added).

99. Waltz II, *supra* note 68, at 885.

100. 607 F.2d 779 (7th Cir. 1979) (surveillance team witnessed events up to and immediately after statements were made but not at the time of the statements).

101. For a definition of "equally percipient" see *supra* note 68.

102. United States v. Blakey, 607 F.2d 779, 785-86 (7th Cir. 1979) (tape recorded conversation between victim and witness less than 23 minutes after defendants had extorted money from victim was admissible as present sense impression). There were witnesses to the events leading up to, and subsequent to the meeting. There were not, however, witnesses to the actual statement. *Id.*

103. *See supra* notes 62-64 and accompanying text.

104. *Blakey*, 607 F.2d at 785.

105. The analysis of surrounding circumstances in *Blakey* is actually a disguised personal knowledge test. *See* FED. R. EVID. 602.

106. See *supra* note 32 and accompanying text for a description of the relevance requirement under the Federal Rules.

107. See *supra* note 33 and accompanying text for a description of the probative value requirement under the Federal Rules.

108. See *supra* note 34 and accompanying text for the text of Rule 602, which describes the personal knowledge requirement under the Federal Rules. It is clear that some courts

ical approach"[109] to hearsay exceptions which the Federal Rules have created. Rather, it retains the categories of Rules 803(1), (2) and (3), and preserves the policies expressed by the Rules.[110] The apparent split among states, with respect to the corroboration issue, demonstrates the difficulty courts have in dealing with fact situations which previously would have been dealt with using imprecise *res gestae* analysis.[111]

As the cases above indicate, the issue of whether the present sense impression exception contains an extra corroboration requirement has fostered judicial confusion. Moreover, upon analysis, it is clear that courts and commentators have further confused the matter by applying dissimilar tests.[112] Indeed, there is not even agreement as to what has to be corroborated.[113]

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use "corroboration," or "equal percipience" as a substitute for a separate requirement that the declarant be speaking from personal knowledge. *See, e.g.*, Booth v. State, 306 Md. 313, 325, 508 A.2d 976, 981 (1986).

> [I]t is clear that the declarant must speak from personal knowledge, *i.e.*, the declarant's own sensory perceptions. . . .
>
> [I]n some instances the content of the statement may itself be sufficient to demonstrate that it is more likely than not the product of personal perception, and in other instances extrinsic evidence may be required to satisfy this threshold requirement of admissibility.

Id. In addition, the trial judge may use inadmissible testimony to determine if the declarant spoke from personal knowledge. *Id.* at 981 n.6. Some propose that "personal knowledge" be made an additional, explicit requirement for the admission of evidence under the present sense impression exception to the hearsay rule. *See, e.g.*, Note, *The Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 NW. U.L. REV. 666, 677 (1976) (arguing that present sense impression bear its own requirement of personal knowledge). This analysis is redundant in light of Rule 602. *See supra* note 34.

109. The strategy of the Federal Rules of Evidence is "categorical"; that is, the issue of admissibility is determined by the use of hearsay categories. If a statement comes within one of the accepted exceptions, "the declaration is admissible without preliminary finding of probable credibility by the judge . . . ." United States v. DiMaria, 727 F.2d 265, 272 (2d Cir. 1984). This type of approach is not without costs. "[It] excludes certain hearsay statements with a high degree of trustworthiness and admits certain statements with a low one. This evil was doubtless thought preferable to requiring preliminary determinations of the judge with respect to trustworthiness, with the attendant possibilities of delay, prejudgment and encroachment on the province of the jury." *Id.*; *see also* WEINSTEIN, *supra* note 34, ¶ 800[02], at 800-13.

110. *See* FED. R. EVID. 102 (states purpose of and guidelines for construction of Federal Rules).

111. See *supra* notes 71-72 and accompanying text for a description of how various states wrestle with this problem.

112. Waltz would have us examine the "factual accuracy" of the hearsay statements. Waltz II, *supra* note 68, at 885. Others, however, simply admit the statement if it complies with the express requirements for admission of Rule 803(1). *See, e.g.*, Booth v. State, 306 Md. 313, 330-31, 508 A.2d 976, 985 (1986).

113. *See* Waltz II, *supra* note 68, at 885-86; *Booth*, 306 Md. at 329-30, 508 A.2d at 983-84.

B. Inconsistencies Within Rule 803

The present sense impression exception has been described as an ideal version of the excited utterance exception.[114] The same contemporaneity is present, but the declarant's faculties are not clouded by excitement.[115] Initially, a present sense impression should be regarded as more reliable than an excited utterance.[116] To require an extra element of corroboration of the substance of the declarant's statement is imprudent, as it confuses the process of *admission* of evidence with the question of *weight*, which is properly for the jury.[117] Present sense impression case analysis is all the more perplexing in light of the intention of the drafters of the Federal Rules of Evidence that there be much overlap between Rules 803(1) and 803(2) in order to avoid "needless niggling."[118]

1. Excited Utterance—Rule 803(2)

Excited utterances fall within an accepted hearsay exception.[119]

114. One commentator notes that statements viewed with suspicion because they are not made under the influence of a startling event, or emotional stress, should actually be regarded as more reliable for precisely that reason. The most reliable type of statement is "made in immediate response to an external stimulus which produces *no shock* or nervous excitement whatever." Hutchins & Slesinger, *Some Observations on the Law of Evidence—Spontaneous Exclamations*, 28 COLUM. L. REV. 432, 439 (1928) (emphasis supplied) [hereinafter Hutchins & Slesinger]. This type of statement, if relevant, should be admitted to the jury. It is more reliable than the excited utterance exception, which is used without question. *Id.* at 439-40.

115. *Id.* at 439. As commentators Hutchins and Slesinger put it: "What the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation." *Id.*

116. *Id.*; *see* United States v. Blakey, 607 F.2d 779, 785 (7th Cir. 1979) ("the underlying rationale of the present sense impression exception is that the substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication"); Nuttal v. Reading Co., 235 F.2d 546, 553 (3d Cir. 1956) (pre-Rules case found that statements "made substantially at the time the event they described was perceived, are free from the possibility of lapse of memory on the part of the declarant. And [sic] this contemporaneousness lessens the likelihood of conscious misrepresentation"); Slough, *Res Gestae*, 2 Kan. L. Rev. 246, 266-67 (1954).

117. Chadbourne, *Bentham and the Hearsay Rule—a Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 947 (1962). "In terms of the time-honored formula, credibility is a matter of fact for the jury, not a matter of law for the judge." *Id.*

118. FED. R. EVID. 803 advisory committee's note. Note, however, that the codified differences remain. The time period for a present sense impression is more limited, as is the subject matter, while there is no requirement that the declarant's reflective capacities be stilled by excitement. See *supra* notes 4-5 and accompanying text.

119. *See, e.g.*, Coy v. Iowa, 108 S. Ct. 2798, 2809 n.6 (1988) (excited utterances admissible in the face of the confrontation clause) (citing Bourjaily v. United States, 483 U.S. 171 (1987) (hearsay statements of co-conspirator under Rule 801(d)(2)(E) may be used by court to determine if conspiracy exists)); United States v. Vazquez, 857 F.2d 857, 864 (1st

The excited utterance exception is more easily accepted than the present sense impression exception largely because of historical accident.[120] Indeed, the relative paucity of situations giving rise to present sense impressions leaves the average person unfamiliar with its truth-inducing qualities.[121] The notion that a calm description of an event be admitted over the hearsay rule is counter-intuitive, and as a practical matter, unexciting events do not often become the subject of litigation.[122]

Wigmore chose to concentrate on excitement as a guarantor, and the emphasis in the law of spontaneous statements shifted from what Thayer[123] "had observed to a requirement of an exciting event and a resulting stilling of the declarant's reflective faculties."[124] These two factors, that present sense impressions are rare, or subsumed into excited utterances, and that the present sense impression was disregarded by a preeminent evidence scholar, have resulted in disparate treatment of the present sense impression and the excited utterance

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Cir. 1988) (hearsay statement of co-conspirator admitted as excited utterance even though clearly not admissible under 801(d)(2)(E) because conspiracy had ended); Morgan v. Foretich, 846 F.2d 941, 946 n.7 (4th Cir. 1988) (excited utterance of witness admitted even though wholly incompetent to testify at trial). *But see* Miller v. Keating, 754 F.2d 507 (3d Cir. 1985) (utterance of unidentified declarant not admissible under Rule 803(2)). The excited utterance exception to the hearsay rule is codified at Federal Rules of Evidence 803(2). See *supra* note 5, for the text of 803(2).

120. Excited utterances overlie present sense impressions, and could therefore be used to admit evidence in a particular case, as people are *more likely* to comment on exciting than non-exciting occurrences. Thus, there are almost no cases applying the present sense impression exception prior to the enactment of Rule 803(1). WEINSTEIN, *supra* note 34, ¶ 803(1)[01]. Indeed, some statements that are candidates for the present sense impression are not treated as such because they are "within the purview of the excited utterance exception . . . ." *Id.* ¶ 803(1)[01] n.13 (quoting Wabisky v. D.C. Transit Sys., Inc., 309 F.2d 317, 318 (D.C. Cir. 1962) (Burger,J.)).

121. WEINSTEIN, *supra* note 34, ¶ 803(1)[01]. While some maintain that the present sense impression is "awesomely elastic," *See, e.g.,* Waltz I, *supra* note 24, at 24, others realize that the exception is in fact "more circumscribed than an excited utterance because it must *describe* or *explain* the event or condition that is the subject of the hearsay assertion. An excited utterance need only relate thereto." D. BINDER, HEARSAY HANDBOOK 90 (2d ed. 1983) (emphasis supplied).

122. MCCORMICK, *supra* note 7, § 298, at 861.

123. An early analysis of present sense impressions was that of James Bradley Thayer. Thayer was satisfied that "[w]hile this sort of exception to the hearsay rule has always existed, it has never been well worked out." Thayer, *supra* note 25, at 82. He opined that there existed an exception for "statements, oral or written, made by those present when a thing took place, made about it and importing what is present at the very time—present, either in itself or in some fresh indications of it, to the faculties of the witness as well as of the declarant." *Id.* at 83. Wigmore, however, argued that contemporaneousness of the event and the declarant's description were not sufficient to guarantee trustworthiness, and would rather rely on the "stress of nervous excitement . . . which stills the reflective faculties." 6 WIGMORE, *supra* note 2, § 1747, at 195.

124. *See* MCCORMICK, *supra* note 7, § 298, at 860.

exceptions to the hearsay rule. Wigmore's analysis of the excited utterance exception to the hearsay rule may have led to an unfortunate restriction in the development of the present sense impression exception.[125]

At least two basic requirements must be met for admission of an excited utterance. First, there must be a sufficiently startling event to render the reflective capacity of the declarant inoperative.[126] Second, the statement or utterance of the declarant must have been in spontaneous reaction to the event.[127] Under the Federal Rules there is a third requirement that the statement relate to the circumstances of the startling event.[128]

It is paradoxical that excited utterances are admitted without concern for corroboration.[129] Athough such utterances are no more reliabile than present sense impressions,[130] it is generally held that the excited utterance itself is sufficient proof that the exciting event occurred.[131] No corroborative proof that the event even occurred is re-

125. Morgan, *Res Gestae*, 12 WASH. L. REV. 91, 98 (1937).

126. MCCORMICK, *supra* note 7, § 297, at 854-55; *see also* 6 WIGMORE, *supra* note 2, § 1747, at 195.

127. MCCORMICK, *supra* note 7, § 297, at 855; *see also* 6 WIGMORE, *supra* note 2, § 1747, at 195.

128. *See, e.g.*, People v. Gee, 406 Mich. 279, 282, 278 N.W.2d 304, 305 (1979).

129. Hutchins & Slesinger, *supra* note 114, at 440. The authors point out that excited utterances should be more closely scrutinized than present sense impressions which do not interfere with perception. They noted that even though most courts "do admit the statements of excited bystanders, [however,] where there is a stimulus which is not sufficient to produce excitement, they do not ordinarily attribute to it the truth-evoking qualities ascribed to shock." *Id.* at 434. If just before a pedestrian is run down by a car, a witness calmly watching from a bus comments on its high speed, the statement would be inadmissible. *Id.* at 435.

130. *Id.* The shock which supposedly deprives the observer of the ability to fabricate also affects the accuracy of his perceptions. This notion is reflected in the charge to the jury in Coasting Co. v. Tolson, 139 U.S. 551 (1891), *quoted in* Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394, 419 n.67 (1933). The pertinent part of the jury charge was as follows:

> It may, at first, seem surprising that a man who himself wears the shoe should not be able to tell where it pinches; that a man who has his foot crushed should not necessarily know better than any other party where it was hurt, and how it was hurt; and yet it is not an uncommon thing for other men who saw the thing done, to be able to tell better than the man himself how the accident happened. The shock and pain may have the effect of rendering the man quite incapable of telling just exactly how the thing took place.

The judge's view agrees with that of the experts. *Id.*

131. United States v. Moore, 791 F.2d 566 (7th Cir. 1986). In *Moore*, the court found that the three requirements for admission of a statement as an excited utterance under Rule 803(2) were all satisfied by the statement itself. *Id.* at 571-72. Thus, an excited utterance can "bootstrap" itself into admissibility. Similarly, in State v. Smith, 358 S.E.2d 188, 194-95 (W. Va. 1987), the declarant's statement that "Junior and Slim [were] drinking and fighting," given the "agitated and disturbed" tone was sufficient in itself to

quired for admission of these statements.[132] When instances of mistaken excited utterances are uncovered, however, the initial preference for them as a vehicle for the admission of hearsay tends to evaporate.[133]

2. *State of Mind—Rule 803(3)*

The requirements for admission[134] of a statement under the present mental state exception[135] of Rule 803(3)[136] are: (1) it must relate to a condition of mind or emotion *existing at the time* of the statement; and (2) it must have been made under circumstances indicating apparent sincerity.[137] Even where these factors are satisfied, however, the explicit qualifications to the rule may still bar admission.[138] Fur-

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qualify as an excited utterance. *Id.* at 194. The statement need not have been related by one who was present at the exciting event, and the utterance itself may contain sufficient indicia that the exciting event occurred. *Id.* at 194-95. *See* MCCORMICK, *supra* note 7, § 297, at 855. The judge can examine *any* evidence, not only admissible evidence, because the rules of evidence do not generally apply to preliminary fact questions of admissibility. *Id.* at 855 n.11. *See also* FED. R. EVID. 104(a).

132. *See Smith*, 358 S.E.2d at 194-95; MCCORMICK, *supra* note 7, § 297, at 855.

133. Hutchins & Slesinger, *supra* note 114. They noted, "One need not be a psychologist to distrust an observation made under emotional stress." *Id.* at 437. Further, they cite two egregious examples of misperception. One was an excited witness to a horrible accident who mistakenly declared that the coachman "deliberately and vindictively ran down a helpless woman." *Id.* Another was a case of an upset man who testified that "hundreds were killed in an accident [, and] he had seen their heads rolling from their bodies." *Id.* Actually only one person was killed and five others were injured. *Id.* These cases were used as illustrations not for the proposition that excited utterances be excluded, but rather that unexcited statements be admitted if relevant. *Id.* at 440.

134. For a recent application of this rule see, United States v. Badalamenti, 794 F.2d 821, 825-26 (2d Cir. 1986) (hearsay statement by informant to government agent that he was willing to meet party at cafe to obtain heroin sample was admissible to show informant's future intent; moreover, statement could be connected to informant's subsequent meeting with defendant because it was corroborated by independent evidence).

135. The present mental state exception is the most relevant subset of Rule 803(3) for the purposes of this Note.

136. The present mental state exception of Rule 803(3) is also known as the *Hillmon* doctrine. See *infra* note 140 for a discussion of the *Hillmon* case.

137. MCCORMICK, *supra* note 7, § 294, at 844. *See* Robinson v. State, 66 Md. App. 246, 261, 503 A.2d 725, 733 (1986) (hearsay statement not admitted under 803(3) because declarant had opportunity to fabricate state of mind). *Contra* United States v. Lawal, 736 F.2d 5, 8 (2d Cir. 1984) (statements of declarant's then existing state of mind admissible under Rule 803(3) even if self-serving and made under untrustworthy circumstances); United States v. DiMaria, 727 F.2d 265, 271 (2d Cir. 1984) (same). For a comprehensive overview of this area, see G. JOSEPH & S. SALTZBERG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES § 58.3, at 68-74 (Supp. 1988).

138. *See* United States v. Emmert, 829 F.2d 805, 809-10 (9th Cir. 1987) (reservation in Rule 803 excepts "a statement of memory or belief to prove the fact remembered or believed"). Thus, a statement of condition, "I'm scared", would be admissible, but a statement of belief, "I'm scared because Galkin threatened me", would not. United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980).

ther, the trial judge has significant discretion to deny a statement's admissibility under Rule 803(3) if a calculated misstatement is probable.[139]

The seminal case in this area is *Mutual Life Insurance Co. v. Hillmon*.[140] The rule in *Hillmon* excepts from the operation of the hearsay rule out-of-court statements of state of mind which tend to prove a plan or intention of the declarant.[141] The rationale supporting admission of statements of present mental state, based on *res gestae*,[142] is similar to both Rules 803(1) and 803(2).[143] Here the declaration, however, is thought to be more valuable than testimony in court.[144] This exception was expressly included in Rule 803(3).[145] One notable distinction from the present sense impression or the ex-

139. MCCORMICK, *supra* note 7, § 295, at 850; *see also* Commonwealth v. Davis, 308 Pa. Super. 398, 402-03, 454 A.2d 595, 597, (1982) (embodies common law principle by requiring that statement tending to expose declarant to criminal liability and offered to exculpate accused is not admissible unless corroborating circumstances clearly indicate trustworthiness of statement). *But see* Smith v. Smith, 364 Pa. 1, 70 A.2d 630, 635 (1950) (weight but not admissibility is influenced by self-serving nature of statement).

140. 145 U.S. 285, 295 (1892). The case was an action on a life insurance policy. The question was whether Hillmon had actually died. A body had been found at Crooked Creek, for which Hillmon had set out on March 5th. Plaintiff contended that Hillmon and Brown were at Crooked Creek when Hillmon was accidentally shot. The insurance company maintained that Walters had accompanied Hillmon, and that it was Walter's body, not Hillmon's, that was found. A letter, from Walter to his sister, containing the following statement, "I expect to leave . . . on or about March 5th, with a certain Mr. Hillmon . . ." was offered to show Walter's state of mind. *Id.* at 288. The inference sought to be drawn was that it would thus be more probable that Hillmon was at Crooked Creek. *Id.* at 295-96. For an in-depth look at the *Hillmon* case, see Maguire, *The* Hillmon *Case—Thirty-three Years After*, 38 HARV. L. REV. 709 (1925).

141. *Hillmon*, 145 U.S. at 295-96. The *Hillmon* rule is limited to statements of future intent. Statements of memory looking backwards in time do not fall within its purview. Shepard v. United States, 290 U.S. 96, 105-06 (1933).

142. *See supra* note 1.

143. *Hillmon*, 145 U.S. at 295. The language of the *Hillmon* court indicates a reliance upon the nature of a person's state of mind as a guarantor of reliability. The *Hillmon* court analogized to *res gestae* as follows:

> [W]henever the intention is of itself a distinct and material fact in a *chain of circumstances*, it may be proved by *contemporaneous* oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention *at that time* is as direct evidence of the fact, as his own testimony that he then had that intention would be.

Id. (emphasis added). Thus, this hearsay exception is actually a specific application of the present sense impression exception. FED. R. EVID. 803(3) advisory committee's note. *See also* Hutchins & Slesinger, *Some Observations on the Law of Evidence — State of Mind to Prove an Act*, 38 YALE L.J. 283, 289 (1929).

144. *Hillmon*, 145 U.S. at 295. The declarant's "own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said." *Id.*

145. The *Hillmon* rule "allowing evidence of intention as tending to prove the doing of

cited utterance is that the declarant is in a unique position to perceive his own mental state.

Attempts at adding other "additional qualifications" for admissibility of evidence under Rule 803(3) have been unsuccessful.[146] This is quite distinct from the requirement of corroboration advanced for Rule 803(1).[147] Courts have gone rather far in admitting hearsay under Rule 803(3),[148] and there appears to be no reason why Rule 803(1) should bear an extra burden when this well accepted subclass of the same rule does not.

C. Additional Strategies Directed at Decreasing the Usefulness of the Present Sense Impression Exception

There are alternative methods to restrain the present sense impression exception to the hearsay rule that are in their nascent stages. Two of these strategies involve legislative rather than judicial modification to the exception found in the Federal Rules.

Originally, the New York Proposed Code of Evidence,[149] just as the Federal Rules,[150] positioned the present sense impression among those exceptions that require no showing of the declarant's unavailability.[151] One commentator, however, suggested that the present sense impression exception be included with the exceptions that first

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the act intended, is, of course, left undisturbed." FED. R. EVID. 803(3) advisory committee's note.

146. *See* United States v. Harris, 733 F.2d 994, 1004-05 (2d Cir. 1984) (defendant declarant's statement, "the Government was trying to set [me] up," should have been admitted under state-of-mind exception 803(3)). In criminal cases, *Hillmon* statements are admissible against a non-declarant when the statement is linked with independent evidence that corroborates. United States v. Sperling, 726 F.2d 69, 74 (2d Cir.), *cert. denied*, 467 U.S. 1243 (1984). This requirement, however, only applies in criminal cases, and it is not particularly onerous. *See, e.g.*, United States v. Nersesian, 824 F.2d 1294, 1325-26 (2d Cir.), *cert. denied*, 108 S. Ct. 357 (1987). See *supra* note 9, for further discussion of situations where extrinsic corroboration is appropriate.

147. See *supra* notes 58-70 and accompanying text for a description of the corroboration requirements of Rule 803(1).

148. *See, e.g.*, United States v. Pheaster, 544 F.2d 353, 379-80 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099. In *Pheaster*, the court allowed the state of mind of the declarant to be used inferentially to prove that a meeting with the defendant actually took place. Several statements to the effect that the declarant was going to "pick up a pound of marijuana which [defendant] had promised him for free" were admitted. *Id.* at 375-80. The court held that it was permissible for the trier of fact to draw the inference that the declarant actually carried out his intention, and met with the defendant. *Id.*

149. A Code of Evidence for the State of New York (proposed) (West 1980).

150. FED. R. EVID. 803(1).

151. McLaughlin, *New York Trial Practice*, 185 N.Y.L.J. 113, June 12, 1981, at 1, col. 1. This article was an influential one, for McLaughlin, now a Federal District Court judge, chaired the New York State Law Revision Commission during the time both versions of the proposed code of evidence were drafted.

require a showing of unavailability.[152] The next version of the New York Code[153] contained just such an alteration.[154] This change appears to substitute a credibility test where admissibility is the issue.[155] The inevitable effect of such a modification would be to rob the present sense impression of its vitality as an instrument for the admission of evidence.[156]

A related alternative means for emasculating the present sense impression exception is to group it with the residual exceptions.[157] This too, however, seems inconsistent with the status of the other exceptions,[158] and should similarly be abandoned. There is no need to position the present sense impression among the residual "catch-all" exceptions. The present sense impression exception has specific criteria governing its application.[159] Placing this exception among the more general residual exceptions would rob the hearsay rule of predictability and ease of use in cases of present sense impressions.

IV. Suggested Approach: A Consistent Method of Analysis

The Federal Rules of Evidence have attempted to supplant a case-by-case approach for determining admissibility of evidence with a cat-

152. McLaughlin, *supra* note 151, at 1, col. 1. McLaughlin questioned the efficacy of including the present sense impression exception to the hearsay rule among those that do not require an initial showing of unavailability. Further, he submitted that if the declarant were available it made more sense to require that he be called, rather than rely on his out-of-court statement. *Id.* A present sense impression, however, just as an excited utterance or *Hillmon* statement, is deemed more useful than stale testimony in court. "The theory of [this] group is that the out-of-court statement is *at least as reliable* as would be his testimony in person, so that producing him would involve pointless delay and inconvenience." MCCORMICK, *supra* note 7, § 253, at 753 (emphasis added).

153. N.Y. CODE EVID. (Proposed Draft 1982).

154. N.Y. CODE EVID. 804(b)(1) (Proposed Draft 1982).

155. The theory behind the 804-type exceptions is that it is preferable to have live in-court, albeit stale testimony. Only if the declarant is unavailable will the out-of-court statement be accepted. Attacking the reliability of the present sense impression exception, by placing it in this category, while nurturing the exceptions with which it shares a common foundation is inexplicable. The comments to the Proposed 1982 Code state only that the displacement of the present sense impression "is more sensible, as the requirement of unavailability will ensure that the evidence is admitted only when truly necessary." N.Y. CODE EVID. 804(b)(1) comment (Proposed Draft 1982).

156. *Cf.* Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 28-29 (1970) (disdaining the *res gestae* exceptions as "an artifice for the admission of highly unreliable evidence which is often the only type of evidence available"). Stewart argues that Rules 803(1), (2) and (3) should require preference for the declarant's testimony in court, and should only be used if the declarant is shown to be unavailable. *Id.* at 38.

157. *See, e.g.*, Waltz I, *supra* note 24, at 22.

158. *See supra* notes 5-6 and accompanying text.

159. *See supra* notes 62-64 and accompanying text.

egorical one.[160] Federal Rules 803(1), (2) and (3) thus replace a baffling amalgam of rationales which had existed under the rubric of *res gestae*.[161] In probing the contours of these Rules, however, consideration should be paid to their common origin in the *res gestae* doctrine.[162] Furthermore, Rules 803(2) and 803(3) do not advance anything that might be called a corroboration requirement.

The benefits[163] served by the proper exercise of the often misapplied *res gestae* doctrine can be satisfied by the Federal Rules and their state counterparts.[164] Realization of these benefits, however, requires a reevaluation of current analysis, especially in states that have assailed the reliability of the present sense impression.[165]

It is important to note that the common origin that Rules 803(1), (2) and (3) share in *res gestae* was criticized for its vague *application*, not for its theoretical underpinnings.[166] This vagueness arose because there were three separate exceptions grouped together, each with distinct guarantors of reliability.[167] The guarantors for each are now codified in the Federal Rules of Evidence. The present sense impression exception should be applied as codified in the Federal Rules of Evidence. Unless there is a substantial showing that additional re-

160. *See* United States v. DiMaria, 727 F.2d 265, 272 (2d Cir. 1984).

161. *See supra* note 1.

162. The remnants of *res gestae* that are codified in the Federal Rules of Evidence 803(1), (2), and (3), each have their own guarantors of reliability. The present sense impression is that subset of *res gestae* which relies upon limitation in subject matter and near contemporaneity. The declarant becomes a "conduit" for his sense impressions. The excited utterance relies upon excitement, and the resulting stilling of the declarant's reflective capacities. The present mental state exception depends for its reliability upon the uniqueness of the declarant's perception of his own mental state. In each of these cases the declaration forms part of the transaction or event it describes—so much a part that the declaration is admitted via a hearsay exception. Requiring additional elements for admission as a present sense impression, while admitting evidence admitted under hearsay exceptions that have similar theoretical foundations is perplexing. *See, e.g., infra* notes 172-76 and accompanying text.

163. *See supra* note 7; *infra* note 188.

164. For instance, *res gestae* will permit the admission of a statement as evidence *before* an exciting event has occurred. *See, e.g.*, Hastings v. Ross, 211 Kan. 732, 734, 508 P.2d 514, 516 (1973) (statement of witness when she saw auto pass her house that, "that boy is going to kill somebody one of these days," uttered *prior* to collision, would be admissible as part of the *res gestae*). This same purpose would be served today by the present sense impression exception.

165. *Compare* N.Y. CODE EVID. Rule 804(b)(1) (Proposed Draft 1982) *with* N.Y. CODE EVID. Rule 803(1) (Proposed Draft 1980).

166. *See* FISCH, *supra* note 2, § 1003, at 583-84. "Basically, the objections . . . are aimed at [*res gestae's*] indeterminate meaning and indiscriminate use which have lead to the confusion of the requirements of one hearsay exception with another and a consequent exclusion of competent evidence." *Id.*

167. *Id.*

quirements for admissibility are required,[168] such additional requirements should be abandoned. Thus, based on the rationale of *res gestae*,[169] the requisite extrinsic support for a present sense impression should be of the same quality as the other two exceptions.[170]

Upon comparing the present sense impression and the excited utterance exception, a curious and illogical calculus becomes apparent. The lack of opportunity to effectively cross-examine is the primary reason for the exclusion of hearsay evidence.[171] Cross-examination is most often used to uncover inconsistencies in memory, perception and narration.[172] Present sense impressions are regarded as most reliable with respect to perception and memory, but may be questioned as to their sincerity.[173] Conversely, excited utterances are thought to be most reliable with respect to their sincerity, while of relatively questionable worth for their perception and memory.[174] Problems of nar-

168. See *supra* note 9, for discussion of a situation where extrinsic corroboration is appropriate.

169. Robertson v. Hackensack Trust Co., 1 N.J. 304, 312, 63 A.2d 515, 519 (1949).

> [T]he admissibility of the proofs as *res gestae* has as its justifying principle that truth, like the Master's robe, is of one piece, without seam . . . each fact . . . and the reproduction of a scene with its multiple incidents, each created naturally and without artificiality and not too distant in point of time, will by very quality and texture tend to disclose the truth.

Id. While this rationale is clear enough, it was the application of this theory that caused problems. The modern approach of the Federal Rules with its categorical view of hearsay exceptions eliminates most of these difficulties of application.

170. Today, however, we enjoy a categorized approach to these hearsay exceptions, and "the law has now reached a stage at which widening admissibility will be best served by other means. The ancient phrase [*res gestae*] can well be jettisoned, *with due acknowledgement that it served its era in the evolution of evidence law.*" MCCORMICK, *supra* note 7, § 288, at 836 (emphasis added).

171. The main reason for rejecting hearsay is an idea basic to the adversary system—the adversary has a right that the jury shall not be prejudiced by testimony which the adversary has had no opportunity to cross-examine. *See Hearsay Rule*, *supra* note 7, at 4. Thus, it is the lack of opportunity to effectively cross-examine that forms the basis of the exclusionary rule. Where the usefulness of cross-examination is reduced *ceteris paribus*, the support for excluding hearsay evidence is similarly reduced.

172. *Hearsay Rule*, *supra* note 7, at 4. While exposure of deliberate falsehood is the most dramatic function of cross-examination, one needs only a brief experience in the courtroom to learn that its more frequently and effectively exercised functions are to bring to light faults in the perception, memory, and narration of the witnesses. *Id.*

173. *See* Tribe, *supra* note 14, at 965. "The closeness in time of statement to perception reduces memory problems to the de minimis level, and . . . there is ordinarily no possibility of erroneous perception. But the . . . infirmities of [narration] and insincerity remain." *Id.*

174. *See, e.g.*, Hilyer v. Howat Concrete Co., 578 F.2d 422 (D.C. Cir. 1978) (statement made by worker up to 45 minutes after fellow worker was run over by truck). Memory is more likely to be a problem in excited utterances than present sense impressions because of the greater period of time allowed between the event and the hearsay declaration. *Id.*

ration are probably equal between the two.[175] Therefore, the lack of opportunity for cross-examination is more damaging in cases of excited utterances, where there are inconsistencies of the type that cross-examination corrects. This reasoning supports the view that present sense impressions should be more easily admitted than excited utterances.[176]

If we assume the existence of a corroboration requirement for admission of evidence as a present sense impression, it still is not clear what has to be corroborated. Is it the substance of the declarant's statement, as in *Watson*?[177] Alternatively, is extrinsic evidence, *i.e.*, corroboration, required only to establish that the statement was a present sense impression?[178] The present sense impression exception is a means to admissibility under the Federal Rules, and not a test of credibility.[179] Credibility of these types of exclamations obviously affected the development of the various categories of exceptions, but now we have a categorical approach to ensure judicial economy concerning questions of admissibility.[180] There is no theoretically sound reason for 803(1) to have an additional corroboration requirement. Proper care that the requirements of 803(1)[181] are met, coupled with the guarantees built into other sections of the Rules,[182] would ensure that the present sense impression does not become overly "capa-

175. Tribe, *supra* note 14, at 965.

176. *See* Hutchins & Slesinger, *supra* note 114. *But see* FED. R. EVID. 801. Rule 801 exempts non-assertive conduct from the definition of hearsay.

> Admittedly evidence of [non-assertive conduct] is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct.

Id. advisory committee's note.

177. People v. Watson, 109 Misc. 2d 71, 437 N.Y.S.2d 1016, *rev'd*, 100 A.D.2d 452, 474 N.Y.S.2d 978 (2d Dep't), *on remand*, 127 Misc. 2d 439, 486 N.Y.S.2d 592 (1984).

178. Note that this is not an easy test to meet. See *supra* notes 62-64 and accompanying text for the requirements for admission as a present sense impression.

179. United States v. Harris, 733 F.2d 994, 1004-05 (2d Cir. 1984). The general rule is that if a statement comes within the requirements for a hearsay exception, except for the residual and business records exceptions, *it is admissible* without any initial finding of probable credibility. *Id. Compare* FED. R. EVID. 803(1) *with* FED. R. EVID. 803(24).

180. United States v. DiMaria, 727 F.2d 265, 272 (2d Cir. 1984). The categories in Rules 803 and 804 all rest on the assumption that these types of statements bear special guarantees of credibility. The method of the Federal Rules, however, is to determine that issue by categories. If a statement falls within one of the exceptions it is admissible without any preliminary finding of admissibility by the judge. *Id.*

181. The elements required for admission of evidence under the present sense impression exception are quite precise. *See supra* notes 62-64 and accompanying text.

182. *See supra* notes 106-08 and accompanying text.

cious."[183] In fact, the present sense impression is significantly narrower than the well accepted excited utterance exception, because a present sense impression must describe or explain the event, while an excited utterance need only relate to the event.[184] If a statement comes within the exception, and does not offend the other rules, it should be admitted.[185] All three of these rules possess sufficient guarantees of trustworthiness within their contours such that an additional requirement of extrinsic corroboration is unnecessary. Casting the present sense impression exception aside by adding an additional element for admission has not been appropriately justified.

V. Conclusion

The purpose which *res gestae* served, that is, the admission of otherwise inadmissible evidence,[186] was necessary even if the doctrine was misapplied to the point of abuse. *Res gestae* may have been "a password for the admission of otherwise inadmissible evidence,"[187] but we must also not allow "extrinsic corroboration" to become a password for the exclusion of otherwise admissible evidence. In many instances hearsay evidence is the only evidence available,[188] and if the evidence meets the requirements of an accepted hearsay exception it should be admitted.[189] The present sense impression exception to the hearsay rule should not be robbed of its utility.

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183. Waltz I, *supra* note 24, at 23.

184. The scope of the subject matter of the present sense impression exception is more circumscribed than that of the excited utterance exception. David v. Pueblo Supermarket, 740 F.2d 230, 234 (3d Cir. 1984). In *Pueblo*, a slip and fall case, the Third Circuit found that the trial court had "reached the very outer bounds" of the excited utterance exception. *Id.* at 235. The statement, "I told them to clean it up about two hours ago . . .", was admitted. The statement was related to the exciting event only insofar as it "concerned the 'circumstances' surrounding the occurrence." *Id.* The statement did not, however, "describe" the event and thus would not meet the more narrow subject matter requirement of the present sense impression. G. JOSEPH & S. SALTZBERG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES § 58.3, at 63 (Supp. 1988); *see supra* note 121 and accompanying text.

185. United States v. DiMaria, 727 F.2d 265, 272 (2d Cir. 1984). Courts should concentrate on the elements for admission under the Federal Rules, and apply these elements to the fact situations that come before them. *See, e.g.*, Booth v. State, 306 Md. 313, 508 A.2d 976, 985 (1986) (court illustrates how it applied elements of present sense impression to facts as basis for admission of evidence).

186. *See, e.g.*, Hastings v. Ross, 211 Kan. 732, 734, 508 P.2d 514, 516 (1973).

187. MCCORMICK, *supra* note 7, § 288, at 836.

188. *See Hearsay Rule, supra* note 7. "[I]n many instances hearsay is better than nothing, especially where its rejection will leave the litigants without evidence." *Id.* at 12.

189. United States v. DiMaria, 727 F.2d 265, 272 (2d Cir. 1984).