Journal of Criminal Law and Criminology

Volume 85
Issue 4 *Spring*

Article 1

Spring 1995

Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision

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0091-4169/95/8504-0843
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 85, No. 4
Printed in U.S.A.

SUPREME COURT REVIEW

FOREWORD: BRIGHT LINES AND HARD EDGES: ANATOMY OF A CRIMINAL EVIDENCE DECISION

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I. INTRODUCTION

As this issue of the *Journal of Criminal Law and Criminology* was going to press, the United States Supreme Court decided the case of *Tome v. United States*.[1] The case addressed an important issue in criminal evidence law: the admissibility of the prior consistent statements of witnesses who testify at trial and are subject to cross-examination concerning those prior statements.[2] The Court held that such prior statements are admissible as substantive evidence under Rule 801(d)(1)(B)[3] of the Federal Rules of Evidence only if the declarant made them at a time prior to the time at which the charged "motive to fabricate" arose.[4] The decision is significant for federal criminal prosecutions and for the many states whose evidence codes contain a version of Rule 801(d)(1)(B).[5] The decision was 5-4,[6] and as in its most recent previous interpretation of a hearsay provision of the Federal

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1 115 S. Ct. 696 (1995).

2 FED. R. EVID. 801(d)(1)(B).

3 Rule 801(d)(1)(B) provides:

(d) Statements that are not hearsay. — A statement is not hearsay if— (1) Prior Statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

Id.

4 *Tome*, 115 S. Ct. at 697.

5 The likely impact of the Supreme Court's interpretation of the Federal Rules provision on the interpretation of parallel state rules was one of the grounds the Attorney Generals of thirteen states asserted for presentation of their Amicus brief in support of the respondent.

6 One section of the Court's opinion garnered the support of only four justices.

Rules, *Williamson v. United States*[7], the Court held that apparently relevant evidence offered by the prosecution was inadmissible, at least on the stated theory. Some may see the case as the second consecutive "defense-oriented" decision on hearsay law, though for reasons described below, such a view fails to cut at the joints of what is significant about the case.[8]

This Article describes the case and the justifications the majority and the dissent offer for their positions. After situating the decision in the ongoing debate about the admissibility of prior statements of witnesses, this Article argues that the thrust of the dissent was basically correct although neither the majority nor the defense articulated its strongest arguments. It then suggests that the decision itself is quite narrow and should not have a great effect on future criminal trials, though a Supreme Court decision may always have a penumbra that carries the holding regrettably far beyond its specific facts. Finally, this Article describes a troubling premise that seems to animate the majority's reasoning and express the hope that this premise is not a portend of things to come.

II. *TOME V. UNITED STATES*

A. BACKGROUND

Tome v. United States[9] involved a criminal prosecution for the felony of criminal sexual abuse of a child.[10] The defendant, Matthew Tome, a Navajo, was accused of sexually abusing his four year old daughter on the Navajo tribal lands in New Mexico. The case was tried to a jury under the Federal Criminal Code in the United States District Court for the District of New Mexico. When Tome and the child's mother divorced in 1988, the tribal court awarded the parents joint custody but gave Tome primary physical custody, allowing her mother custody on weekends and holidays along with visitation rights.[11] There were continuing custody disputes and the parties began alternating two week periods in June of 1989, the month when the abuse allegedly took place.[12]

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7 114 S. Ct. 2431 (1994). *See* Emily F. Duck, Note, *The* Williamson *Standard for the Exception to the Rule Against Hearsay for Statements Against Penal Interest*, 85 J. CRIM. L. & CRIMINOLOGY 1084 (1995), *infra*.

8 More recently still, however, the Supreme Court accepted the prosecution's arguments that a defendant may waive the protections Rule 410 affords. United States v. Mezzanato, 115 S. Ct. 797 (1995).

9 115 S. Ct. 696 (1995).

10 *Id.* at 697. *See* 18 U.S.C. §§ 1153, 2241(c), and §§ 2245(2)(A), (B) (1988).

11 Brief for Respondent at 2, Tome v. United States, 115 S. Ct. 696 (1995) (No. 93-6892).

12 *Id.* at 3.

The child, A.T., spent the summer of 1990 with her mother, who had remarried and moved to Colorado. Shortly before a custody review that was scheduled for August of 1990, A.T. spontaneously remarked to her baby sitter that her father sometimes thought that she, A.T., was "his wife." [13] Five days later, after her mother had been unsuccessful in eliciting further details,[14] A.T. gave a detailed account to the baby-sitter while her mother listened from outside the room.[15] Two days later, A.T. gave an even more detailed account of what appeared to be a second act of abuse to a Colorado Child Protection Services Caseworker.[16]

Three physicians examined A.T., all of whom would testify at trial. About two weeks after A.T.'s interview with the social worker, she was examined by a pediatrician who found physical evidence consistent with penetration. A.T. repeated to the pediatrician that her father had sexually abused her. A week later, A.T. saw a second pediatrician to whom she described the abuse and who concluded based on the physical evidence that A.T. "had definitely had penile penetration in her vaginal area."[17] Finally, about a year later, on 3 September 1991, after the defendant had been indicted, A.T. was seen by a third pediatrician who was an expert in child sexual abuse and who found physical evidence of repeated penetration. A.T. told her that Tome had touched her inappropriately.[18]

The tribal court awarded physical custody of A.T. to her mother on 15 February 1991.[19] Matthew Tome was indicted in the United States District Court in August 1991.

B. THE TRIAL

The trial began on 24 February 1992.[20] A.T. was the government's first witness.[21] A.T.'s direct testimony was mainly in the form

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13 *Tome*, 115 S. Ct. at 697; Respondent's Brief at 3, *Tome* (No. 93-6892).

14 The Government argued that A.T.'s reluctance, in fact, refusal to describe the abuse to her mother while giving a relatively full account to her baby-sitter and the professionals itself served to rebut the defense's theory that the charges had been motivated by a desire to defeat her father's custody claims. Respondent's Brief at 29, *Tome* (No. 93-6892).

15 *Tome*, 115 S. Ct. at 697.

16 Respondent's Brief at 4, *Tome* (No. 93-6892).

17 *Id.* at 6.

18 *Id.*

19 Brief for Petitioner at 18, Tome v. United States, 115 S. Ct. 696 (No. 93-6892) (1995). However, Matthew Tome was allowed visitation. *Id.*

20 United States v. Tome, 3 F.3d 342, 345 (10th Cir. 1993). The case was tried from 24 February 1992, through 2 March 1992. Petitioner's Brief at 2, *Tome* (No. 93-6892).

21 The Court first questioned her to determine her competence as a witness. Respondent's Brief at 6, *Tome* (No. 93-6892). *See* FED. R. EVID. 601.

of one or two word answers to the prosecutor's leading questions.[22] The court allowed A.T to illustrate her testimony through the use of dolls and by pointing to parts of the prosecutor's body.[23] The Court of Appeals concluded that "[t]hrough these means, A.T. testified that Tome removed her clothes, got on top of her, and put his private place where she goes potty and in her mouth. She further testified that after this happened she went to the bathroom and wiped blood off herself with a tissue."[24]

Cross examination took place over two days.[25] On the first day, defense counsel established that A.T. and the prosecutor were on a first-name basis and generally explored the reasons A.T. might have for preferring to live with her mother instead of her father.[26] On the

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[22] *Tome*, 115 S. Ct. at 699. The following are excerpts from the government's direct examination of A.T. and serve to give its tenor:

Q. Did daddy take your clothes off, yes or no?
A. Yes.
Q. Okay. Did daddy take his clothes off?
A. Yes.
. . .
Q. . . .Did he do something?
A. Yes.
Q. Was it good something or bad something?
A. Bad.
Q. It was bad. Did it hurt or did it feel good?
A. Hurt.
. . .
Q. . . .Did he put his private place any place on you?
A. Yes.
. . .
Q. Where did daddy place his private place, just point, point to me. Point to where you are looking right now. . .
Q. What do you call this place? What is that place on you? Do you have a name for that?
A. No.
Q. You don't call it anything? Do you go potty there?
A. Yes.
Q. Okay. And [A.T.], where did your daddy place his private thing, anywhere else? And point to me if he did, where, Point to my body wherever he put it. Where? Is that my mouth you are pointing at? Say yes or no.
A. Yes.
Q. All right. Did he put his private thing in your mouth?
A. Yes.

Petitioner's Brief at 3-4, *Tome* (No. 93-6892) (citations omitted). Recall that A.T. was just four-years-old at the time of the alleged abuse and about six-and-one-half-years-old at the time she testified.

[23] *Tome*, 3 F.3d 342, 345 (10th Cir. 1993).

[24] *Id.* This portion of her testimony was corroborated by her earlier statement to her baby-sitter. *See infra*, note 41.

[25] Tome v. United States, 115 S. Ct. 696, 699 (1995).

[26] For example, the following lines of questions were pursued:

Q. What other kinds of thing did you do at your real dad's house besides go to preschool?

A. Just play.
Q. Just play. What kind of things did you play?
A. I didn't have no one to play with.
Q. Did you just play by yourself then?
A. Yes.
Q. Did you have any toys there?
A. Yes.
Q. When you stayed at your real mom's, did you have people to play with there?
A. Yes.
Q. Was it better to stay with her than your real dad because you had people to play with? Do you know?
. . .
Q. [A.T.], when you lived with Matthew, did your mother live in Colorado some of the time?
A. Yes.
Q. And did she seem far away to you?
A. Yes.
Q. When you lived with Matthew, and your mother lived in Colorado you couldn't visit with your mom, could you?
A. No.
Q. Did you miss your mom when she lived in Colorado?
A. Yes.
Q. Did you want to be with her?
A. Yes.
Q. When you lived with your mom in Colorado, did Matthew ever come to visit you there?
A. (No audible response).
Q. Did Matthew ever come to Colorado?
A. No.
Q. Did you miss Matthew when you were in Colorado?
A. No.
. . .
Q. When you lived with Matthew were you afraid that you wouldn't see your mom again? Were you ever afraid of that?
A. (No audible response).
Q. Have you ever been afraid, [A.T.], that something might happen and you wouldn't see your mom again? Ever been afraid of that?
A. (No audible response).
Q. Sometimes afraid of that, do you know?
A. (No audible response.)
Q. [A.T.], when you go to court, do you think anything is going to happen to your mom?
A. Yes.
Q. What do you think is going to happen to her?
A. My mom might go to jail.
Q. Why do you think that?
A. I don't know.
Q. Do you think anything is going to happen to Matthew when you go to court? Do you think anything is going to happen to him, do you know?
A. (No audible response).
Q. Don't know?
A. (No audible response).
Q. [A.T.], do you think anything is going to happen to you when you go to court.
A. I might go back to my real dad.
Q. Are you afraid of that.
A. Yes.

next day, no testimony was taken, and the prosecutor met with A.T.. The Court of Appeals described the cross-examination that resumed after this intervening day as "strained."[27] Defense counsel first asked A.T. about any conversations she had with the prosecutor on the previous day.[28] Counsel then inquired about any conversations concerning the abuse with anyone other than the prosecutor.[29] According to the petitioner, A.T. testified "that the only person with whom she had discussed the alleged abuse was the prosecutor . . . [and] denied that she ever spoke with her babysitter about the alleged abuse; she either failed to respond or stated that she was unable to remember when asked about other out-of-court statements concerning the alleged abuse."[30]

The cross-examination became increasingly difficult the second day, prompting the judge to note on the record that there had been lapses of forty to fifty-five seconds between the questions and the witness's answers.[31] The judge noted that the witness seemed to be los-

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It appears that the first sequence of questions was asked on the first day of cross-examination, while the second two sequences were put on the second day. *Tome*, 3 F.3d at 345. The questions were consistent with the defense theory of the case explained in opening statement: "[T]his case is about a false accusation made during a child custody case, and that's going to be the evidence that you are going to hear in this case. . . .[T]wo days before [Padilla] was supposed to bring [A.T.] back to the tribal court custody hearing, is when this first allegation is made *** to the babysitter." Government's Brief at 7 n.1, Tome v. United States, 115 S. Ct. 696 (No. 93-6892) (1995).

27 *Tome*, 3 F.3d at 345.

28 It seems that the prosecution never argued that A.T.'s earlier statements were admissible to rebut an implicit charge of improper influence by the prosecutor. Since those statements were clearly made before any influence the prosecution may have had on A.T., they would then seem to have been admissible even on the strictest time-line analysis. There may not have been a sufficient basis in even the implicit thrust of defense counsel's questions to make that argument: defense counsel may have been admirably prescient about the legal consequences of such a charge.

29 *Tome*, 3 F.3d at 345.

30 Petitioner's Brief at 5, *Tome* (No. 93-6892). It is not apparent why this line of inquiry on cross did not itself "open the door" to the introduction of the statements by the prosecution. It would seem that the effect, if not the intent, of this line of questioning would be to suggest that A.T.'s direct testimony is not to be believed because she did not describe the abuse to persons to whom she would naturally have gone with her story. It would seem that ordinary principles of "curative admissibility" would then permit the prosecution to show that she did indeed given detailed accounts of the abuse to the persons defense counsel mentioned, even if such evidence would otherwise be inadmissible. *See e.g.*, United States v. Garcia, 900 F.2d 571, 575 (2d Cir.), *cert. denied*, Camacho v. United States, 498 U.S. 682 (1990). Perhaps the prosecution was concerned that such prior statements would then come in only to rehabilitate the witness and not for their substantive value.

31 Tome v. United States, 115 S. Ct. 696, 699 (1995). The witness's unresponsiveness was the grounds for defendant's unsuccessful argument in the Tenth Circuit that his confrontation rights had been violated by his inability *effectively* to cross-examine the victim about the contents of her prior statements. *Tome*, 3 F.3d 342, 352 (10th Cir. 1993). The defendant did not seek *certiorari* on that ground.

ing concentration and concluded, "We have a very difficult situation here."[32]

After A.T.'s cross-examination, the prosecution called each of the six adults to whom, in 1990 and 1991, A.T. had described the abuse. The trial court relied on the prosecution's argument that it was offering the testimony under Rule 801(d)(1)(B) to rebut the implication of improper motive or influence promised in opening statement and made on cross-examination.[33] The trial court also relied on Rule 803(24)[34] to admit A.T.'s August 22, but not August 27, statement to her babysitter on the apparent ground that the spontaneous declaration of that date had "circumstantial guarantees of trustworthiness" analogous to those of Rule 803(3).[35] The court also admitted, under

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[32] *Tome*, 115 S. Ct. at 699. The Supreme Court repeated that A.T. was asked 348 questions during the cross-examination. *Id.* The Prosecution had argued to the Court that the cross was "very-long." However, she also said she had timed the examination and that it had lasted an hour and fifteen minutes over the two days. Given that the examination was conducted over a two-day period, that the credibility of the child was crucial, and that a portion of the opening day's examination dealt with relatively simple background issues, perhaps designed to put the witness at ease, the length of the examination does not seem exceptionally great.

[33] In discussing the admissibility of A.T.'s statements to the pediatricians, the Court remarked to defense counsel, "I wouldn't admit it under 801 if you hadn't thrust in that direction, that is recent fabrication or improper motive, and that is implied in the manner in which you conducted your examination." Joint Appendix at 14, Tome v. United States, 115 S. Ct. 696 (1995) (No. 93-6892).

Both the Court of Appeals and the Supreme Court declined to take the government's implicit invitation to affirm based on the defense's failure to make its objection with sufficient specificity. *See* FED. R. EVID. 103(a)(1); Government's Brief at 9 n.5, *Tome* (No. 93-6892). The defense had argued that to admit the prior statements in this case would result in the admission of prior statements in all cases, since all impeachment implicitly claims that the witness is fabricating his or her testimony. The defense did not, however, explicitly argue that the earlier statements were inadmissible because they had arisen after the motive to fabricate arose. Joint Appendix at 10, *Tome* (No. 93-6892).

[34] The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24).

[35] Rule 803(3) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (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

Rule 803(4),[36] the statements A.T. made to the first two pediatricians with whom she had spoken, though the trial court seemed to believe that her identification of the defendant as the person who had abused her was admissible only insofar as it supported the doctor's opinion that penetration had occurred and not for the truth of the matter asserted.[37] Thus, the trial court did not give a limiting instruction as to the pediatricians' testimony because it concluded that A.T.'s statements were admissible under Rule 801(d)(1)(B).[38] The court admitted without objection the testimony of the pediatrician and child sexual abuse expert whom A.T. had seen in 1991.[39]

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as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

FED. R. EVID. 803(3). The trial court commented:

> These relate to the declarant's existing state of mind, emotion, sensation and so on, relate to motive, and statement which, apparently was spontaneous, unsolicited by Ms. Rocha [the babysitter], in which the child is asking the aid of a person who apparently she felt was a friend in keeping her or having that person intercede for her with her mother so that she, [A.T.], wouldn't have to go to New Mexico with her father.

Joint Appendix at 9, *Tome* (No. 93-6892). In fact, a credible argument could have been made for the introduction of the August 22 statement under Rule 803(3) which explicitly includes statements of "motive" as a then present state of mind. A central interpretative problem with Rule 803(3) is the extent to which statements of mental states that are "transparent" to the world are admissible to prove those real world states. The Court's decision in Mutual Life Ins. Co. v. Hillman, 145 U.S. 285 (1892), shows that statements of intention are admissible to prove action in the world in conformity with that intention. And the text of the rule reveals that statements of belief or memory are inadmissible to prove the fact believed or remembered. Statements of motive often invoke a real-world state of affairs as the basis for a motive. For example, a party in a divorce case is likely to say, "I moved out of the house because he had often abused me." Though not prohibited by the text of the rule (and so arguably admissible under the principle *inclusio unius est exclusio alterius*), courts have often been reluctant to allow such statements for the purpose of proving the real-world contexts to which these statements are "transparent." *See, e.g.*, United States v. Emmert, 829 F.2d 805, 810 (9th Cir. 1987) (statement of fear cannot include a factual assertion as to why or of what the declarant was afraid); United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980) (same).

[36] The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FED. R. EVID. 803(4).

[37] Joint Appendix at 13, *Tome*, (No. 93-6892) (Transcript at 209). There is authority for the proposition that naming the perpetrator in an abuse case falls within the rule since it is relevant to treatment of psychological and emotional injury and thus is admissible for the truth of the matter asserted. United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985); Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988).

[38] FED. R. EVID. 105.

[39] Tome v. United States, 115 S. Ct. 696, 700 (1995).

The six witnesses, whom the Supreme Court characterized as "a parade of sympathetic and credible witnesses who did no more than recount A.T.'s detailed out-of-court statements to them" provided accounts of the alleged abuse in many ways more adequate than that provided in A.T.'s testimony, something the Court's rather compressed account of their testimony tends to mask.[40] The baby- sitter's account of A.T.'s first complaint illustrated the spontaneity of A.T.'s statements[41] and her account of A.T.'s explanation of what she had meant five days earlier contained a narrative response to an open-ended question that was more detailed and more coherent than A.T.'s direct testimony had been.[42] The account that the social worker gave

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[40] *Id.* at 705. It was the relative detail of the earlier statements rather than the "sympathetic" character of the witnesses that was likely to have been important to the jury. Of course the credibility of a witness to an admissible hearsay declaration is highly relevant and subject to all the modes of impeachment available for any witness. And given A.T.'s performance on cross-examination, it would appear that the jury had an adequate opportunity to understand the declarant's limitations.

[41] Joint Appendix at 11, Tome v. United States, 115 S. Ct. 696 (1995) (93-6892):

Q. All right. And do you recall the month of August 1990 [A.T.] saying something to you regarding Matthew Tome?

A. Yes, I do.

Q. Tell us what date that was. to the best of your recollection?

A. The 22nd.

Q. Of August 1990.

A. Yes.

Q. And on that day were you baby-sitting [A.T.] Tome?

A. Yes, I was.

Q. All right. And what happened during that day?

A. She came to me and she told me, Please don't let my mom take my [sic] back to my father. And I asked her why, and she said, Because I don't want to go back. And I asked her why again, and she said, Because my father gets drunk and he thinks I'm his wife.

Id. at 11-12.

[42] *Id.* at 12. She testified:

Q. So did you talk to [A.T.].?

A. Yes, I did.

Q. And what did you say to her?

A. I asked her to explain to me what she meant by, my dad thinks I'm his wife.

Q. And did she respond?

A. Yes she did.

Q. What did she say?

A. She said that my father does nasties to me.

Q. Did you ask her what that meant?

A. Yes, I did.

Q. What was her answer?

A. She started explaining to me that her father would drag her, drug her through the house by her arms like this, took her into the bedroom and took her clothes off, laid her on the bed. She crossed her legs and he forced her legs open. He laid on top of her, and she got a sharp pain down towards like her stomach area, and then that she was crying for her mother and her father said, Your mother's a bitch. And then that when he got finished, she got up and she went to the bathroom and she wiped herself and there was blood on the tissue.

was even more detailed and added an episode, unlikely to have been fabricated by a six-year-old, in which the defendant's mother confronted the defendant about the incident.[43] The testimony of Dr.

Id. at 12.

A.T.'s mother who was listening in the next room could only remember that A.T. had told the baby sitter "[o]nly pulling her legs apart when her dad was trying to pull it open." *Id.* at 20.

[43] The social worker's testimony was as follows:

Q. Now, tell us what she told you Matthew did to her in detail?

A. She told me, to quote, that he had, quote, put his balls in her.

MS. STEINMETZ: Excuse me. I'm sorry, Ms. Ecklebarger. I have to object for the record to this hearsay part. I think I have to do that at this point, your Honor.

THE COURT: All right, Overruled. Let's proceed, go ahead.

BY MS. NEDA:

Q. I'm sorry, Ms. Ecklebarger, please continue.

A. She stated that he had, and in her words were, quote, put his balls in me, end quote. I at that point asked her where this had happened, and she said that it had happened at their grandma Sadie's house where she and Matthew were with her grandma and grandpa and that her aunty Sheba also lived there.

She specified that none of the other three adults were home during the incident that we were going to talk about. And I had asked her if she could remember, you know, one specific time that we were talking about. We were talking about one incident, and she said that she could remember this one time especially clearly.

And she went on to describe to me that he had told her to take her clothes off. That she had told him no. That he then removed her panties and put her down on the floor and that he had put his balls in her.

And that time I brought the anatomical dolls out and asked her if she could show me with the dolls what he had done. She undressed the male doll and took the panties off of the little girl doll, and then she placed the little girl doll down on its back, put the male adult doll on top of it. Took the penis of the male adult doll and attempted to insert it into the little girl doll and was moving the doll upside down.

She then began—she was reaching down—

Q. Let me stop you. Where did the child place the penis?

A. In the vagina area of the little girl doll.

Q. All right. And you said she moved the doll. How did she move the doll?

A. She moved the male doll up and down on top of the female doll.

Q. All right. Go ahead.

A. Where was I? She then—she was then—she had reached down and was doing something with the legs of the little girl doll. And I said, What are you doing? And she was trying to cross them and keep them crossed, and she was taking the hand of the male doll and trying to shove the legs apart. And she got frustrated and she said, I tried to keep my legs closed so he couldn't put his balls in me.

And then she kind of pushed the dolls away and laid down on the floor, and she put her legs out straight and crossed them and said, I had any [sic] legs out crossed like this. And then she said when she grabbed them, she said she reached and grabbed her own ankles and pulled them apart and then pulled her ankles up to her buttocks so her knees were in the air and then pushed her knees apart and said, and then he did this and then he put his balls in me.

Q. Did [A.T.] tell you whether or not Matthew kissed her?

A. Yeah. She said that he kissed her all over her body and that specifically he kissed her on the vaginal area. She pointed to that area of the doll. She also said that he had asked her to touch him and that she had refused. When I asked her where he had asked her to touch him, she pointed or she touched the penis area of the male doll.

Q. Did [A.T.] tell you what she did after Matthew did this to her?

Karen Kuper, the first pediatrician to see A.T., described her interview with A.T. in a way that emphasized that the child had given her account in response to questions that were a good deal less leading than the ones that the prosecutor used during her direct testimony.[44] The second pediatrician testified that she had quickly determined that A.T. had "been through enough in terms of discussing it and that what was important for me was to examine her"[45] and had decided not to conduct a full interview. She added little except that A.T. had repeated that "her father had put his thing in her."[46] The third pediatrician, who did not see A.T. until after the defendant was indicted and over a year after A.T.'s initial complaints, testified without objec-

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A. Yes. She said that afterwards she had gone to the bathroom, and that when she had wiped herself, that there was blood on it. And that she had kept that and that when her grandmother and aunty came home, that she went and showed them and said, Look what Matthew did to me.

And she said at that point that her grandmother had said, If he does it again, I'm going to haul him away. She said later that her grandmother confronted Matthew and that she was there and that Matthew turned to [A.T.] and said, It's all your fault. And [A.T.] said, No it isn't, it's all your fault.

. . .

Q. Ms. Ecklebarger, did the child [A.T.] tell you that Matthew did this more than once?
A. Yes she did.
Q. What were her words?
A. Well, what she said was—I had asked her what had made him stop. It was after she had talked about grandma saying that if he did it again, that she would have him hauled away. And she said, Well, grandma said that she would have him hauled about, but he didn't stop, he did it every single day and then he stopped.
Id. at 16-19.

[44] Q. Would you please state precisely the question you asked of the child and the answer she would give and just go in chronological order that the interview was conducted?
A. Certainly, I always begin with a very open-ended question, and my question was, Has anyone ever touched you in a way that hurt or was scary and her answer was, Just my dad. I then asked, What did he do? [A.T.] said, He touched me.

And I asked where, And [A.T.] said, Here. She was holding a doll that we have in our play room, and she was pointing to the vaginal area on the doll.

I then said, What did he do? [A.T.] said, He put his fingers inside me. I said, How did it feel? And she said, It hurt and I was scared.

I then said, Did he touch you with anything else? [A.T.] said, His thing, I said what, Do you mean "his thing?" She again could not tell me what this thing was, but she again had the dolls and she pointed to the doll's genital area.

I asked her, What did he do with his thing? And [A.T.] said, He put it inside of me. I asked where, and she then pointed to the doll's vaginal area.
Q. After you conducted this interview of the child—well, let me ask you first. Was the mother present during the interview of this child?
A. Yes, she was.
Q. And where was she while you were talking to the child?
A. She was in the same room. [A.T.] was lying on the exam table. her mother was sitting behind me in one of the chairs in the room.
Id. at 14-15.

[45] Joint Appendix at 11, Tome v. United States, 115 S. Ct. 696 (1995) (93-6892).

[46] *Id.*

tion.[47] By that time, A.T. was disinclined to volunteer anything. In response to direct questions, however, she told the doctor where the defendant had touched her.[48]

After Tome testified and presented his own evidence, he was convicted and sentenced to twelve years imprisonment.[49]

The time-frame in which the events and statements occurred bears emphasizing. The alleged abuse took place in July of 1989, when A.T. was barely four-years-old; A.T.'s first accounts of that abuse occurred in August of 1990, when she was five-years-old; and she gave her in-court testimony in January of 1992, when she was six-and-one-half-years-old, over two-and-one-half years after the events she described. Between the time she first described the abuse to her babysitter, social worker, and pediatricians, she had been in the physical custody of a mother who had carried on a bitter custody battle with the defendant and had every reason to believe that the defendant had engaged in the most vile kind of exploitation of her child. Just before trial the victim discussed her testimony with the prosecutor, with whom she was on a first-name basis, and spent some of the day between her direct and cross-examination, during which court was in recess, with the prosecutor. Much had happened since A.T.'s statements in August and September of 1990, and most of it, including the mere passage of time, served to render her in-court testimony less credible than her earlier statement had been.[50] The earlier statements were much closer in A.T.'s young life to the events they described and seemed more spontaneous, more coherent, and less shaped by leading questions.

C. THE APPEAL AND THE SUPREME COURT'S RESOLUTION

The Court of Appeals affirmed, adopting the government's argument that all of A.T.'s previous statements were admissible under Rule 801(d)(1)(B) even though she had made them after the alleged "motive to fabricate" arose.[51] The Court of Appeals held that the issue of

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47 *Tome*, 115 S. Ct. at 700.

48 It is unclear whether A.T. identified the defendant as the person who had touched her.

49 *Tome*, 115 S. Ct. at 700.

50 *See infra* text at notes 73-80.

51 Tome v. United States, 115 S. Ct. 696, 700 (1995). Justice Kennedy's formulation illustrates the tendency of courts to elide the three categories embedded in Rule 801(d)(1)(B)'s "recent fabrication or improper influence or motive." Must the improper motive be one to fabricate or simply tend to lead the witness sincerely to see the facts in a certain way? For an argument that it is important to keep the categories distinct, see E. O. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231, 245.

whether a previous statement is relevant to rebut a charge of recent fabrication or improper influence or motive is an issue of relevance.[52] Whether the declarant made the previous statement before "the improper influence or motive" was simply one of several considerations, and the admissibility of the previous statement "is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the demonstrated propensity to lie."[53] Applying this balancing test to the case before it, the Court of Appeals concluded that although A.T. may have had some motive to lie to her babysitter, "we do not believe that it is a particularly strong one"[54] and thus concluded further that the district court judge had not abused his discretion in admitting it.[55]

The Supreme Court, with Justice Kennedy writing for a five-judge majority,[56] reversed and held as a matter of law that Rule 801(d)(1)(B) embodies the "prevailing common law rule"[57] that prior consistent statements are "admissible" only if they were made before the "motive to fabricate" arose, something of which there was no evidence in the case at bar. Justice Kennedy relied first on the relatively undisputed historical fact that the prevailing practice of common law courts was to impose the "premotive" or "time-line" requirement on prior consistent statements admitted, under common law, solely to rehabilitate a witness who had been charged with improper influence or motive or recent fabrication.[58] He then noted that the Federal Rules had given a new "weighty, nonhearsay status" only to those prior consistent statements that rebut those particular charges, and later noted that this enhanced importance that the Rules give to prior consistent statements "makes it all the more important to observe the preconditions for admitting the evidence in the first place."[59] The Court then suggested that the premotive requirement would limit the prior consistent statements that would be "admitted"[60] to those that had pecu-

52 United States v. Tome, 3 F.3d 342, 350 (10th Cir. 1993).

53 *Id.*

54 *Id.* at 351.

55 The Court of Appeals took the issue of whether a prior consistent statement was admissible only if made before the motive arose to be an issue of law which it reviewed de novo. Having resolved that issue in the negative, it evaluated the district court's exercise of its discretion in the application of that rule to the facts of the case. *Tome*, 3 F.3d at 346, 349, 351.

56 Justice Scalia, one of the five, declined to join the Court's resort to the Advisory Committee Notes to determine the legislative intent embodied in the rules and filed a Concurring Opinion so indicating. *Tome*, 115 S. Ct. 696, 706 (Scalia, J., concurring).

57 *Id.* at 702.

58 *Id.* at 700.

59 *Id.* at 703.

60 *Id.* at 701. Actually "admitted as substantive evidence" would have been more accurate. The assumption that prior consistent statements not admitted under Rule

liarly "direct and forceful" rebuttal effect: "If consistent statements are admissible without reference to the time frame we find embedded in the Rule, there appears to be no sound reason not to admit consistent statements to rebut other forms of impeachment as well."[61]

Justice Kennedy, now joined by only three Justices,[62] invoked the one-paragraph discussion in the Advisory Committee Notes, which summarizes the only major change effected by the rule—the admissibility of prior consistent statements as substantive evidence and not merely to rehabilitate the witness.[63] The Advisory Committee Notes did not discuss the premotive rule. The Court concluded that it was unlikely that "the drafters of the Rule intended to scuttle the whole premotive requirement and rationale without so much as a whisper of explanation."[64] The Court opined further that the "compromise" embedded in the Rules would likely disappear with the premotive requirement. This would open the "floodgates" to the Uniform Rules' admission of all prior consistent statements[65] and would thus sweep away the Advisory Committee's "unwillingness to countenance the general use of prior prepared statements as substantive evidence."[66]

The Court also rejected the argument for admissibility based on the liberalized notion of relevancy embedded in the Federal Rules and on the "strong academic criticism, beginning in the 1940's, directed at the exclusion of [all] out of court statements made by a declarant who is present in court and subject to cross-examination."[67] In suggesting that this argument "misconceives the design of the

801(d)(1)(B) would not be "admitted" at all permeates the majority's opinion and distorts its reasoning.

61 Tome v. United States, 115 S. Ct. 696, 702 (1995).

62 Justice Scalia declined to give the Advisory Committee Notes the same kind of authoritativeness that the majority gave them. *Id.* at 706 (Scalia, J., concurring).

63 The Advisory Committee Note provides:

> Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

The Note also focuses on the way the initiative for the admissibility of such statements is in the hands of the opposing party. That would seem to apply to all cases where prior consistent statements were offered to rebut charges of recent fabrication or improper influence or motive, whether or not the statements were made before influence took place or the motive arose.

64 Tome v. United States, 115 S. Ct. 696, 703 (1995).

65 NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM RULE OF EVIDENCE 63(1)(1953). The American Law Institute Model Rule 503 (1942) likewise provided for the admission of all prior statements of witnesses.

66 *Tome*, 115 S. Ct. at 703.

67 *Id.* at 704.

Rules' hearsay provisions[,]"[68] the Court drew a sharp distinction between relevance or probative value and the additional value protected by the hearsay rule, to which the Court did not assign a general category name, but which the dissent called "reliability." "That certain out-of-court statements may be relevant does not dispose of the question whether they are admissible."[69] The Court likewise rejected academic criticism of the categorical exclusion of prior consistent statements as substantive evidence, and academic arguments for a more flexible balance between "the probative value of particular statements against their likely prejudicial effect."[70] The Advisory Committee was explicit in generally rejecting this flexible approach: "The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of ruling, [and] enhancing the difficulties of preparation for trial."[71] The Court summed up its conclusion in terms that echoed the Advisory Committee:

> The statement-by-statement balancing approach advocated by the Government and adopted by the Tenth Circuit creates the precise dangers the Advisory Committee sought to avoid: It involves considerable judicial discretion; it reduces predictability and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-court-statements will be admitted.[72]

The Court then used the case before it to illustrate "some of the important considerations supporting the Rule as we interpret it, especially in criminal cases."[73] The Court cited the danger that the introduction of consistent statements in such a case would create a situation where "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones." The Court complained that "in response to a rather weak charge that A.T.'s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A.T.'s detailed out-of-court statements."[74] Though those statements, the Court conceded, "might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether A.T. had the charged motive to fabricate."[75] The Court then con-

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68 *Id.*

69 *Id.*

70 *Id.*

71 Advisory Committees' Introduction to Article VIII, 28 U.S.C. App., p. 771.

72 Tome v. United States, 115 S. Ct. 696, 704-05 (1995).

73 *Id.* at 705.

74 *Id.*

75 *Id.* The Court noted that the prosecution had argued the truth of the statements in

ceded that the task of ascertaining the time a motive arose might in some cases be difficult, though hardly impossible in light of the century-long allegiance of the common law to the premotive rule. Finally, the Court again lamented the lack of guidance a balancing approach would provide "to attorneys preparing a case" or, what might seem an odd, though understandable, example of putting the cart before the horse, "*to appellate courts in reviewing a judgment.*"[76]

Justice Breyer,[77] joined by three other justices, dissented. He characterized the issue before the court as one of relevance, not hearsay, and argued that the premotive requirement had not survived the liberalization of the relevancy requirements of the Rules. Under those requirements, the only question as to admissibility for substantive purposes would be whether a prior consistent statement had, under all the circumstances, *any* tendency to rebut the charge of recent fabrication or improper influence or motive.[78] Justice Breyer noted that the common law recognized various categories of prior consistent statements that could rehabilitate a witness in different ways. He then (1) disputed the majority's assumption that the drafters singled out one of those categories because of its strong *rehabilitative* force; (2) disputed whether that assumption, even if true, had any implications for the premotive rule, since probative force on the question of rehabilitation had nothing to do with the hearsay rule's concern for witness reliability, and thus, the increased *rehabilitative force* of a premotive statement should not effect whether that statement was

closing, but had not used them to rebut the improper motive. Of course, given the way in which the rule conditions what may be in a given case overwhelming probative value on what may simply be strong rehabilitative value even where there may not be an intrinsic logical connection between them, and given the elusiveness of the distinction between substantive value and rehabilitation of witness with a prior consistent statement, few conclusions can, it seems, be drawn from a prosecutor's choice to emphasize overwhelming probative value rather than simply strong rehabilitative value. *Id.*

[76] *Id.* (emphasis added). The Court concluded by invoking the availability of Rule 803(24) for statements that contain strong circumstantial indicia of reliability that are highly probative and are better than other available evidence, though intimating no view on the admissibility of A.T.'s statements on that ground and deferring to the Court of Appeals for a ruling on that issue. In light of the Court's holding in Idaho v. Wright, 497 U.S. 805 (1990) that the catch-all exception is not "firmly rooted" for confrontation purposes, the Court's invocation of that section here is somewhat ironic, though not indefensible. Given *Wright*, it is the availability of the cross-examination of the declarant that would save one of A.T.'s statements offered under Rule 803(24) from constitutional infirmity. Of course, that would precisely be the most distinctive feature of a prior consistent statement offered under Rule 801(d)(1)(B). In other words, to be admissible under Rule 803(24) in a criminal case, the declaration would have to be the prior statement of a witness.

[77] It was Justice Breyer's first published opinion on the Court. It is not traditional that a justice's first opinion is a dissent. An indication of a fiercely independent mind?

[78] Tome v. United States, 115 S. Ct. 696, 708 (1995) (Breyer, J., dissenting).

reliable and thus, nonhearsay; (3) identified a specifically "*hearsay*-related reason" for 801(d)(1)(B) for which (crucially for the issue at bar) the timing of the statement was irrelevant: juries might have a particularly hard time distinguishing such statements' rehabilitative and substantive uses, rendering a limiting instruction ineffective. Justice Breyer concluded,

> In sum, because the Rule addresses a hearsay problem and one can find a reason, unrelated to the premotive rule, for why it does so, I would read the Rule's plain words to mean exactly what they say: if a trial court properly admits a statement that is 'consistent with the declarant's testimony' for the purpose of 'rebut[ting] an express or implied charge . . . of recent fabrication or improper influence or motive,' then that statement is not hearsay,' and the jury may also consider it for the truth of what it says.[79]

Justice Breyer then argued that the notion that a postmotive statement has simply no relevance to rebut a charge of recent fabrication or improper influence or motive in any set of circumstances was grossly overgeneralized. After all, a minority of common law courts had recognized that postmotive statements could under some circumstances be admissible. Suggesting that flexibility might be more important than ease of mechanical application, Justice Breyer invoked the Court's ruling in *Daubert v. Merrell Dow Pharmaceutical, Inc.*[80] for a recent dissolution of a rigid and absolute bar to the admissibility of evidence which promised significant probative value despite problematic reliability. Finding no evidence that the drafters intended the premotive rule to survive or even believed that it would, Justice Breyer opined that the court should not consider whether it should read such a belief or intent into the rule.[81]

III. The Legal Context

A. The Debate Concerning the Admissibility of Prior Statements of Witnesses

Aside from the fact that A.T. first described the abuse over one year after the event allegedly occurred, the case would perfectly illustrate some of the most pervasive problems surrounding the Federal Rules' general prohibition on prior statements by witnesses, and

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79 *Id.* (Breyer, J., dissenting).

80 113 S. Ct. 2786 (1993).

81 Justice Breyer also opined that the approach he suggested would not yield a different result from the majority's in most cases since "in most cases, post-motive statements will not be significantly probative." *Tome*, 115 S. Ct. 696, 709 (1995) (Breyer, J., dissenting). Given the thrust of his argument, that seems an odd concession. Finally, he stated his belief that few trials would turn on the difference in the approaches since the prior statements would in many cases only repeat the in-court testimony.

surely seems to be one of those instances where, as a distinguished commentator and judge put it, such a prohibition is "a practical absurdity."[82] Though the illustration is not perfect, it is still powerful. As noted, there is every reason to believe that A.T.'s statements in August and September of 1990 are more credible than the halting testimony she gave in response to leading questions both on direct and cross at trial one-and-one-half years later.

The assumption underlying the hearsay rule is that the dangers of witness misperception, bad memory, miscommunication, and deliberate falsification are best countered by the in-court protections of (1) the oath (2) the jury's opportunity to observe the demeanor of the witness and, most importantly, (3) cross-examination. That assumption, of course, gives way to the common sense conclusion (embodied under the Federal Rules scheme in twenty-three enumerated exceptions that apply whether or not the declarant is available to testify) that certain kinds of out-of-court statements are at least as reliable, perhaps more reliable, than in-court testimony.

These include statements made during or soon after the events or mental states they "describe" or "explain" admitted under somewhat different conditions, all because of the further assumption that declarants are less likely to fabricate relatively spontaneous statements than considered ones.[83] Such statements are admissible under circumstances where the guarantees of reliability are often far from iron-clad. The spontaneity associated with "excited utterances," for example, seems to *increase* the likelihood of misperception or misinterpretation. Also, it would be difficult to detect a quick-thinking and "insincere" declarant who made a statement of present mental conditions or a statement of present sense impression to someone who could not see what the declarant purported to describe.[84] Rule 803's enumerated exceptions also include statements made by declarants with strong personal or institutional interests in accuracy.[85]

Courts admit statements under Rule 803 into evidence without subjecting available declarants to cross-examination. Further, Rule 804 lists four more types of statements that courts will admit (on rather different supporting assumptions), even where the opponent *cannot* require the appearance of the declarant for cross examina-

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82 Jack Weinstein, *The Probative Force of Hearsay*, 46 IOWA L. REV. 331, 333 (1961).

83 FED. R. EVID. 803(1)-803(3).

84 *See, e.g.*, United States v. Blakey, 607 F.2d 779, 785 (7th Cir. 1979) (no explicit requirement under Rule 803(1) that the witness have personal knowledge of the matter described); United States v. Cain, 587 F.2d 678 (5th Cir. 1979), *cert. denied*, 440 U.S. 975 (1979), *appeal after remand*, 615 F.2d 380 (5th Cir. 1980) (statement made over a C.B. radio admissible).

85 FED. R. EVID. 803(4), (6)-(18).

tion.[86] Thus, for virtually all of the exceptions to the hearsay rule, under Rule 803 and 804, the protection of the oath,[87] assessment of demeanor, and, most importantly, cross-examination are unavailable.[88]

Given the many exceptions based on arguable premises to a rule whose most important purpose was to protect cross-examination, it should come as no surprise that commentators and many courts have consistently questioned the wisdom of excluding prior statements of witnesses who testify at the trial[89] and *are* subject to cross-examination on those statements. Prior statements, of course, *always* have the advantage of relative proximity to the events described or explained and so almost always pose fewer dangers based on faulty memory, even though they may not meet the (somewhat elastic and inconsistently applied) requirements of the exceptions now embodied in Rules 801-803. Further, there were doubts, which the *Tome* case exemplifies, as to whether the demeanor of every witness under the difficult conditions of in-court testimony was a reliable guide to credibility. Further, prior statements of witnesses were far less likely to be tainted by the effects of both arguably legitimate pretrial "horseshedding" or by more clearly improper molding of witnesses' testimony to meet legal standards.[90] And most importantly, there was the availability of the procedural protection that the hearsay rule was increasingly thought primarily to protect: cross-examination, "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[91] In fact, there were often *two* forms of relevant cross-examination: cross-examination of the witness whose prior consistent statement was being reported and further examination of the person to whom that witness made the earlier statement.[92] Thus, both the Uniform Rules of Evi-

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86 *Id.* 804(b)(1)-(4).

87 Except for former testimony. *See id.* 804(b)(1).

88 If the exception is under Rule 803, the opponent may subpoena the declarant and subject him to examination concerning the statement. However, the admissibility of the statement is not conditional upon the availability of the declarant for such an examination. If the exception is under Rule 804, the declarant is necessarily unavailable, at least to compulsory process. *Compare id.* 613 (extrinsic evidence of a prior inconsistent statement is admissible only if the declarant has an opportunity to deny or explain the statement, either on cross or upon being recalled). And the opponent may seek to impeach that hearsay declaration in a manner that would be available if the declarant had made the statement from the stand. *Id.* 806.

89 *See* Tome v. United States, 115 S. Ct. 696, 703 (1995) (summarizing courts who have questioned the wisdom of excluding prior statements).

90 *See, e.g.*, JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 31-42 (2d ed. 1987).

91 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourn rev. 1974).

92 It is well-settled that the witness to a prior consistent statement admitted under Rule 801 need not be the declarant, as long as the declarant *sometime* "testifies at the trial or

dence[93] and the Model Rules of Evidence[94] contained provisions allowing the introduction of all prior statements of witnesses subject to cross examination.

In contrast, several arguments favor excluding prior consistent statements. First, cross-examination at trial does not take place immediately after the declaration. This argument invokes the metaphor of striking while the iron is hot, as if the metaphor alone settles the issue. At times the proponents join the metaphor with concerns that a witness might have time before testifying to construct plausible, but specious, explanations for any weaknesses that the prior statement exhibited. Though it might reduce the number of witnesses rendered speechless by sparkling cross-examinations, it is not apparent that denying witnesses time to explain an apparent weakness in their account consistently ensures that "truth may be ascertained and proceedings justly determined."[95] And in any event the cross examination would follow immediately upon the jury's hearing the prior statement.

Second, there is the concern, to which Justice Kennedy alluded in *Tome*,[96] that admission of prior consistent statements would lead to wholesale use of prior prepared statements as substantive evidence, and, more specifically, that lawyers would draft prior statements for witnesses, especially parties, who would then simply read the statements in-court. This concern has always seemed a bit fanciful in light of the likelihood of devastating cross-examination for any witness who attempted this ploy.[97] And it would, in any event, seem possible to carve out more limited rules for documents prepared in anticipation

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hearing and is subject to cross-examination concerning the statement." FED. R. EVID. 801(d)(1). *See, e.g.*, United States v. Lanier, 578 F.2d 1246, (8th Cir. 1978), *cert. denied*, 439 U.S. 856 (1978). Technically, if someone other than the declarant serves as the witness to the statement, the opposition may cross examine him concerning any relevant circumstances of the statement. FED. R. EVID. 611(b). If the witness presents his own consistent statements, the opposition may cross examine him on those statements. The opposing party may also call the person to whom the witness made the statements, and if that person is "a hostile witness, an adverse party, or a witness identified with an adverse party," the opposition may examine him using leading questions. *Id.* 611(c). The definition of who is a witness "identified with an adverse party" is broader than that of persons who may make vicarious admissions under Rule 801(d)(2). *Id.* 801(d)(2). Advisory Committee Notes, 56 F.R.D. 183, 275. *But see* S. REP. NO. 1277, 93rd Cong., 2d Sess. 26 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7072 (noting that "it may be difficult in criminal cases to determine when a witness is 'identified with an adverse party,' and thus the rule should be applied with caution.").

93 UNIFORM RULES OF EVIDENCE 63(1) (1953).

94 MODEL CODE OF EVIDENCE 503 (1942).

95 FED. R. EVID. 102 (1995).

96 Tome v. United States, 115 S. Ct. 696, 703 (1995).

97 As a general matter, the effectiveness or ineffectiveness of the various argumentative devices of the adversary trial should always be the key consideration in determining whether to resort to the radical solution of exclusion provided by most evidentiary rules.

of litigation, and especially in anticipation of testimony.

Finally, there is another concern which Justice Kennedy mentioned in the more limited context of the *Tome* case, that admission of prior statements of witnesses would result in a situation where "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."[98] This is a weightier consideration and its force requires a more delicate understanding of the actual rhetorical dynamics of the trial than this Article can provide. Note, however, that keeping the focus of the jury on the in-court statements is not an unmixed blessing, particularly in criminal cases. Under the premotive rule, defendants' denials are generally inadmissible even under circumstances that would tend to enhance the credibility of an in-court denial. Often prosecution witnesses, particularly detectives, are self-assured, persuasive, and accustomed to the confining conventions of the courtroom;[99] defense witnesses, including the defendant, often perform poorly in court. Further, many criminal cases include the introduction of the defendant's self-inculpatory statements to the police, either full-blown confessions or admissions as to incriminating specific facts.[100] The defendant often denies the truth of these inculpatory statements which often were, in fact, surrounded by exculpatory statements, consistent with the defendant's in-court testimony, which may not be admissible under the premotive rule if offered by the defendant.[101] The "emphasis of the trial" may thus already be on the defendant's out-of-court statements, but in a partial way that puts the declarant at a distinct advantage. The jury is likely to hear a partisan, sanitized, and oversimplified version of what the defendant actually said and the conditions under which the defendant said it.[102]

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98 *Tome*, 115 S. Ct. at 705.

99 Police perjury is a major concern in American courts. Though no one can be aware of its true extent, there are reasons to believe that it is pervasive. *See* Myron W. Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992). When combined with the policeman's traditional sin of ignoring all the evidence other than that which supports the most obvious hypothesis and then "shaping" the available evidence to support that hypothesis to the exclusion of all others, it consistently threatens the integrity of the system. For the views of the great fictional detective on the dangers of theorizing too early, *see* Thomas A. Sebeok and Jean Umiker-Sebeok, *"You Know My Method": A Juxtaposition of Charles S. Peirce and Sherlock Holmes* 23 *in* THE SIGN OF THREE (Umberto Eco and Thomas Sebeok eds. 1983).

100 *See* FED. R. EVID. 801(d)(2)(A).

101 Of course, only the opposing party may offer party admissions. The defendant will often have made the prior consistent statements after the motive to fabricate has arisen and they may be inadmissible under the holdings of courts that follow the traditional rule.

102 See MARVIN FRANKEL, PARTISAN JUSTICE (1980), for a criticism of the paradox embedded in the combination of broad rights against self-incrimination in court, where procedural protections are combined with the absence of meaningful protections against self-incrimination at the station house, where they are often nonexistent.

B. THE FEDERAL RULES' INNOVATIONS

The Supreme Court cannot make its own unconstrained policy choice about the admissibility of prior consistent statements. It has to interpret the Federal Rules of Evidence like any other statute, relying primarily on the plain meaning of the language.[103] And although the canons of statutory interpretation are not without their own paradoxes,[104] they strongly suggest that courts should interpret the individual provisions of a statute in light of the structure or "design" of the statute as a whole, a notion that the majority explicitly invoked in *Tome*.[105] The structural aspects of the Rules most important in the *Tome* case were those that related to relevancy and to hearsay.

1. Relevance

The Rules opted for a notion of relevancy defined in terms of traditional legally determined materiality plus bare logical relevancy: "*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."[106] The definition thus rejected the notion, associated with Wigmore, that "legal relevancy" required not only materiality, but also a quantum of probative force greater than that necessary merely to alter the probabilities of a material fact's existence or nonexistence.[107] In a related manner, the Rules wisely reject the notion that the issue of whether the tendered evidence tended to prove a material fact (logical relevancy) is primarily a matter of legal doctrine.[108] Logical relevancy, in most cases, "de-

103 Caminetti v. United States, 242 U.S. 470 (1916).

104 The classic source for the way in which the maxims are in tension with one another is KARL LLEWELLYN, THE COMMON LAW TRADITION 521-25 (1960). But this is true of all rules of thumb that require an insight into concrete situations to determine the applicability of the rule: "He who hesitates is lost!" "Look before you leap!" *See* BERNARD J.F. LONERGAN, INSIGHT: A STUDY OF HUMAN UNDERSTANDING 173-81 (1957).

105 Tome v. United States, 115 S. Ct. 696, 702-04 (1995). On interpreting the provisions of a statute in light of the structure of the entire law, see, for example, United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173 (1993).

106 FED. R. EVID. 401 (emphasis added).

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> [T]he Court will of course allow to be considered only such evidence as is worth submitting to men who will judge only by the most common and practicable tests. But to a more important extent the effect is to require a generally *higher degree of probative value for all evidence to be submitted to a jury* than would be asked in ordinary reasoning. The judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning, has constantly seen fit to exclude matter which does not rise to a clearly sufficient degree of value. In other words, legal relevancy denotes, first of all, *something more than a minimum of probative value.* Each single piece of evidence must have a plus value.

WIGMORE, *supra* note 91, § 28 (emphasis added).

108 "The law furnishes no test of relevancy." JAMES BRADLEY THAYER, A PRELIMINARY TREA-

pends upon principles evolved by experience or science, applied logically to the situation at hand."[109] Once evidence meets this bare requirement of logical relevancy, it is admissible unless "its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence[,]"[110] considerations unrelated to pure logical relevancy. The dissent in *Tome* properly invoked this scheme as supporting its view.

2. *Hearsay*

The *most* basic structure of the Federal Rules' hearsay provisions is the traditional one: a definition of hearsay followed by a general rule of nonadmissibility qualified by enumerated exceptions.[111] The majority in *Tome* relied on this traditional scheme to support its position. At a level slightly less basic, the Rules did bring a number of important innovations, all leaning in the direction of admissibility, to hearsay doctrine. By focusing on the "matter *asserted*," the definition of hearsay tilts against any focus on the beliefs of the declarant, and toward the actual words uttered, thus excluding from hearsay a theoretically significant set of statements considered hearsay under alternative definitions.[112] That same focus, together with a related requirement that nonverbal conduct must be intended as an assertion to be considered hearsay,[113] excluded from hearsay so-called implied assertions, which over a century of common law development from *Wright v. Tatham*[114] held to be hearsay. Rule 801(d)(1) renders statements that had been previously admissible as bearing only on credibility admissible for substantive purposes, and Rule 801(d)(2) extends the range of vicarious party admissions well beyond the common law, particularly in admitting statements by the party's agent concerning a

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TISE ON EVIDENCE AT THE COMMON LAW 265 (Boston, Little Brown 1898). Of course, Article IV imposes some doctrine on the issue of relevancy. *See* FED. R. EVID. 404-412. It was inevitable, too, that certain common sense inferences would become "codified" as either legally permissible or impermissible inferences in the case law, but the thrust of the Rules' structure was to discourage that development.

109 Advisory Committee's Note to FED. R. EVID. 401, 56 F.R.D. 183, 215. *See* George F. James, *Relevancy, Probability, and the Law*, 29 CAL. L. REV. 689, 699-700 (1941).

110 FED. R. EVID. 403.

111 Rule 801(d) defines certain traditional categories of possible exceptions as nonhearsay. They are sometimes called the hearsay "exclusions," but are functionally identical to exceptions. FED. R. EVID. 801(d).

112 *See* MCCORMICK ON EVIDENCE §§ 246, 250. *But see* 1 MICHAEL H. GRAHAM, MODERN STATE AND FEDERAL EVIDENCE: A COMPREHENSIVE REFERENCE TEXT 100-17.

113 FED. R. EVID. 801(a).

114 7 Adolph. & E. 313, 112 Eng. Rep. 488 (Exch.Ch 1837); 5 Cl. F. 136 (H.L. 1836).

matter within the scope of the agency made during the relationship. The residual hearsay exceptions,[115] which together apply even if the declarant is available and, at least in civil cases, even if the declarant is unavailable for cross examination, also substantially shift the basic structure of hearsay law. And although Rule 703 is lodged in Article VII and not in Article VIII, its provision allowing experts to rely on potentially inadmissible facts made known to them before the hearing, and at the court's discretion, to describe those facts to the jury—formally on the issue of credibility—may be one of the great shifts in the basic structure of hearsay law.

The Rules also effected a number of important changes from the common law at a somewhat less basic level. For example, the Rules extended the exception for "regularly conducted activity" to include "opinions and diagnoses." They also broadened the official records exception to include in civil cases and against the Government in criminal cases, "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."[116] Attorneys may read supportive secondary literature to the jury during the direct examination of an expert who relied on it, and they can use these "learned treatises" to impeach the testimony of an expert who refused to concede its authoritativeness.[117] Further, the Rules expanded the definition of "unavailability" for those exceptions applying only if the declarant was unavailable, to encompass even the lack of memory of a physically present declarant. They also adopted a relatively broad definition of statements against interest, though they qualified it with a broadly framed requirement that those statements which exculpate the defendant had to be supported by "corroborating circumstances [that] clearly indicate the trustworthiness of the statement."[118] Given the changes at every level but the most basic, one could easily wonder whether the common law of hearsay had in fact died a death by a thousand qualifications.

IV. PRIOR STATEMENTS OF WITNESSES UNDER THE RULES

A. THE STRUCTURE OF RULE 801(d)(1)

It is necessary to interpret Rule 801(d)(1)(B)'s exclusion of some

115 FED. R. EVID. 803(24), 804(b)(5).

116 FED. R. EVID. 803(6) and 803(8)(C). *See, e.g.*, Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988).

117 FED. R. EVID. 803(18).

118 FED. R. EVID. 804(b)(3). Courts have imposed such requirements of trustworthiness on inculpatory statements on Confrontation grounds. *See generally* Williamson v. United States, 114 S. Ct. 2431 (1994).

prior consistent statements from hearsay in relation to Rule 801(d)(1)(A)'s more significant exclusion of certain prior inconsistent statements from hearsay. In all probability, the drafters of the Rules tried to create the exclusion of prior consistent statements to create a kind of rough conceptual balance with the exclusion of prior inconsistent statements. But easy conceptual parallels can cause more problems than they solve, and that is probably what happened here. In any event, for both its congruence with Rule 801(d)(1)(B) and the ways in which it inevitably functions differently, the comparison is illuminating.[119]

The exclusion from hearsay of prior inconsistent statements is more important than that of prior consistent statements, because in the former case, though never in the latter, the prior statement may be the only admissible evidence of an element of a claim or a defense and thus the only bulwark against a motion for summary judgment, a directed verdict, or judgment notwithstanding the verdict. Prior consistent statements will always co-exist with substantially similar testimony that is of record. Since the prior consistent statement will, if offered on the issue of credibility alone, tend to bolster the credibility of the in-court testimony, the Federal Rules transformation of this testimony from rehabilitation to substantive evidence will likely be even less significant. After all, in-court testimony bolstered by a prior consistent statement, even if offered only on credibility, is even more likely to be sufficient to resist a directed verdict. Further, the notion that a limiting instruction to the effect that the jury should take the prior statement not for evidence that, for example, the light was red, but only to support the credibility of a witness who testified that the light was red, is likely to be ephemeral.

A second feature of the parallel is much more important in appreciating the significance (or insignificance) of the Court's decision in *Tome*. It is clear that the prior inconsistent statements described in Rule 801 are merely a subset of all admissible prior inconsistent statements. Most prior inconsistent statements, which do not meet the procedural requirements of Rule 801(d)(1)(B), are admitted solely to impeach a witness. There is allusion to the broader set in Rule 613, but there is understandably no rule which explicitly provides for the admission of such prior inconsistent statements. They are admissible

119 *See* Michael H. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence*, 30 HAST. L.J. 571, 616 (1979) (proposing to redraft the Rule to "solve" some of the problems that emerge from this lack of real congruence with Rule 801(d)(1)(A)); E.O. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.L. REV. 231, 245. For reasons that will emerge below, neither proposal would be effective.

as relevant to the credibility of witnesses under Rule 401 and are not hearsay because they are not "offered for the truth of the matter asserted."[120] Finally, the prior inconsistent statements admissible as substantive evidence exhibit readily determinable procedural formalities which arguably are relevant *primarily* to the statements' value as substantive evidence.

Rule 801(d)(1)(A) clearly contemplates admitting a small subset of prior inconsistent statements whose procedural protections (both the oath and usually some cross-examination, though not necessarily cross-examination from the perspective of the opposing party in the lawsuit in which the prior testimony was given)[121] seem designed specifically to enhance the reliability of the statements from a hearsay perspective. By contrast, Rule 801(d)(1)(B) does not define a small and particularly reliable subset of prior consistent statements, but rather the most important or historically prominent category of admissible prior consistent statements.

Further, Rule 804(b)(1)'s definition of that category mirrors the definition of hearsay in Rule 801(c). Thus, prior consistent statements are not hearsay under Rule 801(d)(1)(B) if they "are offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."[122] On a purely linguistic level, such statements would not be hearsay under Rule 801(c) either, since they would not be "offered in evidence to prove the truth of the matter asserted." Since the exclusion of prior inconsistent statements is not in terms of the purpose offered, but rather in procedural terms, the same oddity does not occur. Put contentiously, the upshot of the interaction of Rules 801(c) and (d) is that parties may offer prior consistent statements for the truth of the matter asserted only if they do not offer them for the truth of the matter asserted, but rather to rehabilitate a witness impeached in one particular way.

The real significance of Rule 801(d)(1)(B) is not whether prior consistent statements will be "admitted."[123] Its possible importance comprises two elements. First, because of Rule 801(d)(1)(B), the opponent is not entitled to a limiting instruction prohibiting the use of the prior statement as substantive evidence. As noted, this is of limited significance. The more significant effect of the Rule is that it deprives the party opposing the evidence of a determination as to whether the possibility of the (illegitimate) substantive employment by the jury substantially outweighs the (legitimate) probative value of

120 FED. R. EVID. 801(c).
121 This is what FED. R. EVID. 804(b)(1) requires.
122 FED. R. EVID. 801(d)(1)(B).
123 United States v. Tome, 115 S. Ct. 696 (1995).

the Rule.[124] This is the structural significance of the Rule, but it is doubtful that anyone will unearth any evidence that the Advisory Committee, the Court, and Congress consciously intended it.

The parallel with Rule 801(d)(1)(B) alerted federal courts to the fact that Rule 801(d)(1)(B) was not exhaustive of admissible prior consistent statements. It had long been recognized that prior consistent statements could have rehabilitative relevancies other than rebutting charges of recent fabrication or improper influence or motive. Justice Breyer noted three other such relevancies:[125] (1) placing a claimed inconsistent statement in context; (2) showing that an inconsistent statement was not made; and (3) indicating that the witness' memory is not as faulty as a cross-examiner had claimed.[126] The inevitable question was the admissibility *for rehabilitative purposes only* of prior consistent statements offered to rebut an implication of recent fabrication or improper influence or motive, but made after the claimed improper influence took place or the motive arose. If Rule 801(d)(1)(B) did not embody the premotive requirement, the question was academic. If Rule 801(d)(1)(B) did embody that requirement, the question was how the courts should proceed. In fact, the overwhelming majority of courts ruled that a prior consistent statement offered solely for rehabilitative purposes did not have to meet the premotive requirement.[127] The issue was solely one of permissible impeachment, and since no specific rule governed the impeachment, the only evidentiary issue was relevancy. The Courts of Appeals seemed convinced, in effect, that the premotive rule was one of those legalized logical relevancy rules that Rule 401 eliminated. As long as a post-motive statement passed muster under Rule 403, and altered the probabilities under Rule 401, it is admissible. As Justice Breyer noted, the circumstances under which the declarant gave the post-motive statement could, in a numerous ways, alter the probabilities after a charge of recent fabrication or improper influence or motive. Factors which may affect the probabilities include: the person to whom the declarant made the statement; the declarant's unawareness of the *full* significance of the statement; the relative spontaneity of the statement (though falling short of the specific requirement of Rule 803(1) and

124 FED. R. EVID. 403.

125 115 S. Ct. 696, 707 (1995) (Breyer, J., dissenting).

126 The leading federal case seems to be Judge Friendly's concurrence in United States v. Rubin, 609 F.2d 51, 68 (2d Cir. 1979).

127 *See* United States v. Brennan, 798 F.2d. 581, 587-89 (2d Cir. 1986); United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986); United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985); United States v. Parodi, 703 F.2d 768, 784-85 (4th Cir. 1983); United States v. Rubin, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring), *aff'd*, 449 U.S. 424 (1981).

(2)); the presence of other motives to tell the truth under the circumstances; and the absence of apparent (though not "charged") trial preparation. All of the concerns that the majority expressed about *sub silentio* changes in the common law seem to evaporate once it is apparent that the specific language and (admittedly opaque) legislative history of Rule 801(d)(1)(B) do not bear at all on the resolution under the Federal Rules of the precise issue that was of central significance to the common law—the use of the prior consistent statements for rehabilitative purposes. This virtually unanimous conclusion of the courts of appeal now leads to a paradoxical result. The fact that the declarant made the prior consistent statement before the "motive to fabricate" arose *greatly* increases the statement's relevance to rebutting the charge of recent fabrication. It seems less obviously relevant to the suitability of the prior consistent statement as substantive evidence. Yet, the Supreme Court's decision makes precisely that leap, excluding as substantive evidence statements that are not the best possible rehabilitative evidence.

B. THE ARGUMENTS THE SUPREME COURT SHOULD HAVE MADE

Now it is clear why both the majority and the dissent failed to make their best arguments, and why Justice Breyer was basically correct in his perspective on the issue. The majority stressed the increased significance that Rule 801(d)(1)(B) gave to prior consistent statements and the absence of legislative history suggesting that the drafters of the Rule intended to change the prevailing common law rule. However, the premotive rule was dying in the lower federal courts because of an articulated intuition that Rule 801(d) had nothing to do with prior consistent statements offered for a purpose other than to rebut a charge of recent fabrication or improper influence or motive—even if offered solely for rehabilitative purposes, the most important categories. In each case, the federal courts viewed the only issue to be relevancy, in particular that hemisphere of relevancy that bears on the credibility of witnesses. The majority opinion in *Tome* rightly stressed the special significance that the timing of the prior statement had for its *impeachment* value though the relevant provision dealt not with its impeachment value, but with its reliability as substantive evidence. The majority should have stated a reason for believing that statements offered to rebut a charge of recent fabrication or improper influence or motive and made before the influence occurred or the motive arose are more reliable as substantive evidence than other forms of prior consistent statements. And a reason does exist: statements made before a reason to distort the truth arose *would* be more reliable than those made after such a motive arose. Thus, it is

possible that the drafters considered such statements sufficiently reliable to be admitted as substantive evidence, given the fact that the Rule provides for in-court cross examination of the declarant concerning the statement. Unfortunately, that argument does not convincingly distinguish between statements made at any time and offered to rebut a "motive to fabricate," and other prior consistent statements offered to rehabilitate a witness after other forms of impeachment (*e.g.*, lack of memory). The latter seem as reliable from a hearsay perspective as those statements identified by Rule 801(d)(1)(B).

Justice Breyer's problem was identifying a reason why the Advisory Committee's category of prior consistent statements in Rule 801(d)(1)(B) was an appropriate one if it was not because of that category's special rehabilitative force, which the premotive rule arguably supports. His candidate was the possibility, for which there was virtually no textual support, that the drafters fatalistically included this category as nonhearsay because they concluded that it is particularly difficult for juries to distinguish between a rehabilitative and a substantive use of this type of prior consistent statement. Not only does this supposition lack textual support, telling juries to do something simply because they are tempted to do it seems a bit like the King in *The Little Prince*, who tried to anticipate what his "subjects" would do and then ordered them to do it as an expression of apparent authority.

A better argument exists which supports Justice Breyer's premises. However, this argument relies on the language and structure of the Rule and not the mental state (*i.e.*, conscious belief or intent) of anyone concerned with the legislation.[128] Like the majority's argument, it is based on the importance of the category of prior consistent statements specified as rehabilitation; but unlike the majority's argument it implies nothing for the premotive requirement. If the drafters of Rule 801 had not rendered nonhearsay Rule 801(d)(1)(B) and required parties to offer them as nonhearsay solely under Rule 801(c), courts would have had to subject such statements to a determination under Rule 403. If a trial court concluded that the danger of unfair prejudice resulting from a jury's consideration of a prior consistent statement as substantive evidence substantially outweighed its probative value as impeachment, it could have excluded the statement. Rule 801(d)(1)(B) might have embodied the legislative intent to remove this discretion from the trial judge in much the same way that Rule 609 removes the discretion from a trial judge to balance the prejudicial effect of certain crimes deemed to have a high impeach-

[128] As such, it ought to have been attractive to Justice Scalia.

ment value against their prejudicial effect.[129] The rule might have embodied a determination to take that discretion away from a trial judge with regard to a class of statements that had significant rehabilitative effect. It could well have been the rehabilitative *purpose* (rebutting a charge of motive to fabricate), not the power with which the particular evidence serves that purpose (premotive statements) that was the basis of the drafters' determination to admit it *because of its rehabilitative significance.* In other words, the drafters could have been focusing on the need to admit rehabilitative evidence when there has been particularly powerful impeachment, not on the need to admit only the most powerful rehabilitative evidence. With that argument, Justice Breyer's already compelling opinion would have been complete.

V. THE UNIMPORTANCE OF THE HOLDING AND THE IMPORTANCE OF A KEY PREMISE

A. THE NARROWNESS OF THE HOLDING

In the narrow sense, *Tome* is unlikely to have a great effect on the trial of criminal cases. The reasons are apparent from the facts of the case. The Court of Appeals will have to determine on remand whether the legal error in admitting the previous statements as substantive evidence under Rule 801(d)(1) was harmless, either because the statements at issue were admissible under another rule or because there is certainty beyond a reasonable doubt that the admission of a particular statement without a limiting instruction could not have affected the verdict. A finding of harmless error is defensible given the direct testimony of the child, the probable admission of all her previous statements solely to rehabilitate, the admissibility of at least her August 22 and possibly her August 27[130] statements under Rule 803(24), the admissibility of her statements to her pediatricians and perhaps to the social worker,[131] under Rule 803(4) and possibly Rule

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129 FED. R. EVID. 609(a)(2).

130 The trial court judge admitted the August 22 statements because he thought they bore circumstantial guarantees of trustworthiness equivalent to those of Rule 803(3). The judge seems to have read "equivalent" to mean "one of the same." Thus, he seemed to have believed that the August 22 statement was admissible because it was couched in the language of motive, explaining why A.T. did not want to return to her father. (The Court also seems to have credited its spontaneity.) However, "equivalent" seems to mean in this context more "of approximately the same force" so that circumstantial guarantees of trustworthiness unlike any of those relied upon in the enumerated exceptions should suffice.

Of course, a court of appeals reviewing an evidentiary determination of the trial court may uphold it on any ground, even one not relied upon by the district court. *See, e.g.*, Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324 (10th Cir. 1984).

131 *See* United States v. DeNoyer, 811 F.2d 436 (8th Cir. 1987).

803(24),[132] and the testimony of the third pediatrician to which the prosecution did not object. The general point is that the glacial drift toward admissibility embedded in the Rules has reached a point where it is relatively rare that a prior statement will not fall under *some* category of admissibility. It would seem even rarer that the admission of a prior consistent statement as substantive evidence rather than "merely" to rehabilitate a witness would affect the outcome of a case, either in allowing a case to go to the jury or in determining the jury's verdict.

The significance of *Tome* lies more in certain themes and modes of argument in the majority's opinion. These themes indicate a troubling longing for relatively bright-line exclusionary rules to lift the "burden" of highly contextual evidentiary determination from the backs of trial judges and to provide "guidance to attorneys in preparing a case" and "to appellate courts in reviewing a judgment."[133] Although this quest for certainty through sharp-edged definition is a minor part of the opinion, it raises concerns that go well beyond the issue that the Court addressed. The remainder of this Article addresses that consideration.

B. THE DIALECTIC OF EVIDENTIARY RULES OF EXCLUSION

A compressed version of implicit logic of exclusionary rules that runs below the surface of the court's opinion and virtually any such discussion is as follows:

(1) Given the adversary system, and the strong motives both parties have in presenting the most powerful, *i.e.*, the most relevant, evidence, there seems to be no reason to impose categorical exclusionary rules on the evidence presented at trial. A regime of truly free proof, limited only by rules of procedure and decorum, should prevail.

It is true that evidence law invokes the distinction between logical

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132 The Fourth, Eighth, and Ninth Circuits have held that statements made by a child to a physician alleging abuse by a family member and naming the family member are admissible under Rule 803(4). United States v. Balfany, 965 F.2d 575, 579 (8th Cir. 1992); United States v. George, 960 F.2d 97, 99-100 (9th Cir. 1992); Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988). The Tenth Circuit, within which Tome was tried, has extended that rule to a wife's charges that her estranged husband sexually abused her. United States v. Joe, 8 F.3d 1488 (10th Cir. 1993). *A fortiori*, it would apply to A.T.'s charges against her father.

With regard to Rule 803(24), the protection of cross-examination as the central accuracy-enhancing device of the trial is now understood to be the primary goal of the hearsay rule. Where, as in all cases where a prior statement is arguably admissible under rule 803(d)(1)(B), the declarant actually testifies at the trial and is available for cross-examination concerning the statement, there would arguably almost always be such guarantees, though one could argue that they would not attach to the circumstances of the making of the first statement, the one at issue.

133 Tome v. United States, 115 S. Ct. 696, 701 (1995).

relevance and reliability, a distinction the Court in *Tome* made, and implicitly claims that exclusionary rules, such as the hearsay and Best Evidence rule and the requirement of authentication, serve to prevent a jury from drawing logically valid conclusions from unreliable premises. But, more basically, reliability is simply a form of logical relevance: a piece of evidence that is in some way problematic simply provides a weaker premise from which to draw valid conclusions. And it is usually possible to deploy the devices of the adversary trial—cross-examination,[134] closing argument, limiting instructions, general jury instructions, the judge's right to comment on the evidence—to attack those weaknesses.

Those devices are preferable to total exclusion, so the argument goes, because they are more flexible and more consistent with the kind of holistic, all-things-considered, highly contextual and complex decision the jury must make[135]. Exclusionary rules pose a particular threat to the jury's task when they have a relatively high foundational threshold for admissibility, such as the preponderance of the evidence standard necessary to satisfy the foundational requirement for hearsay.[136] They also pose a threat when the foundational requirements themselves identify only one of many particular factors that bear on reliability; this is the problem with the majority's interpretation of Rule 801(d)(1)(B). A piece of evidence that fails to meet its foundational requirement may still be somewhat probative, and a determination of reliability would not seem fundamentally different from other sorts of factual determinations a jury must make. An exclusionary rule creates an "epistemological notch."[137] Failure to meet the founda-

134 With regard to hearsay, even if it is not possible to cross examine the declarant, (something that is true only some of the time), it is possible to cross-examine the sponsoring witness, often effectively, with regard to what he does not know about the declarant's opportunity to perceive and remember, his biases, prejudices, character for truthfulness, and so on. And, of course, the opponent, may use any form of impeachment against the hearsay declaration. FED. R. EVID. 806.

135 In most cases the jury's task is an interpretative one in the strong sense: the significance of the parts is determined in light of the whole and the appropriate whole (whose theory of the case to accept) is determined not only because of its coherence, but also because of the individual pieces of evidence that may be brought to bear to support it. The jury is within a hermeneutical circle which one should have very weighty reasons to break. On holism, see WILLIAM TWINING, *Lawyer's Stories, in* RETHINKING EVIDENCED: EXPLANATORY ESSAYS 219, 238-49 (1990).

136 FED. R. EVID. 104(a); Bourjaily v. United States, 483 U.S. 171 (1987).

137 A "notch" in public benefits law is a feature of some legal requirements which unjustifiably condition eligibility for significant government benefits, say Medicaid eligibility, on falling above or beyond a specified dollar level. For example, a person earning $299 per month may be eligible for free health care worth $200 per month, but lose all health care benefits if he earns his 300th dollar. They are a pervasive and destructive feature of certain kinds of either-or schemes. *See* Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 NW. U. L. REV. 184, 236-38 (1989).

tional admissibility criterion means that the court will assign the evidence *no* probative value whatsoever, rather than the limited probative value that its weaker reliability, which the rhetorical devices of the trial may help to emphasize, should dictate. It is better to include each bit of evidence and allow the jury to accord it whatever weight it deserves in the full context of all the other evidence.

Further, any situation where the judge has the ability to "micromanage" the introduction of evidence gives the judge, in the course of a trial, numerous opportunities to shade the evidence in favor of one party or another. Bad judges—either unwise or unfair—can sometimes impose their own unreflective prejudices on the process of proof and intrude upon the jury's democratizing functions.[138]

(2) There are severe problems with this open system of free proof. The rule of law itself requires that the evidence presented invoke the norms that are implicit in the substantive law provided to the jury in the instructions. The evidence that a competent, interested advocate might present may be the more powerful, but its persuasive power may stem from its relation to moral or political norms other than those embedded in the instructions. Their power may derive from passion or emotion. The rule of law itself requires the judge to patrol the evidence for materiality.

It may be true that exclusion should always be a last resort, and that usually the rhetorical devices of the adversary trial are adequate. That is why, after all, questions of the weight of the evidence are for the jury. There may be situations, however, where the devices of the adversary trial are inadequate to assess properly the reliability of evidence. Cross-examination and argument may be particularly ineffectual in certain situations, and the material necessary to demonstrate the unreliability of certain forms of evidence may be difficult to obtain in the short time-frames within which many cases are tried. It would often be better to exclude this sort of evidence entirely. Thus exclusionary rules of evidence are necessary.

(3) On the contrary, given the considerations noted in the first step of this dialectic, the determination to exclude evidence should be highly contextual. Factors suggesting the exclusion of evidence in one case will not be sufficiently present in another to justify the epistemological costs of exclusion. Courts will often make evidentiary determinations before the parties have presented all the evidence and without full appreciation of the importance of individual bits of evidence to the party's theory of the case. Any general exclusionary rules

138 JEFFREY AMBRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1993).

will almost inevitably be *over*-generalized. Courts should certainly not exclude any general category of evidence. Rather, the contextual judgment of a wise judge should determine whether the factors mentioned at the second stage of this dialectic warrant exclusion. The slogan here is: "Rules 401 to 403—that is all there needs to be!"

(4) But now some of the original concerns about judicial tyranny, obtuseness, and prejudice reassert themselves. Will trial judges actually make these contextual and therefore probably unreviewable individual determinations? And what about the procedural side of the rule of law requiring that similar cases be similarly decided?[139] Surely there must be some recurring situations that it is possible to capture with generalizations to constrain judicial discretion. And to the extent that it is necessary to contextualize broad generalizations, it is possible to rely on the standard methods of common law adjudication[140] to identify binding considerations dictating admission or exclusion in light of the purposes of the Rules as a whole and the provision in particular.

(5) But evidence law addresses every possible event that could find its way into a civil or criminal courtroom from the "booming, buzzing confusion" of the world. Further, the law of evidence has to be simple enough for advocates and judges to retrieve and apply them in the second or two in which most evidentiary rulings occur. An enormously complex and refined set of "hard law" rules and exceptions and exceptions to exceptions, the violation of which would constitute reversible error, seems unworkable even with perspicuous categories.

(6) Perhaps the best alternative, then, is a small set of overlapping evidentiary rules that function like guidelines for the trial judge and alert the appeals court to possible fundamental unfairness in the trial court. The law of evidence would not be a set of binding general rules qualified by those specific facts of prior cases whose inclusion in or exclusion from the stated authoritative rule is developed in light of the purposes of the general rule. Rather, the law would be constituted by a process by which the kind of judicial determinations described at the second stage of this dialectic were somewhat structured for the trial court by general rules that alerted the trial judge and the advocates to what was at stake and appellate courts to thoroughgoing unfairness. In short, there would be broad rules and individual facts, and little in between. Sometimes a court will hold that a factual situation is outside those broad rules, but not by virtue of its violating au-

139 JOHN RAWLS, A THEORY OF JUSTICE 235-43 (1971).

140 EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (1948).

thoritative middle-level generalizations, such as the premotive rule.

This seems to be the current state of evidence law. It is not a bad place to be, though it offers little solace for those whose quest is for certainty. Theoretical or doctrinal certainty is in any event not practical certainty.[141] The situation will not improve in any substantive way by adding necessarily overgeneral requirements to those found in evidentiary rules to achieve a predictability that is, in light of the uncertainties surrounding judicial determinations of preliminary fact and the applicability of numerous overlapping rules, illusory. Hopefully, *Tome* does not signal such a development.

VI. CONCLUSION

Almost one-half century ago the Supreme Court gave a useful and provocative statement of the traditionalist perspective on the law of evidence in *Michelson v. United States*:[142]

> [T]he task of modernizing the long-standing rules of evidence. . .is one of magnitude and difficulty which even those dedicated to law reform do not lightly undertake. . . .We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage on one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by the discretional controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than establish a rational edifice.

The process of law reform has, by now, made many changes in the "grotesque structure" of the traditional edifice of evidence law. The irrationalities of that structure may have been offset, to invoke Lord Keynes, in that long run in which we are all dead, but not in any individual case. That conviction is embedded in the simplified structure of the Federal Rules and their tilt toward admissibility. When the plain language of a Rule embodies a traditional doctrine, the Court must respect Congress's determination. Beyond that and by reason of the law reform efforts, such as those that produced the Federal Rules and Rule 801 in particular, the Court should no longer invoke the pure weight of tradition and authority, even that of "more than a century."[143]

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141 John Dewey, *Logical Methods and Law*, 10 CORNELL L.Q. 17, 25 (1925).

142 335 U.S. 469, 485-86 (1948).

143 Tome v. United States, 115 S. Ct. 693, 198 (1995). On the implications of understanding law as a conscious set of policy determinations, see BRUCE ACKERMAN, RESTRUCTURING AMERICAN LAW.