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Seeking Consistency for Prior Consistent Statements: Amending Federal Rule of Evidence 801(d)(1)(B)

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The Advisory Committee for the Federal Rules of Evidence was hard at work in 2013 trying to bring resolution to a mystery that has plagued Rule 801(d)(1)(B) since its enactment thirty-eight years ago. Scholars, judges, and litigants have long pondered why the drafters of Rule 801(d)(1)(B) carved out a hearsay exemption for prior consistent statements admitted to repair impeaching attacks on witness motivations*, but failed to extend the same treatment to* other *similarly situated prior consistencies admitted to repair other types of impeaching attacks. In May 2013, the Advisory Committee proposed an amendment to Rule 801(d)(1)(B) in an effort to end the mysterious disparate treatment of prior consistent witness statements by expanding the hearsay exemption to include prior consistent statements ignored by the original Rule. Although the proposed amendment is on track to take effect December 1, 2014, it has encountered strong criticism regarding its potential to liberally admit witness hearsay. This Article seeks to find a constructive path forward by highlighting the beneficial purposes of the proposed amendment and exploring criticisms levied against it. The Article concludes that an amendment of Rule 801(d)(1)(B) is in keeping with the policies underlying the original Rule and with the broader operation of the Federal Rules of Evidence. After examining several drafting alternatives for an amended Rule 801(d)(1)(B), however, the Article concludes that a simple and straightforward amendment that applies a single standard to substantive availability of all prior consistent statements would be superior to the proposed amendment because it would eliminate the confusion that has plagued the existing Rule and chart a clear course for prior consistent statements in the future.*

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LIESA L. RICHTER*

I. INTRODUCTION

Attacking a witness's testimony represents a standard and time-honored trial technique. Indeed, there are numerous ways in which a witness may be discredited on the stand.[1] Following such an impeaching attack, the proponent of the witness may wish to rehabilitate the witness in the eyes of the fact-finder.[2] When a trial witness's motivations, memory, or consistency are challenged during cross-examination, pre-trial "prior consistent statements" of the witness may serve a powerful rehabilitative purpose.[3] At common law, such prior consistent statements were not to be considered for their truth by the fact-finder due to the prohibition on hearsay evidence, but were useful to demonstrate the constancy of the witness's story.[4] In other words, the evidence for the jury to consider had to emanate from the trial testimony of the witness and the prior statements could be used only to assess the witness's credibility on the stand.

The Federal Rules of Evidence altered the common law treatment of some prior consistent statements through Rule 801(d)(1)(B) by allowing them to be considered for their truth, as well as for their rehabilitative purpose, when "offered to rebut an express or implied charge that the declarant recently fabricated [testimony] or acted from a recent improper influence or motive in so testifying."[5] Although this change affected the use of prior consistent statements after an impeaching attack on the witness's *motivations*, it curiously did not alter the common law with

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[1] *See* 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 33, at 205 (7th ed. 2013) [hereinafter MCCORMICK] ("[T]he common law and the Federal Rules liberally admit impeaching evidence.").

[2] *See id.* § 47, at 303 (noting that the "witness's proponent must be given an opportunity to . . . present[] evidence rehabilitating the [impeached] witness").

[3] *See id.* § 47, at 307 (noting use of prior consistent statements as one of two principal methods of rehabilitation).

[4] *See id.* § 47, at 318 (noting that even a witness statement constitutes hearsay if offered for the truth of the matter asserted, and limiting non-hearsay use of prior consistent statements to rehabilitating the credibility of a witness).

[5] FED. R. EVID. 801(d)(1)(B).

respect to prior consistencies offered to repair other forms of impeachment, such as attacks on memory or constancy.[6] Thus, in the post-Rules universe, there is disparate treatment of prior consistent statements used to rehabilitate: some may be considered for their truth by the fact-finder, while others may be used only to repair and must be accompanied by limiting instructions cautioning the jury against substantive use.[7]

In the years since the adoption of the Federal Rules of Evidence, this hearsay exemption for certain prior consistent statements has become complicated and confused. The difficulty began with the original drafters' decision to permit substantive use of prior consistent statements after only one form of impeachment, with no explanation as to why other prior consistencies relevant to repair other forms of impeachment should not also be available for substantive use.[8] This difficulty was compounded twenty years later by the Supreme Court's effort in *Tome v. United States*[9] to make sense of the drafters' choice to single out one form of rehabilitation by finding a "premotive" requirement embedded in Rule 801(d)(1)(B).[10]

As a result of this history, there are several different types of prior consistent statements that may be treated very differently in federal court today.[11] Following a charge of recent fabrication or improper motive or influence, a "premotive" prior consistent statement by the witness may be admitted to rehabilitate and for its truth.[12] In contrast, prior consistent statements made by the witness *after* the inception of the improper motive may never be used for their truth.[13] Federal courts differ as to whether such "postmotive" prior consistent statements should be excluded altogether or whether they may be admitted solely for their non-hearsay

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[6] *See id.* (allowing prior statements to be considered for their truth only after an attack on "influence or motive").

[7] *See* MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 7012, at 151–52 (2011 interim ed.) (noting that certain "prior consistent statements are admitted for corroborative purposes only and not as substantive evidence; the jury should be instructed accordingly").

[8] *See* FED. R. EVID. 801 advisory committee's note (discussing reasons for allowing substantive use of prior consistent statements after an impeaching attack on the witness's motives, without commentary as to why prior consistent statements cannot be used substantively after other forms of impeachment).

[9] 513 U.S. 150 (1995).

[10] *Id.* at 160–62.

[11] Most states follow the standards adopted in the Federal Rules of Evidence, extending confusion into state practice as well. *See* ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 10 (2d ed. 2004) (noting generally that most state codifications of evidence law are similar "in organization and substance to the Federal Rules of Evidence").

[12] *Tome*, 513 U.S. at 160.

[13] *Id.* at 156.

rehabilitative purpose.[14] Finally, prior consistent statements that properly repair impeaching attacks on witness memory or consistency may never be admitted for their truth.[15] They may, however, be provided to the fact-finder for rehabilitative purposes with limiting instructions cautioning against substantive use.[16]

To remedy the confusion surrounding Rule 801(d)(1)(B) and to bring consistency to treatment of prior consistent statements in federal court, the Advisory Committee for the Federal Rules of Evidence has proposed an amendment to the Rule.[17] The Committee considered various drafting alternatives for an amended Rule 801(d)(1)(B) and solicited public comment on the proposal, as well as input from federal district court judges.[18] Following this process, the Advisory Committee and the Standing Committee on Rules of Practice and Procedure recently approved a proposed amendment to Rule 801(d)(1)(B).[19] The proposed amendment adopts a two category approach to the substantive use of prior consistent statements, which maintains the current standard for prior consistencies offered to rebut charges of recent fabrication or improper influence or motive.[20] It adds a hearsay exemption to the existing standard for prior consistent statements offered to rehabilitate a trial witness impeached on

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[14] *Compare* United States v. Miller, 874 F.2d 1255, 1273 (9th Cir. 1989) ("[A] prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all."), *with* United States v. Ellis, 121 F.3d 908, 920 (4th Cir. 1997) (reasoning that "the pre-motive rule of *Tome* ha[s] no effect" where prior consistent statements are not offered as substantive evidence (internal quotation marks omitted)).

[15] *See supra* note 6.

[16] *See* GRAHAM, *supra* note 7, § 7012, at 149, 152 ("A prior consistent statement of the witness may be admitted without reference to Rule 801(d)(1)(B) when relevant to rehabilitation . . . . for corroborative purposes only and not as substantive evidence; the jury should be instructed accordingly.").

[17] Memorandum from Honorable Sidney A. Fitzwater, Chair of the Advisory Comm. on Evidence Rules to Honorable Jeffrey S. Sutton, Chair of the Standing Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S. (May 7, 2013) [hereinafter May 2013 Advisory Comm. Report], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2013.pdf.

[18] *Id.* at 1–4; *see also* TIM REAGAN & MARGARET S. WILLIAMS, SURVEY OF DISTRICT COURT JUDGES ON A PROPOSED AMENDMENT TO FEDERAL RULE OF EVIDENCE 801(D)(1)(B) CONCERNING PRIOR CONSISTENT STATEMENTS app. (2012) [hereinafter FJC SURVEY], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule801d1b.pdf/$file/rule801d1b.pdf (providing the email distributed to all district court judges asking for comments about the possibility of amending Rule 801(d)(1)(B)).

[19] *See* May 2013 Advisory Comm. Report, *supra* note 17, at 1 (seeking "final Standing Committee approval and transmittal to the Judicial Conference of the United States . . . of an amendment to Rule 801(d)(1)(B)"); *see also* REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 15 (2013), *reprinted in* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., AGENDA BOOK 33 (2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-01.pdf (noting that the Standing Committee approved the amendment by a voice vote).

[20] May 2013 Advisory Comm. Report, *supra* note 17, at 3.

other grounds.[21] The proposed amendment will be reviewed by the Judicial Conference and passed to the Supreme Court for consideration.[22] Pending these additional steps, the amendment is on track to take effect on December 1, 2014.[23]

If adopted, the amendment would expand the hearsay exemption currently available for prior consistent statements to include prior consistent statements offered to repair other types of impeaching attacks on a witness.[24] The goal of the proposed amendment is to eliminate the disparate treatment of similarly situated prior consistent statements at trial, as well as the need for confusing limiting instructions that may befuddle a lay jury.[25] Yet the proposed amendment has received mixed reviews. Though some commentators generally support the expansion of the hearsay exemption, others have sharply criticized any effort to broaden the admissibility of prior witness statements.[26] Still others, while supportive of a change, have criticized the specific drafting choices inherent in the proposed amendment to Rule 801(d)(1)(B).[27]

This Article explores the policies underlying the proposed amendment, as well as criticisms levied against it. The Article contends that an amendment that brings consistency to treatment of prior consistent statements is in keeping with the policies behind original Rule 801(d)(1)(B). Further, this Article argues that rational evidence rules that treat similarly situated evidence in a symmetrical fashion ultimately further the goals of efficiency and fairness that underscore the Federal Rules. The Article also gives in-depth consideration to criticisms of the proposal, however, highlighting potential unintended consequences of the proposed amendment. In response to these concerns, the Article explores drafting alternatives for an amended Rule 801(d)(1)(B) and suggests revisions that have the potential to curb the dangers suggested by its critics, while maintaining its beneficial purpose. The Article ultimately proposes a

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[21] *See id.* at 3 (adding "to rehabilitate the declarant's credibility as a witness when attacked on another ground" to the existing rule).

[22] *See Pending Rules Amendments*, U.S. CTS., http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx (last visited Jan. 21, 2014) (outlining the steps taken following approval by the Committee on Rules of Practice and Procedure).

[23] ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOK 5 (2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2013-10.pdf ("Barring any unforeseen developments, these amendments will become effective on December 1, 2014.").

[24] May 2013 Advisory Comm. Report, *supra* note 17, at 2.

[25] *Id.*; *see also* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 449 n.163 (2013) (examining limiting and other evidentiary instructions and their effect on a lay jury).

[26] *See infra* Part III.B.

[27] *See* May 2013 Advisory Comm. Report, *supra* note 17, at 2 (noting "largely negative" but "sparse" public comment on the proposed amendment).

simple and straightforward amendment that discards the language of the existing rule in favor of a single standard allowing substantive use of all rehabilitative prior consistent statements. A single standard amendment is best suited to eliminate the confusion that has plagued Rule 801(d)(1)(B) and to chart a clear course for prior consistent statements in the future.

Part II of this Article examines the common law history of prior consistent statements, as well as the treatment of prior consistencies under the Federal Rules of Evidence. Part II describes Rule 801(d)(1)(B), the United States Supreme Court's interpretation of it in *Tome v. United States*, and the ramifications of that decision for federal trial practice. Part III describes the proposed amendment that would expand existing Rule 801(d)(1)(B) and the policies supporting it. Part III also articulates and examines the criticisms and concerns that have arisen in response to the current proposal. Part IV seeks a path forward for Rule 801(d)(1)(B) that achieves the rational and consistent treatment of similarly situated prior consistent statements, and also accounts for the risk of indiscriminate admission of witness hearsay feared by critics. In so doing, Part IV analyzes four alternatives to the existing proposal, identifying the potential benefits and drawbacks inherent in each. Part IV ultimately suggests a concise amendment to expand Rule 801(d)(1)(B) that promises to harmonize treatment of all similarly situated prior consistencies. This proposed revision of the amendment to Rule 801(d)(1)(B) would focus trial judges and litigants on the fundamental rehabilitative purpose of prior consistent statements and on the appropriate contextual analysis that serves as a gateway to expanded substantive use of prior consistent statements.

II. THE INCONSISTENT HISTORY OF PRIOR CONSISTENT STATEMENTS

A. *The Common Law Approach to Impeachment and Rehabilitation*

Prior to the enactment of the Federal Rules of Evidence in 1975, evidentiary decisions were regulated by the common law.[28] At common law, attorneys routinely used various impeachment techniques to undermine the credibility of testifying witnesses.[29] Following an impeaching attack on a witness, the proponent of the witness often responded with rehabilitative information designed to repair any damage to the witness's credibility.[30] There were two overriding principles governing rehabilitation at common law that remain constant today. First, a witness may not be rehabilitated unless an opponent previously launched some

[28] *See* PARK ET AL., *supra* note 11, at 9–10 (noting that the "common law of evidence evolved over the centuries" that preceded the enactment of Federal Rules of Evidence in 1975).

[29] MCCORMICK, *supra* note 1, § 33, at 205.

[30] *See id.* § 47, at 303 (describing rehabilitation).

impeaching attack on that witness.[31] In other words, "bolstering" the credibility of a testifying witness whose credibility has yet to be contested is prohibited.[32] Second, any rehabilitation of a witness must repair credibility at the point of attack.[33] An impeaching attack on a witness's ability to recall, for example, should not be repaired with a showing of the witness's honesty. Likewise, a showing of honesty does not counter the damage done to the witness's faulty memory. The trial judge, in his or her discretion—aided by the arguments of vigilant counsel—must police these two overriding principles on a contextual basis. The trial judge must determine whether an impeaching attack occurred, what type of attack occurred, and whether the proffered rehabilitation is appropriately responsive.[34]

At common law, prior out-of-court statements made by an impeached witness that were consistent with trial testimony were considered helpful in repairing credibility in certain circumstances. More specifically, courts recognized that prior consistent statements could repair the credibility of a trial witness whose motivations had been questioned, whose memory had been challenged, or whose consistency in describing pertinent events had been attacked.

A common type of impeachment that historically has opened the door to use a prior consistent statement is the attack on a witness's motivations for testifying at trial. For example, if a opposing counsel suggested on cross-examination that a witness's trial testimony was recently developed as a result of some improper influence or other motivation, such as a bribe, pre-trial statements by the witness that are consistent with the trial version may serve to mitigate such an attack. Specifically, prior consistent statements would powerfully rebut the suggestion that trial testimony was the product of a bribe if those statements were made prior to the alleged bribe.[35] In these circumstances, courts typically permitted rehabilitation with prior consistent statements before the enactment of the Federal Rules of Evidence.[36]

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[31] *Id.* § 47, at 303–04.

[32] *See id.* ("[O]ne general principle, recognized under both case law and the Federal Rules of Evidence, is that absent an attack upon credibility, no bolstering evidence is allowed.").

[33] *See id.* § 47, at 307 ("The rehabilitating facts must meet the impeachment with relative directness.").

[34] *See id.* § 47, at 308 (noting that the trial judge has discretion to determine whether circumstances justify rehabilitative evidence).

[35] *See* 4 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL, 801-32 to -33 (8th ed. 2002) ("[O]nce the suggestion is made that trial testimony is fabricated or that the witness has been unduly influenced, consistent statements made prior to the time when there was a motive for the witness to lie or the influence was likely are especially probative . . . .").

[36] *See* FED. R. EVID. 801(d)(1)(B) advisory committee's note ("Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence.").

In addition, prior consistent statements historically were permitted to rehabilitate some trial witnesses whose memory had been challenged on cross-examination.[37] For example, if an opponent suggested that a witness had forgotten important details about an underlying event as a result of the passage of time between that event and trial, that witness's prior consistent statement made close in time to the foundational event could serve as powerful rebuttal.[38] On the other hand, a prior consistent statement made by the witness shortly before trial and long after underlying events might not answer the charge of forgetfulness and might not be useful to rehabilitate.

Finally, in some limited circumstances, courts at common law recognized that a witness's prior consistent statement could repair an attack launched on that witness's credibility by virtue of a prior *inconsistent* statement.[39] For example, a prior consistent statement made by the witness at the same time as the alleged inconsistency might clarify or complete the witness's prior statement that the opponent sought to characterize as inconsistent. In this circumstance, a prior consistency might demonstrate that the statement offered as impeachment evidence was not really inconsistent with trial testimony at all. Even a prior statement made by a trial witness at another time may account for or explain a purported inconsistency in a way that refutes the impeaching attack.[40] As noted above, the important question in this arena relates to the second principle of rehabilitation—whether the proposed repair genuinely answers the impeaching attack.[41] Evaluation of the impeachment launched, as well as the context of the prior consistency, has been critical in determining whether a prior consistent statement genuinely responds to the use of a

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[37] MCCORMICK, *supra* note 1, § 49, at 120; *see also* Edward D. 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, 257–58 ("Before the enactment of the Federal rules of Evidence, many commentaries and a few courts suggested that if a witness' live testimony [was] challenged as the product of an inaccurate memory or a faulty recollection, a prior consistent statement [could] legitimately be offered to rebut the attack." (footnotes omitted)).

[38] *See* SALTZBURG ET AL., *supra* note 35, at 801-33 ("[I]f the witness is charged with a bad memory, a statement by the witness made near to the event and consistent with the in-court testimony tends to rebut the charge.").

[39] *See id.* at 801-37 (noting that a prior consistent statement may be admissible "to explain or clarify an inconsistent statement introduced by the adversary").

[40] *See* MCCORMICK, *supra* note 1, § 47, at 316 ("[W]hen the attacked witness denies making the inconsistent statement, evidence of consistent statements very near the time of the alleged inconsistent one is relevant to corroborate his denial."); *see also* United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986) ("When the prior statement tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony, its use for rehabilitation purposes is within the sound discretion of the trial judge. Such use is also permissible when the consistent statement will amplify or clarify the allegedly inconsistent statement.").

[41] *See* MCCORMICK, *supra* note 1, § 47, at 315–16 (noting that some inconsistencies "remain[] despite all consistent statements").

prior inconsistent statement and is thus admissible for rehabilitation.

At common law, these basic principles of impeachment and rehabilitation, applied by the trial judge on a case-by-case basis, governed the admissibility of prior consistent statements. Of course, out-of-court statements offered at trial for their truth constituted inadmissible hearsay at common law.[42] Therefore, the prior consistent statements of trial witnesses would be considered hearsay if offered to prove the truth of the information conveyed therein. To serve their rehabilitative purposes described above, however, such statements need not be considered substantively. The simple fact that the witness previously uttered a statement that matches trial testimony might serve to repair an attack on memory, constancy, or improper motivation at the time of trial. At common law, therefore, such rehabilitative prior consistent statements were *admissible* if they satisfied principles of rehabilitation, but solely for their non-hearsay credibility purposes.[43] Prior consistencies could not be considered for their truth and thus could not assist in building a case.

B. *Impeachment and Rehabilitation Under the Federal Rules of Evidence*

The Federal Rules of Evidence were enacted in 1975 to regulate the admissibility of evidence in federal trials.[44] Although the drafters of the Rules created the most successful set of rules to govern the admissibility of evidence at trial, they did not seek to exhaustively dictate the admissibility of every piece of evidence that might be offered at trial. In certain areas, therefore, the Federal Rules of Evidence do not articulate a specific standard for evaluating certain types of evidence and leave decisions about the admissibility of evidence to be governed by common law development within the federal framework.[45]

In keeping with this drafting philosophy, the Federal Rules of Evidence do not comprehensively regulate modes of impeachment and rehabilitation of trial witnesses.[46] In regulating impeachment practices, the Federal Rules carefully control character evidence demonstrating a

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[42] *See* GRAHAM, *supra* note 7, § 7012, at 149 n.2 (noting that prior consistencies offered for their truth were excluded under common law).

[43] Ohlbaum, *supra* note 37, at 236.

[44] Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. (2012)).

[45] *See* Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978) ("In principle, under the Federal Rules no common law of evidence remains. . . . In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.").

[46] MCCORMICK, *supra* note 1, § 33, at 206 (noting that some impeaching attacks are not "specifically or completely treated by the Federal . . . Rules of Evidence, but nevertheless they are implicitly authorized by those rules").

witness's propensity for dishonesty.[47] In addition, the Rules provide some limitation on the use of extrinsic evidence of prior inconsistent statements.[48] The Rules also proscribe certain prejudicial forms of impeachment.[49] While covering these areas of impeachment, the Federal Rules leave other well-accepted types of impeachment unregulated within Article Six of the Rules governing "Witnesses." Impeachment of a witness based on bias, sensory or mental incapacity, or contradiction are not treated specifically in the Federal Rules.[50] Similarly, drafters of the Federal Rules of Evidence chose not to comprehensively regulate the methods of rehabilitating impeached trial witnesses.[51] While Rule 608(a) governs the use of character witnesses to demonstrate the trustworthiness of testifying witnesses for rehabilitative purposes,[52] there are no other provisions outlining proper methods for rehabilitating an impeached trial witness.

Although there may not be specific rules governing well-accepted areas of impeachment and rehabilitation,[53] this type of evidence remains regulated by Rules 401, 402, and 403, which require that all evidence admitted be relevant and provide for the exclusion of relevant evidence when its probative value is substantially outweighed by dangers of unfair prejudice or other risks to the trial process.[54] These Article Four provisions, therefore, maintain the common law limits on rehabilitation: rehabilitative evidence must be offered after impeachment and must serve

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[47] *See* FED. R. EVID. 608 & 609 (outlining the types of evidence that may be introduced to attack the character of a witness).

[48] *See id.* 613 ("Extrinsic evidence . . . is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon.").

[49] *See, e.g.*, *id.* 610 (discussing the inadmissibility of evidence relating to beliefs or opinions on the matter of religion).

[50] *See* 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6094, at 627 (2d ed. 2007) ("No rules specifically address these . . . three ways to attack witness credibility."); *see also* United States v. Abel, 469 U.S. 45, 51 (1984) ("[T]he Rules do not by their terms deal with impeachment for 'bias,' although they do expressly treat impeachment by character evidence and conduct, . . . by evidence of conviction of a crime, . . . and by showing religious beliefs or opinion.").

[51] *See* 28 WRIGHT & GOLD, *supra* note 50, § 6206, at 598 (noting that the Federal Rules of Evidence "leave unanswered many questions surrounding the admissibility of prior consistent statements").

[52] *See* FED. R. EVID. 608(a) ("A witness's credibility may be . . . supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.").

[53] *See* SALTZBURG ET AL., *supra* note 35, at 801-37 (noting that Rules 401 and 402 justify the admission of prior consistencies for repair purposes); *see also Abel*, 469 U.S. at 51 (discussing the continuing viability of impeachment for bias under Rules 401 and 402 despite an absence of specific rules governing impeachment technique).

[54] *See* FED. R. EVID. 401 (defining relevant evidence); *id.* 402 (providing for the admission of relevant evidence); *id.* 403 (allowing for the exclusion of relevant evidence with the potential to negatively impact a trial).

to repair the attack actually launched.[55] Therefore, for prior consistent statements to be admissible under the Federal Rules for their traditional non-hearsay rehabilitative purpose, they must have some tendency to refute a specific attack made on the credibility of the witness.[56] Further, the probative value of a rehabilitating prior consistent statement must not be substantially outweighed by unfair prejudice or other dangers.[57]

C. *The Federal Rules of Evidence and Hearsay Treatment of Prior Statements by Testifying Witnesses*

In approaching limits on the admissibility of hearsay evidence, the drafters of the Federal Rules took a much more hands-on approach, creating a comprehensive definition of hearsay in Rule 801;[58] setting forth twenty-nine hearsay "exceptions" in Rules 803, 804, and 807;[59] and classifying eight other statements as "not hearsay" under Rule 801(d)(1) and (d)(2).[60] In crafting the Federal Rules of Evidence to replace and supplement purely common law evidentiary standards governing hearsay, drafters debated whether to include prior statements of testifying witnesses within the definition of hearsay at all.[61] Some commentators argued for liberal admission of all prior statements of testifying witnesses because the witnesses may be subject to full cross-examination at trial.[62] Others raised significant concerns about the broad admissibility of prior witness statements, positing that parties would rely on pre-prepared witness statements at trial and transform live testimony into an empty exercise.[63] These critics suggested that limitations should remain on the admissibility of witness hearsay offered at trial for the truth of the matter asserted.[64]

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[55] *See* MCCORMICK, *supra* note 1, § 47, at 318 ("[T]he judge has discretion under Rules 401 and 403 to determine whether the particular circumstances justify admission of consistent statements to rehabilitate the witness.").

[56] *See* SALTZBURG ET AL., *supra* note 35, at 801-34 ("[N]ot every attack on credibility opens the door for rehabilitation with prior consistent statements; for example, if a witness is attacked for having an untruthful character, he cannot be rehabilitated with prior consistent statements because such statements do not respond to the attack that the witness has a character trait for lying.").

[57] FED. R. EVID. 403.

[58] *Id.* 801.

[59] *Id.* 803, 804 & 807.

[60] *Id.* 801(d)(1), (d)(2).

[61] *See* FED. R. EVID. 801(d)(1) advisory committee's note ("Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact should be classed as hearsay.").

[62] *See* SALTZBURG ET AL., *supra* note 35, 801-28 ("Many commentators have urged that as long as a witness is present at trial for cross-examination, there are adequate guarantees of trustworthiness, and that any statement . . . should be admissible.").

[63] *Id.* at 801-28 (noting the House of Representatives' restrictive view regarding prior witness statements and the "compromise" that became Rule 801(d)(1)).

[64] *Id.*

Ultimately, the Federal Rules of Evidence rejected expansive admissibility of prior witness statements and carved out only certain prior statements by testifying witnesses to be treated as "not hearsay" under the Rules.[65] Prior inconsistent and consistent statements by trial witnesses that satisfy certain criteria may be considered for their truth by the fact-finder.[66] In addition, prior statements of identification by a trial witness may be considered for their truth under the Federal Rules.[67]

Rule 801(d)(1)(B) permits substantive use of certain prior consistent statements made by testifying witnesses. Rule 801(d)(1)(B) provides:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement: . . .
>
> (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying . . . .[68]

This hearsay exemption allows a prior consistency, admitted to rehabilitate a testifying witness after he is impeached for lying or improper motive or influence, to be used for its substantive, as well as its non-hearsay rehabilitative purpose by the jury.[69] Thus, if an opponent suggests on cross-examination that a witness's testimony has been altered as a result of a bribe, for example, the proponent of that witness may admit a pre-trial statement the witness made before the alleged bribe that matches her trial testimony. In this context, a prior consistent statement might be used for its non-hearsay purpose—the simple fact that the witness gave the same story before the alleged bribe strongly undermines the opponent's suggestion that the trial version was concocted as a result of the bribe. The

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[65] FED. R. EVID. 801(d)(1).

[66] *Id.* 801(d)(1)(A), (B). A prior *inconsistent* statement by a testifying witness subject to cross-examination concerning the statement may be admitted if it was made under oath and at a prior trial, hearing, deposition, or other proceeding. *Id.* 801(d)(1)(A).

[67] *Id.* 801(d)(1)(C).

[68] *Id.* 801(d)(1)(B). The structure of the Rule was altered in the restyling project in 2011. The restyling of the Rule did not alter its operation, however. *See id.* 801 advisory committee's note on 2011 amendment ("The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.").

[69] *See id.* 801(d)(1)(B) advisory committee's note ("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.").

fact-finder need not depend on the truthfulness of the prior statement for it to serve this rehabilitative purpose, and this use of a prior consistency is permitted outside of the prohibition on hearsay pursuant to the standards of relevance and probative value articulated in Article Four of the Federal Rules.[70] Rule 801(d)(1)(B) is, therefore, unnecessary to this use of a testifying witness's prior consistent statement.

Under Rule 801(d)(1)(B), the proponent of the witness may go one step further and argue to the jury that it should accept the truth of the pre-trial statement as well.[71] Rather than rely simply on the existence of such a matching statement, the jury may depend on the accuracy of the pre-trial statement. Therefore, the hearsay exemption for prior consistent statements expands the appropriate use of this already admissible evidence.[72] In permitting the use of certain prior consistencies for their truth, the Advisory Committee relied upon the common law practice of admitting such witness statements for rehabilitation.[73] Because these prior consistent statements were typically admitted and published to the fact-finder for rehabilitative purposes, the question confronting the drafters of the Federal Rules was not *whether* these statements should be admitted, but rather what *purpose* they could serve after they were disclosed to the jury. The drafters chose to expand the permissible use of such prior consistent statements to allow the jury to consider such statements for their truth, as well as for their traditional rehabilitative purpose.[74]

The Advisory Committee articulated two factors counseling in favor of the substantive use of the admitted statements. First, the Advisory Committee Note emphasized that these pre-trial statements will be admitted to rehabilitate only when they match previously admitted trial testimony.[75] It is the consistency between prior statements and trial testimony that makes them relevant to repair witness credibility. According to the Advisory Committee Note, the hearsay risks associated with out-of-court statements are less salient when they are accompanied by live testimony to the same effect.[76] Second, the Advisory Committee

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[70] *See supra* notes 53–54 and accompanying text.

[71] *See* FED. R. EVID. 801(d)(1)(B) advisory committee's note ("Under the rule, [prior consistent statements] are substantive evidence.").

[72] *See* SALTZBURG ET AL., *supra* note 35, at 801-35 (noting that the "Advisory Committee *did* intend to change the common-law rule, in a rather fundamental way").

[73] *See* FED. R. EVID. 801(d)(1)(B) advisory committee's note ("Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence.").

[74] *Id.*

[75] *Id.*

[76] *See* FED. R. EVID. 801(d)(1) advisory committee's note ("If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem."); *see also* SALTZBURG ET AL., *supra* note 35, at 801-32 (noting that the substance of a prior consistent statement "is already before the factfinder by way of the witness's in-court testimony").

observed that prior consistencies only become relevant to rehabilitate a witness after opposing counsel opens the door to their admission with impeachment.[77] The fact that the opponent of a prior consistent statement can exercise control over its admission through the choice of impeachment options further minimizes any perceived unfairness connected to the substantive use of prior consistencies. In sum, the Advisory Committee adopted what could be characterized as a "why not" approach to the substantive use of prior consistent statements, noting that there is "no sound reason" why such statements "should not be received generally" once they are received for rehabilitative purposes.[78]

The policy justifications originally articulated by the Advisory Committee for expanding the use of prior consistencies through Rule 801(d)(1)(B) reflect a particular philosophical approach to the interaction between principles of rehabilitation and hearsay that arose naturally out of common law practice. By emphasizing that prior consistent statements traditionally are admitted for rehabilitation purposes,[79] the Advisory Committee Note assumes that the admissibility of such statements is governed by evidentiary rules outside of hearsay doctrine. Thus the Note contemplates that the statements will be admitted outside the hearsay regime and will merely adapt that hearsay regime to the expected reality in which it will operate. In addition, the original Advisory Committee Note provides a two-step analysis for the substantive use of prior consistent statements, with step one revolving around a proper rehabilitative non-hearsay purpose for the statement and step two extending substantive privileges to statements admitted on that basis.

Accordingly, the Federal Rules of Evidence altered the common law approach to prior consistent statements covered by Rule 801(d)(1)(B), allowing them to be used for their truth, as well as for their palliative rehabilitative purpose.[80] Under this Rule, the hearsay doctrine permits expanded use of prior consistent statements properly admitted for rehabilitation purposes long recognized under Article Four of the Rules and its common law antecedents.

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[77] FED. R. EVID. 801(d)(1)(B) advisory committee's note.

[78] *Id.* In contrast to certain prior consistencies admitted to rehabilitate, the Advisory Committee did articulate concern regarding the "general and indiscriminate use of previously prepared statements." FED. R. EVID. 801(d)(1)(A) advisory committee's note.

[79] *See supra* note 73.

[80] *See* FED. R. EVID. 801(d)(1)(B) (classifying prior consistent statements as "not hearsay" although they fit the definition of hearsay provided by Rule 801(a)–(c)); *see also* SALTZBURG ET AL., *supra* note 35, at 801-26 (noting that "[e]very one of the statements discussed in subdivision (d) of the Rule [801] comes within the hearsay rule as defined in subdivision (c)").

D. *The Prior Consistent Statement Disconnect Under the Federal Rules of Evidence*

In drafting Rule 801(d)(1)(B), the Advisory Committee chose language tracking the commonly utilized method for repairing an attack on witness motivation or influence with a prior consistent statement.[81] As discussed above, however, the type of impeachment referenced in Rule 801(d)(1)(B) is not the only type of impeaching attack that may be repaired with a prior consistency. Prior consistent statements sometimes can serve to rehabilitate a witness whose memory or consistency has been attacked, in addition to a witness whose motivations have been challenged.[82]

By choosing language specific to only one method of impeachment and rehabilitation, the drafters of the Federal Rules of Evidence singled out one type of rehabilitative prior consistent statement for substantive use.[83] Under the Rule, prior consistent statements offered to repair attacks of recent fabrication or improper influence or motivation may be considered for their truth. Prior consistencies admitted to rehabilitate *other* types of impeaching attacks, such as on memory or witness consistency, have been left out in the cold. Consistent with the common law approach to prior consistent statements generally, these prior consistencies may be used only for their non-hearsay rehabilitative purposes, if any, but may *never* be considered for their truth.[84] For example, if an opponent suggests on cross-examination that a witness has forgotten details of underlying events due to the passage of time, a prior statement by that witness made close in time to the underlying events that matches the trial testimony may rehabilitate the allegation of forgetfulness. Accordingly, the prior consistent statement should be admitted for its non-hearsay rehabilitative purpose. In contrast to prior consistencies admitted to repair attacks on witness motivations, however, this prior consistent statement could *not* be considered substantively because this type of prior consistency is not included within the language of the Rule 801(d)(1)(B) hearsay exemption.[85] This disconnect between different breeds of prior consistent statements requires

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[81] *See* FED. R. EVID. 801(d)(1)(B) (defining a statement as not hearsay if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant . . . acted from a recent improper influence or motive in so testifying").

[82] *See* GRAHAM, *supra* note 7, § 7012, at 149 ("A prior consistent statement of the witness may be admitted without reference to Rule 801(d)(1)(B) when relevant to rehabilitation in a manner other than refutation encompassed in Rule 801(d)(1)(B).").

[83] *See* Tome v. United States, 513 U.S. 150, 159 (1995) (noting that the Rule singles out prior consistent statements used for only one type of rehabilitation).

[84] *See* GRAHAM, *supra* note 7, § 7012, at 151–52 (noting that such prior consistent statements may be admitted "for corroborative purposes only and not as substantive evidence."); *see also* SALTZBURG ET AL., *supra* note 35, at 801-33 (noting such statements "may be admitted only as proof of the witness's credibility, and not as substantive evidence").

[85] *See supra* notes 5–6 and accompanying text.

that those admitted solely to rehabilitate outside the strictures of Rule 801(d)(1)(B) be accompanied by a limiting instruction informing the jury that the statement may be used to evaluate the credibility of the witness, but may not be taken as true.[86]

This dichotomy between different breeds of prior consistent statements has existed in practice under the Federal Rules of Evidence since their adoption in 1975.[87] Based upon the policies articulated by the Advisory Committee in adopting Rule 801(d)(1)(B), the reasons for this differential treatment are difficult to discern. If a prior consistent statement is admitted to repair an impeaching attack on a witness's memory, it too will be presented to the fact-finder. Similarly, the statement will have to be consistent with previously received trial testimony to rehabilitate. Finally, such a prior consistency will be helpful to repair only after the opponent opens the door with a challenge to the witness's ability to recall. Notwithstanding these identical considerations, prior consistencies offered to repair attacks on memory are not admissible for their truth under Rule 801(d)(1)(B) and may be offered only for their non-hearsay purposes consistent with pre-Rules practice. In 1995, the United States Supreme Court attempted to provide a justification for this differential treatment of prior consistencies and, in so doing, found an additional limitation embedded in Rule 801(d)(1)(B).

E. Tome v. United States*: The Supreme Court Weighs In*

In *Tome v. United States*, Petitioner Tome was convicted of sexually abusing his four-year-old daughter following a divorce that gave him primary custody of her.[88] The victim was six and a half years old at the time of trial and had a difficult time on the stand.[89] She gave "one- and two-word answers" on direct examination by the prosecution in response to "a series of leading questions" about the defendant's conduct.[90] The defense cross-examined the child over the course of two trial days, asking her 348 questions and suggesting that she concocted the story of abuse to avoid having to return to her father after spending summer vacation with her mother.[91] The child appeared reluctant to answer questions about the alleged abuse and took as many as fifty-five seconds to respond to defense questions.[92] On the second day of cross-examination, the child appeared to "be losing concentration" and the trial judge remarked "[w]e have a very

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[86] *See supra* note 7 and accompanying text.
[87] *See supra* note 44.
[88] Tome v. United States, 513 U.S. 150, 159 (1995).
[89] *Id.* at 153–54.
[90] *Id.* at 153.
[91] *Id.*
[92] *Id.*

difficult situation here."[93]

Following the child's stilted testimony, the prosecution called six witnesses who testified to the victim's out-of-court statements, revealing to the jury "a total of seven [hearsay] statements made by [the victim] describing the alleged sexual assaults."[94] In contrast to the victim's trial testimony, these out-of-court statements very powerfully implicated Tome and offered significantly more detail regarding the alleged abuse than the child had managed to give on the stand.[95] The trial court admitted all of the victim's hearsay statements pursuant to Rule 801(d)(1)(B) over the objection of defense counsel, finding that the prior statements were consistent with the trial testimony and rebutted the defense's implied accusation that her trial testimony was motivated by a desire to return to her mother.[96]

Following his conviction, Tome appealed to the United States Court of Appeals for the Tenth Circuit, arguing that the victim's statements were not admissible under Rule 801(d)(1)(B) because they were all made *after* primary custody had been awarded to Tome at a time when the victim was similarly motivated to return to her mother.[97] Tome argued that such postmotive consistent statements were equally likely to suffer from the custody motivations alleged by the defense and, hence, failed to refute the allegation of improper motivation.[98] The Tenth Circuit affirmed Tome's conviction, rejecting a hard and fast premotive limitation for prior consistent statements admitted through Rule 801(d)(1)(B).[99] Specifically, the Tenth Circuit found that the proper scope of witness *rehabilitation* simply was not dictated by the *hearsay* provision of Rule 801(d)(1)(B):

> [T]he pre-motive requirement is a function of the relevancy rules, not the hearsay rules . . . [and] as a function of relevance, the pre-motive rule is clearly too broad . . . because it is simply not true that an individual with a motive to lie always will do so.[100]

The Supreme Court granted certiorari and reversed Tome's conviction, finding admission of the victim's prior statements under Rule 801(d)(1)(B) erroneous.[101] The Court held that Rule 801(d)(1)(B) allows admission of

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[93] *Id.* at 154.

[94] *Id.*

[95] *See id.* (describing testimony by the child's babysitter that the girl stated that "she did not want to return to her father because he 'gets drunk and he thinks I'm his wife'").

[96] *Id.*

[97] *Id.* at 155.

[98] *Id.*

[99] *Id.*

[100] United States v. Tome, 3 F.3d 342, 350 (10th Cir. 1993), *overruled by* 513 U.S. 150.

[101] *Tome*, 513 U.S. at 167.

prior consistent statements only if they were made *prior* to the time that the charged motive to fabricate arose.[102] According to the Court, such a temporal premotive requirement was uniformly applied at common law in admitting prior consistent statements by witnesses impeached with an accusation of an improper motive.[103] The Court found that the Federal Rules of Evidence were designed to be interpreted consistently with common law standards in the absence of express language to the contrary.[104] Finding no rejection of the "common law premotive" limitation in the text of Rule 801(d)(1)(B) or in the Advisory Committee Notes, the Court held that the hearsay exemption implicitly mandated a similar "premotive" limitation.[105]

According to the Court, such "premotive" prior consistent statements provide particularly compelling and reliable rebuttal of an impeaching attack.[106] If a witness related the same story prior to the existence of a particular motive to lie, an opponent's accusation that trial testimony was altered as a result of that motive is plainly refuted.[107] Therefore, the Court reasoned that the premotive requirement justified extending a hearsay exemption to only one type of prior consistent statement:

> If consistent statements are admissible without reference to the timeframe we find imbedded in the Rule, *there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well*. Whatever objections can be leveled against limiting the Rule to this designated form of impeachment and confining the rebuttal to those statements made before the fabrication or improper influence or motive arose, it is clear to us that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement.[108]

Notwithstanding the temporal priority requirement imposed by *Tome*, the Court acknowledged the possibility that a postmotive statement might repair an impeaching attack under some circumstances.[109] Still, the Court found that Rule 801(d)(1)(B) would not allow the *substantive* use of such

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[102] *Id.* at 156.

[103] *Id.* at 155–56.

[104] *See id.* at 160 (noting that the language of Rule 801(d)(1)(B) tracks the language of common law cases, evincing an intent "to carry over the common-law premotive rule").

[105] *Id.*

[106] *See id.* at 158 (explaining that charges of recent fabrication or improper motive are "capable of direct and forceful refutation through introduction of out-of-court consistent statements that predate the alleged fabrication, influence, or motive").

[107] *Id.*

[108] *Id.* at 159 (emphasis added).

[109] *Id.* at 158–59.

postmotive prior consistent statements.[110] In sum, the *Tome* Court articulated a "premotive" limitation implicitly embedded within Rule 801(d)(1)(B) and posited that the existence of this inchoate requirement justified the dichotomy between prior consistencies admissible for their truth under the Rule and all others that may be admitted only for their non-hearsay rehabilitative purposes.

In so doing, the Supreme Court effected a subtle philosophical shift in the approach to rehabilitation taken by Article Eight of the Rules governing hearsay evidence. In contrast to the approach reflected in the original Advisory Committee Note that presupposed that *admissibility* of prior consistencies would be decided under other rules, the Supreme Court's interpretation of Rule 801(d)(1)(B) discerned the drafters' intention to regulate appropriate rehabilitation practices within Article Eight of the Federal Rules of Evidence. According to the Court, the drafters of the Federal Rules singled out only one type of prior consistent statement because of its unique rehabilitative reliability ensured by the silent premotive requirement.[111] Although the dissent in *Tome* emphasized that rehabilitation requirements arise out of relevancy rules and not hearsay rules,[112] the majority rejected that view and found that the Article Eight hearsay exemption was designed to cabin proper rehabilitation.[113] Accordingly, the *Tome* decision appeared to shift some of the authority for rehabilitation standards to the hearsay rules.

F. *The Post-*Tome *Universe for Prior Consistent Statements*

At common law, all prior consistent statements admitted at trial were used similarly for their rehabilitative non-hearsay purpose.[114] In contrast, following adoption of Rule 801(d)(1)(B) and the Supreme Court's interpretation of it in *Tome*, prior consistent statements made by testifying witnesses are treated differently at trial depending on their timing and the type of impeaching attack to which they respond.

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[110] *See id.* at 158–59 (recognizing that there may be instances when postmotive out-of-court statements "have some probative force in rebutting a charge of fabrication or improper influence or motive," but observing that "those statements refute the charged fabrication in a less direct and forceful way").

[111] *See id.* at 157 (remarking that "the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense" because they are "capable of direct and forceful refutation").

[112] *See id.* at 169 (Breyer, J., dissenting) ("The basic issue in this case concerns not hearsay, but relevance.").

[113] *See id.* at 164 (majority opinion) ("That certain out-of-court statements may be relevant does not dispose of the question whether they are admissible.").

[114] *See supra* notes 42–43 and accompanying text.

1. *Premotive Prior Consistent Statements*

If a trial witness is accused of having an improper motive or influence, either expressly or impliedly, the proponent of the witness may seek to offer a prior statement by the witness that is consistent with the challenged trial testimony. When this prior statement pre-dates the charged motive or influence upon the witness's testimony, the fact-finder may consider the prior statement in evaluating the witness's credibility and for its truth pursuant to Rule 801(d)(1)(B).[115] This is the use of premotive prior consistent statements sanctioned by the Supreme Court in *Tome*.[116]

2. *Postmotive Prior Consistent Statements*

Following the Supreme Court's *Tome* decision, courts have struggled with the proper approach to prior consistent statements made *after* the charged motive to fabricate arose. Some courts have suggested that *Tome* may cover the waterfront for admission of prior consistent statements to rebut attacks on witness motivation, regulating both proper rehabilitation and hearsay.[117] This view indicates that postmotive statements are inadmissible for any purpose.[118] According to this view, postmotive prior consistent statements may not be utilized to rehabilitate impeached trial witnesses *or* for their truth. As such, postmotive prior consistent statements are excluded altogether.

In contrast, other courts have held that *Tome* controls the use of prior consistent statements for their truth pursuant to Rule 801(d)(1)(B), but

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[115] *See id.* (holding that "[t]he Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive").

[116] *Id.*

[117] *See, e.g.*, United States v. Lozada-Rivera, 177 F.3d 98, 103 (1st Cir. 1999) (stating that, although the issue did not need to be addressed directly in the case at bar, "[i]t is a matter of some debate whether Rule 801(d)(1)(B) controls prior consistent statements of all stripes or whether a more relaxed test applies when a prior statement is offered for a rehabilitative purpose"); *see also* United States v. Miller, 874 F.2d 1255, 1273 n.12 (9th Cir. 1989) (observing, prior to the *Tome* decision, that "[t]here is . . . no class of prior consistent statements, offered for purposes of rehabilitation, that does not fall within the literal scope of Rule 801(d)(1)(B)").

[118] *See* MCCORMICK, *supra* note 1, § 47, at 315 (noting that some commentators read *Tome* as a "signal" that the premotive limitation applies to rehabilitative use of prior consistencies as well); SALTZBURG ET AL., *supra* note 35, at 801-38 (reflecting the view that postmotive consistent statements "will not be admissible *at all*, either substantively or for impeachment purposes."); *see also* REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES app. (2013), *reprinted in* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., AGENDA BOOK 832 (2013) [hereinafter Committee Note to Proposed Rule], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2011-06.pdf (noting that Rule 801(d)(1)(B) "led to some conflict in the cases," with some courts distinguishing "between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all").

does not regulate their use solely for rehabilitative purposes.[119] These courts have found that postmotive prior consistent statements may be used to repair an impeached witness's credibility when the trial judge, in the exercise of his or her discretion, finds that they rehabilitate.[120] Even if these statements are published to the fact-finder for a limited credibility purpose, such postmotive prior consistent statements may not be used for their truth because they do not satisfy the premotive limitation announced in *Tome*. This approach to prior consistent statements is reminiscent of the philosophy reflected in the original Advisory Committee Note to Rule 801(d)(1)(B) regarding authority for proper rehabilitation—namely, that standards of rehabilitation are entirely governed by considerations of relevance and probative value and that the hearsay rules affect only substantive use.

3. *Prior Consistent Statements that Repair Other Impeaching Attacks*

Although prior consistent statements have been used routinely to rehabilitate a trial witness whose motivations for testifying have been called into question, prior consistent statements can repair other types of impeaching attacks, as described above.[121] For example, when a witness is accused of being forgetful at trial, a prior consistent statement that was made close in time to underlying events can constitute powerful rehabilitation. In addition, the impeachment of a trial witness based upon some prior *inconsistencies* may be remedied by reference to prior consistencies that refute the attack—often by placing statements in context.

While prior consistent statements may be introduced to respond to such impeachment methods, the statements may never be considered for their truth under these circumstances.[122] Rule 801(d)(1)(B) expressly eliminates a hearsay objection to only one breed of prior consistent statement—one offered to rebut a charge of improper motive or influence or recent fabrication.[123] Prior consistent statements that aim to repair attacks on memory or constancy do not fall within the narrow category defined by the hearsay exemption.[124] Thus, while these prior consistent statements may be introduced as relevant rehabilitation evidence, they may be considered only for the non-hearsay purpose of assessing credibility and may never be relied upon for their truth by the fact-finder.

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[119] *See* United States v. Simonelli, 237 F.3d 19, 27–28 (1st Cir. 2001) (describing the view that postmotive statements may be admitted for rehabilitation purposes as the "majority" view).

[120] *See* Laird C. Kirkpatrick, *An Unneeded Hearsay Amendment: No Need to Expand Admissibility of Prior Consistent Statements as Substantive Evidence*, NAT'L L.J., Oct. 15, 2012, at 43 (noting that many courts admit postmotive statements solely for rehabilitation purposes).

[121] *See supra* note 82 and accompanying text.

[122] *See supra* note 84 and accompanying text.

[123] *See supra* note 5 and accompanying text.

[124] *See supra* note 6 and accompanying text.

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The language of Rule 801(d)(1)(B) and *Tome*'s interpretation of it have affected the use of prior consistent statements at trial in multiple ways. First, similarly situated prior consistent statements are treated differently. Premotive prior consistent statements that repair attacks on motivation are admissible to rehabilitate, as well as for their truth. All other prior consistent statements by a witness may be admitted for their credibility purposes alone, but may never be relied upon by the jury for their truth. Second, this disparate treatment of similarly situated prior consistent statements has created a need for limiting instructions to caution jurors against considering prior consistent statements for their truth. It is likely difficult for lay jurors to appreciate the subtle distinction between reliance upon pre-trial consistent witness statements solely for rehabilitative purposes and use of those statements for their truth. Where the admitted prior statements, by definition, match trial testimony and are offered to evaluate the truth-telling of the witness on the stand, an instruction that warns the jury not to consider the matching consistent statement to be true is confusing to say the least. Such confusion has led some to seek more uniformity with respect to admitted prior consistent statements.[125]

III. A PROPOSAL FOR CHANGE

In 2011, the Advisory Committee for the Federal Rules of Evidence began formally considering an amendment to Rule 801(d)(1)(B) to bring uniformity to the treatment of prior consistent statements at trial.[126] With the assistance of the Federal Judicial Center, federal district court judges were surveyed concerning a proposed amendment, and results of the survey were reported in March 2012.[127] Following the survey, a revised

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[125] *See* May 2013 Advisory Comm. Report, *supra* note 17, at 2 (noting that the proposal to amend Rule 801(d)(1)(B) originated with Judge Frank W. Bullock during his tenure as a member of the Standing Committee).

[126] *See* Memorandum from the Honorable Sidney A. Fitzwater, Standing Comm. on Rules of Practice & Procedure, to the Honorable Lee H. Rosenthal, Advisory Comm. on Fed. Rules of Evidence Procedure (Apr. 8, 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV04-2011.pdf (noting the "[p]ossible [a]mendment of Rule 801(d)(1)(B)" as an "[i]nformation [i]tem"). Although formal consideration of the current proposal began in 2011, calls to amend Rule 801(d)(1)(B) began more than a decade earlier. *See* Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 FLA. ST. U. L. REV. 509, 517 (1997) (advocating for substantive admissibility of all prior consistencies that are admissible to rehabilitate).

[127] FJC SURVEY, *supra* note 18, at 1. The Federal Judicial Center developed the eight question email survey in collaboration with the Advisory Committee for the Federal Rules of Evidence. *Id.* The survey was sent to 961 federal district judges and fifty-three percent of the surveyed judges responded. *Id.* This survey sought input regarding an early draft of the proposed amendment that discarded the existing Rule 801(d)(1)(B) language in favor of a single standard allowing substantive use of all prior

version of the proposed amendment was published for notice and comment in 2012–2013.[128] At its May 2013 meeting, the Advisory Committee approved a third and final draft Rule as a proposed amendment to Rule 801(d)(1)(B).[129]

A. *The Proposed Amendment to the Rule*

The proposed amendment would maintain the current language of Rule 801(d)(1)(B), but would expand the Rule's coverage to include prior consistent statements offered to rehabilitate types of impeaching attacks omitted from the existing provision. The version of the amendment ultimately proposed by the Advisory Committee reads as follows:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement: . . .
>
> (B) is consistent with the declarant's testimony and is offered*:*
>
> *(i)* to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying*; or*
>
> *(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; . . . .*[130]

In essence, the proposed amendment preserves the standard currently found in Rule 801(d)(1)(B) and the *Tome* premotive gloss on that standard. The amendment adds an additional category of prior consistencies available for substantive use, characterized as those "offered" to rehabilitate on grounds *not* covered by the original Rule. The proposed Advisory Committee Note accompanying the amendment cites the

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consistent statements "otherwise admissible to rehabilitate the declarant's credibility as a witness." *Id.* at 2.

[128] COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE: REQUEST FOR COMMENT 217 (2012) [hereinafter PRELIMINARY DRAFT OF PROPOSED AMENDMENTS], *available at* http://www.uscourts.gov/uscourts/rules/rules-published-comment.pdf; May 2013 Advisory Comm. Report, *supra* note 17, at 2 (noting that the Standing Committee approved the proposed amendment for publication at its June 2012 meeting).

[129] *See* May 2013 Advisory Comm. Report, *supra* note 17, at 2 (noting that the proposed amendment and committee note were "modified slightly from the versions issued for publication to address certain concerns raised by public comment").

[130] *Id.* at 3. The emphases stress where the proposed language differs from the current version.

differential hearsay treatment of similarly situated prior consistent statements, as well as conflict in the case law, as reasons for the change.[131] Cautioning against liberal interpretation of the Rule to allow indiscriminate use of prior witness statements, the Advisory Committee Note emphasizes that principles of relevance and probative value continue to control decisions about admitting prior consistent statements for rehabilitation and clarifies that improper bolstering of a witness remains disallowed under the Rules.[132] Finally, the Advisory Committee Note clarifies that the amendment preserves the ruling in *Tome* and maintains the premotive requirement for prior consistent statements offered to repair attacks of recent fabrication or improper influence or motivation.[133]

B. *Concerns and Criticisms*

The district court judges surveyed by the Federal Judicial Center with respect to an earlier version of the proposed amendment expressed support for the general expansion of Rule 801(d)(1)(B), with fifty-seven percent of responding judges approving of an amendment to the existing Rule.[134] However, the proposed amendment has encountered criticism and expressions of concern from the bar, the bench, and the academy.[135]

First, some critics have discouraged adoption of the amendment by arguing that it aims to fix a non-existent problem. Indeed, several commenters in the Federal Judicial Center survey made remarks such as "[i]f it ain't broke, don't fix it" and "this proposal [appears] to be a solution in search of a problem."[136] These critics, who raise no particular substantive objection to the amendment, believe that the current Rule functions well and appropriately. Others commented that the issue of

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[131] *See* Committee Note to Proposed Rule, *supra* note 118, at 832 (noting the limited coverage of the original Rule).

[132] *Id.* at 833.

[133] *Id.* at 832.

[134] *See* FJC SURVEY, *supra* note 18, at 23–25 (explaining that fifty-seven percent of surveyed judges disagreed with the statement "Rule 801(d)(1)(B) should not be amended" and concluding that the survey "showed substantial support for the proposed amendment to Rule 801(d)(1)(B)").

[135] *See, e.g.*, *id.* at 8 (detailing comments from district court judges, including: "Allowing such statements could substantially bolster the weak in-court testimony of a questionable witness" and "This rule change would encourage a calculating declarant to deliberately contrive to take advantage of the Rule in contemplation of litigation"); *see also* Kirkpatrick, *supra* note 120, at 43 ("The committee has not provided a compelling justification for further modifying the long-standing definition of hearsay."); Comment from Honorable Joan N. Ericksen to Honorable Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure 4 (Dec. 28, 2012) [hereinafter Judge Ericksen Comment], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2012-evidence-comments/12-EV-001-comment.pdf ("Short of foregoing cross-examination altogether, it will be difficult for an opponent to have any control over whether a testifying declarant will be deemed to need some rehabilitation of his 'credibility as a witness.'").

[136] *See* FJC SURVEY, *supra* note 18, at 20, 23 (responding to "Question Eight" regarding whether any amendment should be proposed).

limited use of prior consistent statements arises so infrequently in actual trial practice that any perceived problem simply is not worth remedying.[137] While these critics do not assert any danger associated with expanding the Rule, they simply deem change unnecessary.

Other commentators have expressed more substantive concerns regarding the fair operation of an amended Rule. These critics fear a drastic increase in the use of prior witness statements at trial arising from an amendment.[138] According to this criticism, a rule that allows for expanded *use* of admitted prior consistent statements will lead to an increase in *admission* of such statements. Indeed, the federal district judges surveyed overwhelmingly predicted that an amendment would lead to increased admission of prior consistent statements at trial.[139] Under this view, an amendment to the Rule 801(d)(1)(B) hearsay exemption could be interpreted as a blessing for admission of all prior consistent statements made by impeached trial witnesses.[140] As commentators have observed: "The risk of an unbridled use of Rule 801(d)(1)(B) is . . . that the Trial Court may play fast and loose with principles of relevance, shifting the trial from a focus on in-court witnesses to out-of-court statements."[141] Critics fear that an amended provision could undercut the original 1975 compromise that treats out-of-court witness statements as hearsay with only limited exceptions.[142] These commentators anticipate that expanded application of Rule 801(d)(1)(B) will lead litigants to rely heavily upon prepared pre-trial witness statements rather than on the preferred in-court trial testimony under oath and subject to cross-examination.[143]

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[137] *See, e.g.*, *id.* at 3 ("This issue has never come up in seventeen years on the federal bench.").

[138] *See* Kirkpatrick, *supra* note 120, at 43 (criticizing the proposal that would "significantly expand the admissibility of prior consistent statements as substantive evidence"); Judge Ericksen Comment, *supra* note 135, at 3–4 ("[I]t seems inevitable that more prior statements would be heard by fact-finders under the amended rule.").

[139] *See* FJC SURVEY, *supra* note 18, at 9 (showing that seventy-two percent of federal district judges agreed there would be greater admission of prior consistent statements under the amendment); *id.* at 25 ("The survey also showed support for the empirical prediction that the amendment would lead to an increase in prior consistent statements coming into evidence.").

[140] *See* Judge Ericksen Comment, *supra* note 135, at 4 (suggesting that the amendment could permit substantive use of prior consistent statements whenever a testifying witness needs "some rehabilitation of his 'credibility as a witness'").

[141] SALTZBURG ET AL., *supra* note 35, at 801-37.

[142] *See* Kirkpatrick, *supra* note 120, at 43 (noting that Federal Rules rejected a liberal approach that would have allowed admission of all prior statements by testifying witnesses).

[143] *See* FJC SURVEY, *supra* note 18, at 24 ("It won't take long for lawyers to recognize this amendment as a way to build a case with out-of-court statements."). Indeed, the Supreme Court opined that liberal substantive admission of prior consistent statements could "shift" the "whole emphasis of the trial . . . to the out-of-court statements, not the in-court ones." Tome v. United States, 513 U.S. 150, 165 (1995).

IV. TO AMEND OR NOT TO AMEND: THAT IS THE QUESTION

The proposal to amend Rule 801(d)(1)(B) raises three crucial questions. First, is *any* proposed amendment to Rule 801(d)(1)(B) supported by sound evidentiary and rule-making policy? Second, notwithstanding any beneficial policy justifications, is the proposed amendment likely to create unintended consequences and to open the floodgates to expansive use of prior consistent statements at trial? Finally, if there are both sound justifications for an amendment, as well as significant trial risks, are there any alternatives to the current proposal that could promote logical evidentiary policy while minimizing the risk of improvident use of prior consistent statements?

A. *A Laudable Goal: Consistent and Rational Operation of Evidence Rules*

Extending Rule 801(d)(1)(B) to cover all prior consistent statements admitted to rehabilitate a testifying witness is in keeping with the policies reflected in the original Advisory Committee Note explaining the hearsay exemption. As described above, the Advisory Committee Notes reveal several justifications for allowing substantive use of prior consistent statements that rehabilitate.

First, the hearsay exemption does not give the fact-finder access to out-of-court statements that it would not otherwise receive.[144] Under the Rule, prior consistent statements may be considered for their truth only if they are admissible for a non-hearsay rehabilitative purpose.[145] Thus, the hearsay exemption merely allows for greater use of out-of-court statements already received by the fact-finder. Second, the statements at issue must be "consistent" with trial testimony already subject to cross-examination in order to qualify as rehabilitative.[146] Allowing substantive use of out-of-court statements that merely echo previously received trial testimony decreases the core hearsay risk—i.e., that unreliable out-of-court statements will be used to build a case.[147] Third, such prior consistent statements may be offered for their non-hearsay rehabilitative purpose only if the opponent of those statements first opens the door with a specific impeaching attack on the testifying witness that makes prior consistencies

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[144] *See* FED. R. EVID. 801(d)(1)(B) advisory committee's note (noting that such statements "traditionally have been admissible").

[145] *See supra* text accompanying notes 68–69, 72.

[146] *See* FED. R. EVID. 801 (d)(1)(B) advisory committee's note ("The prior statement is consistent with the testimony given on the stand . . . .").

[147] *See* David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 15–16 (noting that one of the traditional justifications for the hearsay rule is the unreliability of out-of-court statements).

relevant to repair.[148] Therefore, the party opponent may control access to prior consistent statements through careful consideration of impeachment strategies.[149]

Logically exploring these policy considerations reveals that the existing Rule is under-inclusive in permitting substantive use of prior consistent statements that rebut attacks of recent fabrication or improper motive only.[150] Importantly, the articulated justifications for allowing substantive use of prior consistent statements under Rule 801(d)(1)(B) apply equally when prior consistent statements are admitted to rehabilitate attacks on memory and consistency. The fact-finder necessarily has access to these prior consistent statements for their non-hearsay rehabilitative value. The value in such statements arises out of their consistency with trial testimony already given by the declarant subject to in court cross-examination. Finally, these prior consistent statements are admissible only *after* the opponent opens the door with a triggering challenge to witness memory or consistency. Based upon the stated rationale for permitting the hearsay exemption in existing Rule 801(d)(1)(B), there is no satisfactory reason to limit the hearsay exemption to one type of rehabilitative prior consistent statement alone.

It is true that many out-of-court statements may be admissible solely for their limited non-hearsay purposes in some circumstances, but admissible for their truth in others.[151] Indeed, this is a fundamental feature of hearsay doctrine, and there is nothing irrational about such differential treatment of out-of-court statements in most contexts. It is critical, however, to have some logical basis for drawing the line between those statements that may be admitted for their truth and those that may not. In contexts outside of the prior consistent statement, such a rational distinction exists and can be understood and defended. Because the policies underlying existing Rule 801(d)(1)(B) apply equally to other prior consistent statements not captured by its language, a logical distinction is lacking in this context.

In contrast, Rule 801(d)(1)(A) provides a hearsay exemption for a limited class of prior *inconsistent* statements made by testifying

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[148] *See* Bullock & Gardner, *supra* note 126, at 512–13 ("[C]ourts [have] held prior consistent statements inadmissible when offered during direct testimony, and admitted such statements only after impeachment . . . .").

[149] *See* FED. R. EVID. 801(d)(1)(B) advisory committee's note ("[I]f 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.").

[150] FED. R. EVID. 801(d)(1)(B).

[151] *See* CHRISTOPHER B. MUELLER ET AL., EVIDENCE PRACTICE UNDER THE RULES § 1.14, at 51 (4th ed. 2012) ("Out-of-court statements may be admitted for many limited purposes even if the hearsay doctrine would block their use to prove what they assert.").

witnesses.[152] Only prior inconsistent statements that were made under oath and in a prior trial, hearing, deposition or other proceeding may be admitted for their truth.[153] Of course, any prior inconsistent statement made by a testifying witness in any context may be used for the limited purpose of impeaching the witness's testimony.[154] To discredit the witness, the prior inconsistency need not be "true," however. The fact that a witness made a statement that differs from her trial version demonstrates vacillation that may lead the fact-finder to question credibility regardless of which version is accurate.[155] Limited non-hearsay use of prior inconsistent statements outside the Rule 801(d)(1)(A) requirements necessitates a limiting instruction to the fact-finder cautioning against substantive consideration of the prior statement.[156] In the arena of prior inconsistencies, therefore, it is textbook evidence law that some may be used for their truth, while others may be used for their limited non-hearsay impeachment value only.[157]

There is a very logical basis for distinguishing among different prior inconsistent statements made by testifying witnesses, however. First, these out-of-court statements are by definition *inconsistent* with trial testimony—meaning that they conflict with what the witness testified to under oath before the jury. To allow the jury to utilize such out-of-court inconsistencies for their truth is to permit the jury to reject the live testimony, currently being offered by the witness under oath and subject to penalty of perjury, in favor of a contradictory version provided at some other time. Before allowing the rejection of trial evidence in favor of hearsay, the Rules demand some guarantee that the prior statement is sufficiently reliable to be afforded such treatment.[158] Thus, the oath and prior proceeding requirements for the substantive use of prior inconsistencies are designed to provide some assurance that the out-of-court version is especially worthy of belief.[159] This special reliability

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[152] FED. R. EVID. 801(d)(1)(A).

[153] *Id.* This hearsay exemption also requires that the declarant testify at trial and be subject to cross examination about the prior statement. *Id.*

[154] *See* SALTZBURG ET AL., *supra* note 35, at 801-29 (noting that prior inconsistencies that do not meet the requirements of Rule 801(d)(1)(A) "may be used only for impeachment purposes").

[155] *See id.* at 801-28 (noting value of prior inconsistencies to test witness credibility without regard to truth).

[156] *See id.* at 801-29 ("[T]he nonoffering party is entitled to a limiting instruction that the statement is to be used only for impeachment purposes.").

[157] *Id.*

[158] *See id.* at 801-28 (noting congressional concern over reliability of prior inconsistencies afforded substantive use).

[159] *See id.* (explaining that Rule 801(d)(1)(A) represents a "compromise" between the Advisory Committee's liberal approach to the admission of prior witness statements and the restrictive approach espoused by the House of Representatives); *see also id.* at 801-32 ("Because the party offering an inconsistent statement as substantive evidence wants the trier of fact to accept it as true, and in

concern inherent in the substantive use of *inconsistencies* rationally justifies disparate treatment of prior inconsistent statements made in different contexts. Additionally, a limiting instruction cautioning jurors to disregard the truth of a prior inconsistent statement is likely to make sense where jurors are asked to disregard an out-of-court statement that substantively conflicts with the trial testimony. Where a witness gives conflicting versions of events, lay jurors may readily comprehend a command to disregard one version due to its questionable reliability.

Where the stated policies supporting substantive use of prior consistencies under existing Rule 801(d)(1)(B) apply equally to *all* prior consistencies admitted to rehabilitate, there is no rational basis for the hearsay/non-hearsay distinction currently being drawn under the Rule. Furthermore, the fact that the hearsay statements at issue are *consistent* with previous trial testimony sets the stage for a uniquely incomprehensible limiting instruction to the jury. Without a hearsay exception, jurors must be told to use a prior consistent statement to evaluate the "credibility" of the witness's trial testimony only, but *not* to accept the out-of-court statement as true.[160] But, if jurors decide to believe or "credit" the testifying witness—in part because of the existence of the prior consistent statement—jurors are, in essence, accepting the "truth" of the out-of-court statement as well, because it matches the trial testimony. A lay jury may well be confused as to what use to make of the statement if they are prohibited from "accepting" its substance.[161] Indeed, eighty-four percent of surveyed federal district judges agreed that the limiting instructions accompanying prior consistent statements that fall outside of existing Rule 801(d)(1)(B) are difficult for jurors to follow.[162]

The incoherence of the limiting instruction accompanying a prior consistency admitted for its non-hearsay purpose is not an indictment of limiting instructions generally. Noted evidence scholar, Professor David Sklansky, recently examined the efficacy of limiting and other evidentiary instructions, concluding that some instructions work better than others and calling for a "context-specific weighing of the likelihood that an

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preference to trial testimony, arguably greater circumstantial guarantees of trustworthiness should be required than in the case of consistent statements.").

[160] *See id.* at 801-38 ("Where a consistent statement is admissible for other, rehabilitative purposes such as to explain an inconsistency, and yet is not admissible as substantive evidence under Rule 801(d)(1)(B), the adversary is entitled to a limiting instruction as to the appropriate use of the evidence.").

[161] *See* PARK ET AL., *supra* note 11, at 270 (noting that rehabilitative use of a prior consistent statement "can lead to a truly unintelligible limiting instruction"); SALTZBURG ET AL., *supra* note 35, at 801-38 (remarking that limiting instructions to disregard consistent witness statements are "unlikely to be understood by a jury").

[162] FJC SURVEY, *supra* note 18, at 2.

evidentiary instruction will work and the costs of it failing."[163] Professor Sklansky observed that limiting instructions given in mock juror experiments appear to function better when jurors are given an explanation or basis for the limitation that they can comprehend—such as that hearsay evidence is not "reliable."[164] He opined: "[I]f we cannot come up with an explanation for the instruction that will make sense to jurors[,] [t]hen it may be a good time to reexamine the rule that the instruction attempts to implement."[165]

Professor Sklansky's analysis highlights the shortcomings in the limiting instructions required under existing Rule 801(d)(1)(B). When evaluated in context, it is apparent that jurors will have difficulty comprehending *why* they must disregard the substance of a statement that merely echoes trial testimony they are told to consider. In the unique circumstance of the prior consistent statement, telling jurors that the out-of-court statement is "unreliable" could undercut its very purpose in repairing the credibility of the witness and confuse jurors as to the appropriate use they are to make of the consistent statement. Without a rational explanation, the limiting instruction is likely to be ineffective. Crafting a more comprehensible instruction in this area has proved elusive.

Therefore, reconsideration of the hearsay rule that necessitates the limiting instruction is in order. If the jury's consideration of the prior consistency presented a significant risk to a fair trial outcome, an appropriate remedy would be to exclude the prior consistency altogether—even for rehabilitative purposes.[166] Because the out-of-court statement is, by definition, consistent with testimony given at trial by the witness subject to cross-examination, there appears to be little cost to the trial process if the limiting instruction fails. In this context, therefore, permitting full use of all admitted prior consistencies would be a superior change in the operation of the Rules that would eliminate altogether the need for an ineffective and confusing jury instruction.

Thus, the disparate treatment of similarly situated prior consistent statements is not simply an example of the traditional limited admissibility of some out-of-court statements. In seeking a rational and uniform

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[163] Sklansky, *supra* note 25, at 446; *see id.* at 429 ("Sometimes evidentiary instructions work, sometimes they fail, and sometimes they backfire. Sometimes the effectiveness of the instruction depends on the seriousness of the charge; sometimes it depends on the personality of the jurors; sometimes it depends on how much stress is put on the instruction or what kind of stress; and sometimes none of that seems to matter.").

[164] *See id.* at 438 ("Clearly, jurors respond to specific information they can understand and appreciate." (quoting Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469, 486 (2006)) (internal quotation marks omitted)).

[165] *Id.* at 447.

[166] *See id.* at 444 ("If we thought jurors could not or would not follow [the limiting] instruction, we would have to choose between either excluding the evidence or admitting it for all purposes.").

approach to the admissibility of prior consistent statements, the proposed amendment to Rule 801(d)(1)(B) promotes an important and laudable objective. Of course, the entire purpose of the Federal Rules of Evidence is to encourage a trial process driven by logic and fairness.[167] Rules that draw illogical or even arbitrary distinctions create confusion among judges, litigants, and jurors. The proposal to amend Rule 801(d)(1)(B) nicely aligns with a model of clear and consistent rule-making and, as suggested by an early draft of a proposed Advisory Committee Note, merely "extends the argument made in the original Advisory Committee Note to its logical conclusion."[168]

B. *Lost in Translation: Theory vs. Practice*

Notwithstanding the policy justifications for the amendment, there has been significant concern that an amendment would pave the way for unfettered use of pre-trial witness statements as evidence.[169] In *theory*, the proposed amendment should not increase the number of prior consistent statements admitted at trial.[170] This is because the prior consistent statements it covers—those that repair attacks on a testifying witness's memory or inconsistency—are admissible under currently existing rules, albeit for their limited rehabilitative purpose.[171] As a result of the amendment, these already admissible prior consistent statements will simply be put to greater *use* as substantive evidence. Accordingly, the amendment should not alter the volume of prior consistent statements being *admitted* at trial under existing rules. Viewed in this light, the proposed amendment could be expected to have little negative impact on trial proceedings.[172]

Critics of the proposed amendment reject this vision of its impact on the trial process as overly simplistic and unrealistic. Opponents of the proposed amendment predict that its adoption will open the floodgates to admitting prior consistencies—which are *not* currently admitted—for any purpose at all.[173] Indeed, federal district judges overwhelmingly predicted an increase in the admission of prior consistent statements under an amended Rule.[174] There are two principal reasons why this might be the

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[167] *See* FED. R. EVID. 102 (outlining the purpose of the Federal Rules of Evidence).

[168] PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, *supra* note 128, at 218.

[169] *See supra* notes 138–140 and accompanying text.

[170] *See* Committee Note to Proposed Rule, *supra* note 118, at 833 ("The amendment does not make any consistent statement admissible that was not admissible previously . . . .").

[171] *Id.*

[172] The biggest impacts the amendment would have under this view would be the positive ones of eliminating confusing and possibly misleading limiting instructions and allowing appellate scrutiny of admitted prior consistencies.

[173] *See supra* notes 138–143 and accompanying text.

[174] *See supra* note 139 and accompanying text.

case, one pragmatic and the other theoretical.

1. *The Amended Rule in the Courtroom*

The pragmatic reason for possible increased admission of prior consistent witness statements at trial stems from increased litigant reliance on prior consistencies following the amendment. Litigants may have neglected to proffer admissible prior consistencies under the existing Rule,[175] but may be motivated to do so under an amended version. While litigants may appreciate the admissibility of prior consistent statements offered to repair attacks on memory and consistency under the existing rules, litigants also must realize that they are only admissible for their non-hearsay purpose. Without the ability to argue the truth of such admitted prior consistent statements and recognizing that they must be accompanied by cumbersome limiting instructions, lawyers may conclude that these non-hearsay prior consistent statements are not worth the effort. In the event of an amendment that affords substantive use to these prior consistent statements and permits a closing argument based upon their truth, prior consistent witness statements in these categories may become more attractive to litigants and may be proffered far more often. Under this scenario, an amendment could do much more than afford substantive effect to statements already being published to juries under existing rules; it may increase drastically the number of prior consistent statements offered at trial.[176]

The theoretical response to this potential for more aggressive use of prior consistencies is that well-established limitations, outside of hearsay doctrine, govern the trial judge's decision about proper rehabilitation. As described above, use of a prior consistent statement must follow an impeaching attack on the witness and the prior consistency must repair the attack launched.[177] Neither of these fundamental rehabilitation principles would be disturbed by an amended Rule. Indeed, the proposed Advisory Committee Note to the amendment very strongly emphasizes the continued applicability of these common law limitations on rehabilitation.[178] While an amendment certainly could encourage party *attempts* to use prior consistencies more often, trial judges would retain full control over the decision about rehabilitation (which triggers substantive use under the

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[175] *See id.* at 3 (presenting the comment of one district judge who indicated that the issue of limited admissibility of prior consistent statements had not come up once in seventeen years of trying federal cases).

[176] This could be one reason that district judges predicted an increase in admission of prior consistent statements.

[177] *See supra* notes 31, 33 and accompanying text.

[178] *See* Committee Note to Proposed Rule, *supra* note 118, at 833 ("As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked.").

proposal).

If the newly proffered prior consistent statements properly repair impeachment of a witness, they *should* be admitted, in which case there is little harm in allowing them to be used for their truth as well. This is the point of the amendment. If, on the other hand, lawyers begin indiscriminately offering prior consistent statements that fail to rehabilitate properly and simply attempt to bolster witnesses and build cases from prepared out-of-court statements, opponents may object that those prior consistent statements have little or no tendency to repair the impeachment and should be excluded altogether. Even if proffered prior consistencies have some slight rehabilitative value, litigants may argue that such value is substantially outweighed by their tendency to add additional hearsay information to the proponent's case. To be sure, this process will demand vigilance by opponents of prior consistent statements and active oversight by trial judges.[179] Although this may be viewed as burdensome for trial judges, it represents no change from existing practice: The Federal Rules of Evidence currently leave rehabilitation questions to development by judges on a case-by-case basis.[180] Therefore, interpreted as intended, the proposed amendment does not pave the way for indiscriminate use of pre-trial witness statements even if litigants proffer them with more frequency.

However, it is important to place the theory behind the proposed amendment within the courtroom context in which it will play its part. Significantly, surveyed federal district judges, who will be responsible for policing an amended Rule, have predicted that trial judges will allow many more prior consistent statements to be admitted in the wake of the amendment.[181] A philosophical shift in the approach to prior consistent statements in the courtroom since the enactment of the Rules and the *Tome* decision may impair judicial efforts to combat any onslaught of proffered prior consistencies in the wake of an amendment.

2. *The Philosophical Clash with* Tome

When Rule 801(d)(1)(B) was enacted, it entered a common law trial landscape in which prior consistent statements were admissible *only* for their non-hearsay rehabilitative purpose.[182] In this litigation climate, judges and lawyers were required to discern and articulate the non-hearsay purpose for admitting any prior consistency. The proposed amendment

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[179] *See* FJC SURVEY, *supra* note 18, at 9 (noting that because "the amendment ties admissibility to the need for rehabilitation, . . . [which] all witnesses need . . . to some degree" and consequently shifts a trial judge's focus to "tricky" 403 issues about the "credibility and weighing [of] the evidence," trial judges will inherit enhanced duties on the use of prior consistent statements in court).

[180] Committee Note to Proposed Rule, *supra* note 118, at 833.

[181] *See* FJC SURVEY, *supra* note 18, at 14 (noting that only thirty-five percent of surveyed judges thought that trial judges would or could stem the flow of prior consistencies into evidence).

[182] *See supra* note 43 and accompanying text.

currently under review would enter a very different trial landscape that has evolved since the enactment of the Rules in 1975 and the *Tome* decision in 1995. In the post-Rules universe, judges and lawyers are accustomed to looking at Rule 801(d)(1)(B) to determine *admissibility* of prior consistencies. Accordingly, the independent focus on non-hearsay rehabilitation purposes for prior consistent statements has likely diminished since the door to substantive use was opened through Rule 801(d)(1)(B).[183] This philosophical shift in the approach to prior consistent statements under the Rules and *Tome* may make it difficult for litigants and judges to police any significant uptick in the use of prior consistent statements effectively following an amendment to the Rule.

Viewing the proposed amendment through the lens of current practice under Rule 801(d)(1)(B), there is genuine reason to fear that it may not be applied as intended. In the fast-paced context of a jury trial, many lawyers and judges may fail to recognize the somewhat nuanced interaction between rehabilitation and hearsay embodied in the amendment. Litigants may ignore the two-step process that governs the substantive use of prior consistent statements under the amendment and may assume that Rule 801(d)(1)(B) represents a proxy for prior consistent statement admission. In other words, litigants might conclude that a prior consistent statement may be *admitted* and used *substantively* whenever it "fits" the amended Rule 801(d)(1)(B) language without further inquiry regarding the specific impeachment launched or the relevance of the proffered consistency to repair.

This tendency may be exacerbated by the traditional approach to hearsay exceptions and exemptions in the courtroom. Once litigants identify a hearsay exception applicable to a particular out-of-court statement, they may naturally skip any analysis of the potential limited non-hearsay use of such a statement. For example, if a declarant expressed her then-existing state of mind out of court and that state of mind became relevant in a subsequent trial, a lawyer would likely argue that the Rule 803(3) hearsay exception provides for the admission of the statement.[184] Knowing there is an available hearsay exception that paves the way to admit the statement for its truth, an advocate need not undertake a careful analysis of whether the statement could be admitted for its limited non-

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[183] *See* FJC SURVEY, *supra* note 18, at 19 ("[I]t opens the door to argument[s] about when a witness's credibility has been challenged rather than specifying what type of challenge triggers the use of the prior statement[s]."); *id.* ("I have a concern with the proposed amendment because I do not know what is meant by the words 'otherwise admissible.' . . . I would better understand the proposed amendment if the words . . . were changed to 'offered.'"); *id.* ("What does 'otherwise admissible' to rehabilitate mean?").

[184] *See* FED. R. EVID. 803(3) (providing a hearsay exception for statements of declarant's then-existing state of mind).

hearsay value in demonstrating circumstantial evidence of the declarant's state of mind.

Under the proposed hearsay exemption embodied in amended Rule 801(d)(1)(B), however, there remains an assumption that prior consistent witness statements are inadmissible hearsay. That is, proponents *must* identify a valid non-hearsay purpose for admission of a prior consistent statement. Only if the out-of-court statement could be admitted for a limited purpose does the amended Rule permit substantive use.[185] Lawyers and judges might mistakenly interpret an amended Rule 801(d)(1)(B) in traditional fashion, however, and conclude that there is no need for a thoughtful evaluation of the non-hearsay value of a prior consistent statement now that an exemption paves the way for substantive use. Indeed, comments made in the course of the Federal Judicial Center survey reflect such misunderstanding.[186] If the proposed amendment ultimately takes effect, it will be the only hearsay exception or exemption that requires independent consideration of the non-hearsay value of a statement as the exclusive condition precedent to substantive availability.[187] As the lone exemption with such operation, the proposed amendment to Rule 801(d)(1)(B) risks misapplication. As currently configured, the amended Rule could be interpreted to bless and automatically admit any prior consistent statement offered to repair an impeaching attack.

This view of the Rule 801(d)(1)(B) is not simply the result of lawyer ignorance: the Supreme Court's decision in *Tome* may have much to do with creating it. By mandating a premotive requirement in the hearsay Rule, the Supreme Court suggested that the hearsay exemption *does* regulate proper rehabilitation.[188] Consequently, lawyers and judges alike may have adopted the view that a prior consistent statement is (1) admissible and (2) available for substantive use whenever it fits the language of Rule 801(d)(1)(B). Indeed, this is true of the existing Rule. If the specific impeaching attack of recent fabrication or improper influence or motive outlined in the current Rule is made *and* the proffered prior statement is both consistent with the witness's trial testimony and a

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[185] *See* Committee Note to Proposed Rule, *supra* note 118, at 832–33 ("The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes.").

[186] *See* FJC SURVEY, *supra* note 18, at 5 ("If it is not hearsay, why is a limiting instruction being given?"); *id.* at 15 ("If the statements would be admissible for substantive purposes, what would be the source of the unfair prejudice that would support a ruling to exclude the evidence under Rule 403?").

[187] Although Rule 801(d)(1)(A) demands "inconsistency" for a prior witness statement that is crucial to non-hearsay impeachment value, substantive availability ultimately turns on the context of the out-of-court statement. *See* FED. R. EVID. 801(d)(1)(A) (requiring that an inconsistent statement be made under oath and at a prior trial, hearing, deposition, or other proceeding for substantive availability).

[188] *See* Tome v. United States, 513 U.S. 150, 167 (1995) (holding that the hearsay exemption requires premotive statements for proper rehabilitation).

premotive statement, it will satisfy both rehabilitation concerns and hearsay concerns and be admitted for its truth. All of the components of admissibility for rehabilitative purposes and substantive use are embodied in that single self-contained provision. Therefore, practice under the existing Rule may have evolved into a one-step analysis focused entirely on Rule 801(d)(1)(B) and neglecting any independent assessment of rehabilitative value. In other words, many lawyers and judges may use Rule 801(d)(1)(B) as a simple shorthand for appropriate rehabilitation with prior consistent statements, offering and allowing statements that fall within the confines of the Rule and ignoring those that do not.[189]

Transferring this interpretation of existing Rule 801(d)(1)(B) to the proposed amendment could lead to the more frequent admission of prior consistent statements decried by critics. All prior consistent statements proffered after any impeaching attack on a witness not within the original Rule 801(d)(1)(B) category could be seen as automatically (1) admissible to rehabilitate and (2) available for substantive use under the Rule. Notwithstanding the cautionary statements in the proposed commentary regarding appropriate rehabilitation, litigants may be lulled into a false sense of security that the rehabilitation requirement is automatically satisfied for any prior consistent statement falling within the amended Rule.[190]

First, while the amended provision is premised upon the original two-step analysis behind the hearsay exemption that allows substantive use of statements *already* admissible to rehabilitate, it preserves the well-recognized *Tome* category in its first clause and expressly ratifies the *Tome* premotive requirement in the proposed Advisory Committee Note.[191] This adoption of *Tome* may signal acceptance of the *Tome* philosophy that Rule 801(d)(1)(B) regulates the proper scope of rehabilitation, in addition to hearsay. This philosophical bent could cause judges and litigants to assume that the amendment also covers both issues of appropriate rehabilitation and hearsay and to neglect a careful independent assessment of the rehabilitation value of proffered prior consistent statements.

Second, the specific language chosen for the new clause of the proposed amendment may exacerbate litigants' tendency to presume that Rule 801(d)(1)(B) defines allowable rehabilitation. The new clause

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[189] Indeed, several comments made by district judges in the FJC Survey reflect such a one-step approach to prior consistencies. *See, e.g.*, FJC SURVEY, *supra* note 18, at 9 (noting that the "current language [of Rule 801(d)(1)(B)] places a governor on admissibility"); *id.* at 10 (opining that the amendment creates a "new avenue of admissibility" for prior consistencies); *id.* at 15 ("If the statements [are] admissible for substantive purposes [under the amendment], what would be the source of the unfair prejudice that would support a ruling to exclude the evidence under Rule 403?").

[190] *See Tome*, 513 U.S. at 168 (Scalia, J. concurring in part and concurring in judgment) ("[T]he promulgated Rule says what it says, regardless of the intent of its drafters.").

[191] Committee Note to Proposed Rule, *supra* note 118, at 832.

provides that a statement is "not hearsay" if the declarant testifies at trial subject to cross-examination and the statement is consistent with the declarant's testimony and "is *offered . . . to rehabilitate* the declarant's credibility as a witness *when attacked on another ground*."[192] This language may signal that hearsay concerns disappear whenever a prior consistent statement is "offered" to rehabilitate an impeached witness. So interpreted, the Rule could be seen to bless the use of prior consistencies both for repair and substance any time a witness is impeached on "another ground" and the proponent of the witness "offers" a prior consistent statement in an effort to "rehabilitate [the] declarant's credibility as a witness."[193] A proponent of a prior consistency need only explain that he is "offering" the statement for repair following "impeachment" of his witness to track the language of the amendment and argue for admission and substantive use of the statement.

The key to proper application of Rule 801(d)(1)(B) is careful contextual evaluation of impeachment and proffered rehabilitation by the trial judge in advance of consideration of substantive use of a prior statement. Should trial judges neglect this contextual rehabilitation analysis in favor of more rote admission under the proposed amendment, some of the concerns expressed about expansive use of prior consistent statements may be legitimate.

For example, trial judges may feel comfortable allowing prior consistent statements to be admitted pursuant to subsection (ii) of the proposed amendment whenever an opponent references a prior inconsistent statement. Yet, it is not the case that all suggestions of a prior inconsistency will be ameliorated by a prior consistency.[194] If the prior consistent statement was made at or near the time of the alleged inconsistency, it may repair the attack by suggesting that the witness did not vacillate and that the proffered inconsistency was never really inconsistent after all.[195] In that case, the prior consistent statement rehabilitates and should be admitted and available for substantive use.[196] Conversely, if the proponent of a witness seeks to counter an attack with a prior inconsistent statement by demonstrating that the trial witness made a statement consistent with trial testimony at some *other* time, this prior consistent statement may not respond to the attack on the witness's constancy. The fact that the witness made statements in keeping with trial

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[192] May 2013 Advisory Comm. Report, *supra* note 17, at 3 (emphasis added).

[193] Judge Ericksen Comment, *supra* note 135, at 4.

[194] *See* MCCORMICK, *supra* note 1, § 47, at 315–16 (noting that some inconsistencies "remain[] despite all consistent statements").

[195] *Id.* § 47, at 316.

[196] *See id.* (asserting that certain circumstances may make prior consistent statements relevant to rehabilitate the witness).

testimony at some times does not undercut the impeaching sting of vacillation demonstrated by inconsistencies at other times. Therefore, such a prior consistent statement does not rehabilitate the attack and should not be admitted for repair purposes *or* substantively. There is a legitimate concern, however, that litigants and trial judges will presume automatic admissibility of witness prior consistent statements after an attack with a prior inconsistent statement should an amendment provide that prior consistent statements are not hearsay when they "are offered to rehabilitate" after the witness is "attacked on another ground."[197]

In essence, the amended Rule as it is currently configured presents something of a mixed metaphor. Its first clause arises out of the post-*Tome* era in which Rule 801(d)(1)(B) addresses appropriate rehabilitation *and* hearsay in one efficient package.[198] Without any express signaling in the text of the amendment, the newly added clause harkens back to common law practice, providing a hearsay exemption but outsourcing the decision about proper rehabilitation to a case-by-case analysis by the trial judge.[199] There is a real risk that litigants and judges accustomed to operating in the post-*Tome* universe will construe the amended portion of the Rule consistently with its predecessor and fail to focus on the limited reach of the amendment. Judges and lawyers using Rule 801(d)(1)(B) on a one-stop shopping basis may ignore the contextual threshold inquiry into appropriate rehabilitation that must be performed in applying the second clause of the amended Rule.[200] If they do, all prior consistent statements "offered to rehabilitate" a trial witness who has been impeached on *any* ground (other than recent fabrication or improper influence or motive) will be both admissible and available for substantive use. Such a construction of the amendment could lead to the liberal and somewhat routine admission of witness statements feared by critics, especially if litigants aggressively seek admission of prior consistencies in the wake of the amendment.

With sound evidentiary policy behind it, the proposed amendment represents an opportunity to bring needed clarity and consistency to the

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[197] May 2013 Advisory Comm. Report, *supra* note 17, at 3.

[198] *See* Judge Ericksen Comment, *supra* note 135, at 3 (referring to the *Tome* language in a prior draft proposal as a "vestigial remnant" of the existing Rule).

[199] Indeed, the amended provision appears to track the view of Rule 801(d)(1)(B) espoused by the dissent in *Tome*. *See* Tome v. United States, 513 U.S. 150, 169 (1995) (Breyer, J., dissenting) ("[*I*]*f* such a statement is admissible for a particular rehabilitative purpose . . . its proponent now may use it substantively, for a hearsay purpose . . . .").

[200] To be sure, judges and litigants should appreciate that an item of evidence does not become *admissible* simply because it is "not hearsay" as provided by Rule 801(d)(1)(B). All evidence must meet the minimum threshold of relevance to be admissible. FED. R. EVID. 402. However, the relevance standard sets a low bar to admissibility. *See id.* 401 (classifying as "relevant" all evidence that has "any tendency" to make a "fact . . . of consequence . . . more probable or less probable than it would be without the evidence").

law of prior consistent statements. Arriving on the scene in the post-*Tome* Rules era, however, the amendment must conform its common law roots to existing practice. As currently drafted, the amendment may prove to be plagued by unintended misapplication. The current proposal, although well-founded, threatens to squander a golden opportunity to achieve consistency for prior consistent statements.

C. *How to Solve a Problem like Rule 801(d)(1)(B)*

The proposed amendment to Rule 801(d)(1)(B) adopted by the Advisory Committee is premised upon a logical and workable two-step approach to rehabilitation and hearsay analysis that is traceable to common law practice. That said, lawyers and judges accustomed to operating under the existing regime may have difficulty adjusting to the modified scheme. Relying on habitual practice under the existing Rule, litigants and judges may not sift the wheat from the chaff aggressively in a post-amendment universe. Thus, if the language chosen for the amendment is retained, there may be an unintended increase in the admission of prior consistent statements in practice.[201] There are three potential methods for preventing an influx of witness hearsay into the trial process through an amended Rule 801(d)(1)(B): (1) reject any amendment and preserve the existing Rule; (2) repeal Rule 801(d)(1)(B) altogether and allow non-hearsay use of all prior consistencies only; or (3) redraft the proposed amendment to minimize the risk of misapplication.

1. *Maintain the Status Quo*

The path of least resistance would be to reject any amendment to Rule 801(d)(1)(B) and to leave practice under the Rule alone. Many voices would certainly favor this approach. Indeed, there is something to be said for the safety of the familiar. Altering long-standing evidence rules is a risky proposition. Courts and litigants have many years of experience with the current Rule and the *Tome* premotive analysis. Leaving the Rule untouched eliminates concerns over the possibility for expanded use of prior witness statements. Many of the judges surveyed by the Federal Judicial Center made comments to the effect that the Rule should not be "fixed" because it is not "broken."[202]

The obvious drawback of this option is that it ignores the fact that the existing Rule may be "broken" because it maintains a mysterious disparate treatment for different types of prior consistent statements under the

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[201] While improvident admission could form the basis for an appeal, it would be preferable to fix any foreseeable misinterpretation at the trial level rather than relying on the corrective of the appellate process.

[202] *See supra* note 136 and accompanying text.

Evidence Rules. In addition, this approach would maintain the need for complicated jury instructions of questionable utility. Indeed, the current disparity in the treatment of different types of prior consistent statements could pose a greater fairness risk to litigants than a Rule that treats all admitted prior consistent statements similarly. Under the existing Rule, an appellate court might find that a trial judge abused her discretion in allowing a prior consistent statement to rehabilitate an impeaching attack, thus erroneously giving the jury access to a witness's prior consistent statement. Upon a finding of error, an appellate court would review the record to determine the effect of the erroneous admission on the appellant's trial outcome.

For an admitted prior consistent statement covered by existing Rule 801(d)(1)(B), an appellate court could find a harmful error requiring reversal given that the jury was free to make substantive use of the erroneously admitted prior consistency. For admitted prior consistencies *not* covered by the current Rule, the trial judge will likely have given the requisite limiting instruction, cautioning the jury against reliance on the truth of the statement.[203] Under these circumstances, it is likely that an appellate court would find the admission of the prior consistent statement a harmless error because of the protection provided by the limiting instruction.[204] Because of the presence of limiting instructions, therefore, some litigants may be denied relief that would otherwise be forthcoming as a result of improvident admission of a prior consistency. The Supreme Court has recognized the reality that jurors may be unable to adhere to limiting instructions in some circumstances due to the difficulty inherent in ignoring or disregarding what has already been revealed.[205] Jurors may have proven incapable of disregarding the truth of the admitted prior consistent statement and may have relied upon it in reaching a verdict.[206] That verdict may remain unassailable due to the presence of the ignored instruction. Therefore, the limiting instruction required by the current

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[203] *See* MUELLER ET AL., *supra* note 151, § 1.7, at 25 ("One common curative step is to instruct the jury by limiting the purposes for which evidence may be considered, directing that it be disregarded, or explaining it in other ways.").

[204] *See id.* ("Usually reviewing courts conclude that [limiting] instructions make any error in admitting evidence harmless.").

[205] *See* Bruton v. United States, 391 U.S. 123, 139 (1968) ("The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors." (quoting Delli Paoli v. United States, 352 U.S. 232, 247 (1957)) (internal quotation marks omitted)).

[206] *See* Sklansky, *supra* note 25, at 456 ("[J]uries should never be presumed to follow instructions that are incoherent or that are likely to appear senseless to them."). Several district court judges surveyed by the FJC commented that juries already use prior consistencies for their truth and disregard any accompanying limiting instructions. *See, e.g.*, FJC SURVEY, *supra* note 18, at 6 ("It is likely evidence admitted at trial is weighed as being admitted for its truth even if a cautionary instruction is given."); *id.* ("[J]urors have already amended the rule.").

disparity in treatment between different prior consistent statements may be serving to protect artificially erroneous admission of some prior consistent statements from appellate review.[207]

It would be the unusual case in which admission of a prior statement that was consistent with testimony given at trial would be an outcome-altering error.[208] But *Tome* was just such a case. Admission of the child victim's prior consistent statements under Rule 801(d)(1)(B) constituted harmful error in light of her stilted trial testimony.[209] The admitted prior consistencies were relied upon in closing arguments and clearly were game-changing for the prosecution.[210] Thus, the admission of those prior consistencies for their truth justified reversal.

If the defense had chosen to attack the victim's memory instead of her motivations, it could have suggested that she could no longer recall details of alleged activity that took place when she was only four years old. In response to this impeaching attack, the victim's prior consistencies that were made much closer to the alleged assaults may have been appropriate rehabilitation. If admitted in response to an attack on memory, however, the victim's prior consistent statements could not have been used for their truth under the current Rule and would have to be accompanied by an appropriate limiting instruction. If the jury had nonetheless convicted the defendant, even erroneous admission of these prior consistencies would be unlikely to lead to reversal due to the cautionary limiting instructions given to the jury. Although it might be just as probable that the jury relied upon the victim's hearsay to convict, the non-hearsay purpose for the admission would likely insulate the conviction from reversal. Using the *Tome* facts as an example illustrates the potential unfairness caused by differential treatment of similarly situated prior consistencies.

With an amended Rule that allows all admitted prior consistencies to be used for their truth without any limiting instruction, appellate courts

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[207] *See* Kirkpatrick, *supra* note 120, at 43 (noting that the proposed amendment would make "a finding of harmless error more difficult" because all admitted consistent statements would "become substantive evidence"); *see also* Sklansky, *supra* note 25, at 443 ("In some cases, though, the admission of certain evidence before the jury would be deemed prejudicial error in the absence of a curative instruction. If we stopped presuming that evidentiary instructions worked and instead presumed that they did not work, those would be cases in which the judge would have to declare a mistrial and try the case anew.").

[208] *See* GRAHAM, *supra* note 7, § 7012, at 154 ("[S]ince the prior consistent statement is by its very nature consistent with in court testimony of the witness, introduction of reversible error through misinterpretation is very unlikely."); SALTZBURG ET AL., *supra* note 35, at 801-32 ("[A]n error in either admitting or excluding a statement for its truth under Rule 801(d)(1)(B) is more likely, though not certain, to be harmless.").

[209] *See* Tome v. United States, 513 U.S. 150, 154–55 (1995) (holding that the trial judge abused his discretion by admitting prior consistent statements).

[210] Case Comment, *Evidence—The Common-Law Premotive Rule Regains Momentum in the Federal Rules of Evidence*—Tome v. United States, 29 SUFFOLK U. L. REV. 1219, 1224 n.32 (1995).

would be forced to take a closer look at those admitted prior consistencies and police improvident admissions evenly.[211] For these reasons, abandoning any attempt at amending the Rule and maintaining the status quo may not be an optimal solution. Finally, a decision to maintain a conceptually irrational disconnect between similarly situated prior consistent statements due to fear of the unknown threatens to elevate "safety" over rational rule-making.

One of the most compelling arguments for keeping the current version of Rule 801(d)(1)(B) is that it provides a powerful "bright-line" standard that creates certainty for litigants and prevents trial judges from liberally admitting prior consistencies.[212] The protection provided by the existing Rule is somewhat illusory, however, and fails to provide a compelling justification for maintaining the status quo. First, while the existing Rule may constitute a bright-line standard that absolutely prohibits the substantive use of prior consistencies outside of its purview, administering the standard already demands significant judicial discretion. Trial judges must ascertain whether an appropriate charge of recent fabrication or improper influence or motive has been made.[213] Because such a charge need not be express, determining whether an implied charge has been levied is a necessarily contextual task requiring judicial assessment of impeachment techniques on a case-by-case basis.[214] Furthermore, determining whether a prior consistent statement was made prior to the charged motive or influence requires a determination as to when in the chronology of the case the motive arose. Although the impeaching attack may make this apparent in some circumstances, analysis of the timing may be less clear in other cases.[215] Trial judges necessarily enjoy significant discretion in administering the existing Rule.

Second, trial judges already possess the power to admit prior consistencies outside the scope of Rule 801(d)(1)(B) if they are appropriately rehabilitative.[216] Of course, these prior consistent statements may be admitted only for their non-hearsay purpose. Still, they may be

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[211] *See* Kirkpatrick, *supra* note 120, at 43 (noting a "possibility of increased reversals").

[212] *See* FJC SURVEY, *supra* note 18, at 9 (noting that the "current language [of Rule 801(d)(1)(B)] places a governor on admissibility"); *see also* SALTZBURG ET AL., *supra* note 35, at 801-37 ("The risk of an unbridled use of Rule 801(d)(1)(B) is . . . that the Trial Court may play fast and loose with principles of relevance, shifting the trial from a focus on in-court to out-of-court statements."); Bullock & Gardner, *supra* note 126, at 537 ("An argument can be made that anything but a time-line rule leaves some uncertainty in the parties' pre-trial preparation.").

[213] MCCORMICK, *supra* note 1, § 47, at 316.

[214] *See id.* ("It is up to the judge to decide whether the impeachment at least implies a charge of contrivance.").

[215] *See* Bullock & Gardner, *supra* note 126, at 537 ("The parties cannot know exactly how the court will rule in regard to relevancy or the premotive or postmotive status of a prior consistent statement.").

[216] MCCORMICK, *supra* note 1, § 47, at 318.

published to the fact-finder and trial judges must be trusted to assess which prior consistent statements properly rehabilitate using flexible standards of relevance and probative value.[217]

Finally, to suggest that trial judges need bright-line standards to cabin rehabilitation fairly is to reject the decision by the drafters of the Federal Rules of Evidence to leave significant areas of impeachment and rehabilitation to continued case-by-case development.[218] In theory, specific rules governing appropriate rehabilitation could make life easier and more predictable for trial judges and litigants. But drafting specific rules of rehabilitation to cover every possible scenario that might arise at trial would be an exercise in futility. Like general notions of relevance, many issues regarding proper impeachment and rehabilitation are best left to flexible contextual decision-making.[219] For all of these reasons, preserving existing Rule 801(d)(1)(B) as a bright line limitation to prevent discretionary judicial consideration of the appropriate use of prior consistencies appears ill-advised.

2. *Back to the Future: Consistency Through Repeal of Rule 801(d)(1)(B).*

There is, of course, another way of achieving consistency between prior consistent statements without risking liberal admission of prior witness consistencies. Although likely to be a political non-starter, the Advisory Committee could achieve logical consistency by eliminating the hearsay exemption provided by Rule 801(d)(1)(B) altogether, relegating *all* prior consistent statements solely to rehabilitative use.[220] Indeed, if the fundamental significance of such witness consistencies stems from their rehabilitative value, it makes sense to confine the use of all such statements to that fundamental purpose. With a repeal of Rule 801(d)(1)(B), the trial judge would be charged with determining the rehabilitative value of a proffered prior consistent statement and could allow its admission for non-hearsay credibility purposes alone. Limited admissibility would require an instruction cautioning the fact-finder against substantive use of the prior consistent statement in all cases. This would restore logic to the Rules and

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[217] *See id.* ("[T]he judge has discretion under Rules 401 and 403 to determine whether the particular circumstances justify admission of consistent statements to rehabilitate the witness.").

[218] *See supra* notes 45–46, 51 and accompanying text.

[219] *See* MUELLER ET AL., *supra* note 151, at 161 n.7 (explaining that the "'variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof' and that an 'enormous number of cases fall in no set pattern,' and therefore Rule 401 is intended only 'as a guide for handling them'" (quoting FED. R. EVID. 401 advisory committee's note)).

[220] Illinois has maintained this common law approach even after the enactment of Rule 801(d)(1)(B) in the federal system. *See* People v. Lambert, 681 N.E.2d 675, 680 (Ill. App. Ct. 1997) ("Illinois follows the common-law rule that, where admission is allowed, a prior consistent statement is permitted solely for rehabilitative purposes and not as substantive evidence.").

case law by treating similarly situated prior consistent statements consistently—none would be available for their truth.[221]

Such a solution runs counter to the policy espoused by the current Rule, which explains that there is "no sound reason" to restrict substantive use of such admitted consistent statements, however.[222] To support elimination of the hearsay exemption that has existed since 1975, there must indeed be some good reason for such a change in course and limitation on the use of prior consistent statements. Whether or not there is such a reason may depend on one's view of the efficacy of limiting instructions. To the extent that jurors can be relied upon to comprehend and adhere to such instructions, eliminating substantive availability of prior consistent statements may make sense.[223] Proponents of a witness will have access to all such consistencies to the extent that they have rehabilitative value, but will always be forced to build a case from the witness's live testimony.

But skeptics have long questioned jurors' ability to ignore information they have already received.[224] Indeed, the Supreme Court has acknowledged the failings of limiting instructions in certain contexts.[225] Several of the district court judges surveyed regarding the proposed amendment to Rule 801(d)(1)(B) commented that jurors ignore such instructions and rely on prior consistencies substantively, notwithstanding warnings to the contrary.[226] If jurors ignore instructions limiting the use of prior consistent statements to their rehabilitative purposes—willfully, unconsciously, or from a lack of comprehension—they may utilize those prior consistent statements substantively for their truth. If this happens, the prejudiced party is unlikely to have any recourse due to the appellate

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[221] Of course, if a prior consistent statement by a trial witness satisfied a separate exception to the hearsay rule, it could be substantively admissible through that exception without regard to its rehabilitative value. FED. R. EVID. 802.

[222] FED. R. EVID. 801(d)(1)(B) advisory committee's note.

[223] Of course, the American trial system depends upon the premise that juries comprehend and follow instructions provided to them. *See* Bruton v. United States, 391 U.S. 123, 135 (1968) ("Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." (quoting Delli Paoli v. United States, 352 U.S. 232, 242 (1957)) (internal quotation marks omitted)).

[224] *See* Sklansky, *supra* note 25, at 410–13 (describing the legal community's long-standing belief that lay jurors are incapable of following limiting and other evidentiary instructions).

[225] *See Bruton*, 391 U.S. at 129 ("The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction." (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)) (internal quotation marks omitted)); Shepard v. United States, 290 U.S. 96, 104 (1933) (observing that the admission of evidence for a limited purpose can be problematic for a jury and commenting that "[d]iscrimination so subtle is a feat beyond the compass of ordinary minds").

[226] FJC SURVEY, *supra* note 18, at 3.

practice of finding limiting instructions curative.[227] Therefore, the existence of limiting instructions could insulate improvident use of prior consistent statements from review under a version of the Rules that rejects substantive use of prior consistent statements altogether.

Although treating all prior consistencies similarly on its face, such a rule could create more disparity and unpredictability in the treatment of prior consistent statements below the surface. Parties would continue to depend upon the trial judge's assessment of the rehabilitative value of prior consistent statements to determine which will be admitted, but will have no way of knowing when the fact-finder will disregard the limiting instruction and when it will adhere to it. Under this scenario, some prior consistent statements will in fact be used for their truth and others will not, but litigants will have no method for discerning the difference because it will be hidden through the use of limiting instructions.

If there is legitimate reason to fear a jury's disregard of a limiting instruction, bringing logical consistency to Rule 801(d)(1)(B) by expanding it to all rehabilitative prior consistent statements may be the better course.[228] In that case, all prior consistent statements admitted to rehabilitate legitimately will be available substantively to the fact-finder. If such substantive use of a prior consistent statement is improper in a particular case under standards of appropriate rehabilitation, the aggrieved party can obtain appellate review of the admission decision based upon the reality that the statement was considered substantively, rather than have that appeal foreclosed by the fiction that the fact-finder dutifully complied with a limiting instruction.

3. *Preserving the Amendment and the Original Intent of Rule 801(d)(1)(B)*

Each of the preceding avenues for eliminating concerns about the proposed amendment throws the baby out with the bath water. Quashing the amendment and retaining existing Rule 801(d)(1)(B) would maintain an irrational status quo in the name of safety and out of fear of change. The repeal of Rule 801(d)(1)(B) altogether would remove potentially helpful evidence from the fact-finder, *increase* the use of confusing limiting instructions at trial, and create unreviewable disparities in jury use of prior consistencies.

The third possible approach to the mixed message of the current proposal is to revise the amendment in an effort to define clearly in rule text the analysis necessary for admission of prior consistent statements for substantive purposes. Such a revision could provide judges and litigants

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[227] *See supra* note 204 and accompanying text.

[228] *See* Sklansky, *supra* note 25, at 447 (noting that reconsideration of an evidence rule is appropriate when judges cannot craft a limiting instruction that is likely to be understood by a lay jury).

meaningful tools to prevent indiscriminate admission of all witness consistencies. Although there are undoubtedly numerous possible revisions that could be undertaken, two seem most suited to achieving greater consistency for prior consistent statements, while simultaneously minimizing (if not eliminating entirely) concerns about expansive use of witness statements.[229] The first potential revision would preserve the two-category approach of the current proposal, as well as the language of original Rule 801(d)(1)(B). The second possible revision would be more drastic, discarding the language of the original Rule in favor of a single hearsay exemption applicable to all prior consistencies properly admitted to rehabilitate any type of impeaching attack.

a. A Modest Revision

The first possible revision presents a modest change that would not disturb practice under existing Rule 801(d)(1)(B) and would highlight the proper analysis of the newly added provision for judges and lawyers. Instead of suggesting that a prior consistency may come in whenever it is "offered" to rehabilitate an impeached witness, an amendment could be drafted to capture a threshold conclusion about limited rehabilitative use, as follows:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement: . . .
>
> (B) is consistent with the declarant's testimony *and is independently admissible for the non-hearsay purpose of:*
>
> (i) *rebutting* an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> (ii) *repairing another specific impeaching attack on the* declarant's credibility as a witness; . . . .[230]

This draft offers several benefits. First, spelling out the threshold inquiry into limited rehabilitative value in rule text may curb overly aggressive resort to prior consistencies. Furthermore, highlighting the rehabilitation question in rule text may arm opponents of a prior consistency with the appropriate objection under the amendment. With

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[229] Indeed, some of the district judges surveyed about a proposed amendment offered redrafting suggestions. *See* FJC SURVEY, *supra* note 18, at 7 ("Maybe you could delete the language above, 'whenever it would be otherwise admissible to' and instead just say, 'if it rehabilitates a witness.'").

[230] The emphases stress suggested language that differs from the proposed amendment.

such a draft, opponents of prior consistencies would insist upon clear articulation of the rehabilitative value of the proffered consistency. Judges and lawyers would be certain to appreciate the unique operation of the amended hearsay exemption, requiring a finding about limited non-hearsay use before allowing substantive use of a prior consistency. Importantly, a draft that emphasizes consideration of rehabilitation independently of hearsay re-aligns the Rule with its common law antecedents and eliminates the potential use of the Rule as a proxy for admission of prior consistencies. Judges and litigants will not be lulled into thinking that any prior consistent statement "offered" to rehabilitate becomes automatically admissible for its truth, but instead will focus on the "specific impeaching attack" and on the non-hearsay rehabilitative purpose for the proffered prior consistency.

The last paragraph of the proposed Advisory Committee Note to the current amendment clarifies that the Rule "does not make any consistent statement admissible that was not admissible previously."[231] Still, it seems important to make this point more overtly in Rule text. Although the Advisory Committee Notes are widely recognized as authoritative for proper rule interpretation,[232] it is possible that judges and litigators could miss the finer points buried in the notes in the heat of trial. Further, the unusual focus on non-hearsay value under an amendment may demand more overt explanation to avoid misapplication.

Finally, this draft would preserve *Tome* and existing practice by maintaining its triggering language and via express language to that effect in the proposed Advisory Committee Note.[233] Thus, this version of an amended Rule would not alter the way in which judges and lawyers currently handle prior consistencies used to repair charges of recent fabrication or improper influence or motive. The preservation of *Tome* in such a revision is also its biggest weakness. By maintaining *Tome* and the premotive limitation, this draft would include provisions within the same Rule embodying contradictory philosophies. The first clause of such a draft would continue to occupy the field of rehabilitation and hearsay, while the second clause would require a distinctly independent assessment of the rehabilitative value of a particular proffered prior consistent statement. Furthermore, like the proposed amendment, this version of the Rule would fail to achieve true consistency for prior consistent statements and would maintain the need for confusing limiting instructions in some circumstances. In *Tome*, the Supreme Court acknowledged that

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[231] Committee Note to Proposed Rule, *supra* note 118, at 833.

[232] *See* Tome v. United States, 513 U.S. 150, 160 (1995) ("We have relied on those well-considered [Advisory Committee] Notes as a useful guide in ascertaining the meaning of the Rules.").

[233] The current proposed advisory committee note expressly maintains the *Tome* premotive requirement. Committee Note to Proposed Rule, *supra* note 118, at 832.

postmotive statements could serve to rehabilitate charges of improper motive or influence in some, albeit rare, circumstances.[234] Under a version of the amendment that retains *Tome*, therefore, some postmotive statements could be admitted for their limited non-hearsay purpose even if they are not admissible for their truth under the first clause of an amended Rule 801(d)(1)(B), thus requiring limiting instructions for the jury in some cases. Any draft that maintains *Tome* and its rigid rejection of postmotive statements will fail to achieve genuine uniformity in the approach to prior consistent statements. Maintaining *Tome* also could generate additional interpretive problems requiring resolution by the courts. Although generally recognized methods of impeachment do exist, actual impeaching attacks in the courtroom often defy concrete categorization.[235] Litigants may dispute which of the two clauses in the amended Rule they are relying upon in proffering a prior consistent statement. The overlapping nature of impeaching attacks may make it difficult for the trial judge to regulate a continuing premotive requirement in a post-amendment universe.

b. A Single Standard

For these reasons, an amendment that creates a single standard applicable to all prior consistent statements promises to achieve the greatest uniformity in the treatment of prior consistencies and is most closely aligned with the policies outlined in the original Advisory Committee Note to Rule 801(d)(1)(B). Such an amendment would treat all proffered prior consistencies similarly and would avoid the slippery task of classifying or categorizing different breeds of impeachment and rehabilitation.[236] Importantly, the key feature of a single-standard amendment would be a case-by-case inquiry into the threshold question of rehabilitation as a condition precedent to use of prior consistencies for their truth as a matter of hearsay doctrine.[237]

An amended Rule simply could provide for the substantive admissibility of all prior consistent statements that have been evaluated as properly admissible for the limited purpose of rehabilitating the declarant's

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[234] *See Tome*, 513 U.S. at 158 (explaining that postmotive out-of-court consistent statements can rebut a charge of fabrication or improper motive or influence in a less forceful way); *see also* Bullock & Gardner, *supra* note 126, at 535–36 (detailing circumstances in which postmotive statements could rehabilitate an impeached trial witness).

[235] *See* MCCORMICK, *supra* note 1, § 47, at 316 (noting that an attack with a prior inconsistent statement could be "interpretable as a charge of a recent plan or contrivance to give false testimony").

[236] *See* SALTZBURG ET AL., *supra* note 35, at 801-33 (noting that a single standard hearsay exemption applicable to all prior consistencies admitted to rehabilitate would "make the Rule more straightforward and simpler to apply in practice").

[237] A single standard option was the original proposal circulated to district court judges in connection with the survey conducted by the Federal Judicial Center. *See* FJC SURVEY, *supra* note 18, at 2 (displaying a single-standard proposal allowing consistent witness statements "otherwise admissible to rehabilitate the declarant's credibility as a witness").

credibility as a witness, as follows:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement: . . .
>
> (B) is consistent with the declarant's testimony and is *independently admissible for the non-hearsay purpose of repairing a specific impeaching attack on the declarant's credibility as a witness*; . . . .[238]

Such a rule would clarify that all prior consistent statements properly admissible for limited rehabilitative purposes may be used substantively as well. By making an express reference to the non-hearsay purpose for a prior consistency, this draft prevents litigants from skipping straight to substantive use of the statement as they may do under other hearsay exceptions and exemptions. Language in the text of the rule focusing judges and litigants on the fact that Rule 801(d)(1)(B) allows substantive use of prior consistent statements only to the extent that they will already be available to the fact-finder for their non-hearsay rehabilitation purpose captures the intended operation of the amendment and may prevent the expansive use feared by critics.

Importantly, this simple unitary standard for all proffered prior consistencies would reflect a single philosophical approach to the substantive use of witness consistencies. Regardless of the type of impeachment launched, the hearsay rule would never control proper rehabilitation: a trial judge would need to undertake an independent assessment of proper rehabilitation in every case before affording substantive use to a witness consistency. Indeed, this draft would focus judges and lawyers on the common law rehabilitation analysis that routinely was required prior to the adoption of Rule 801(d)(1)(B). In contrast to the current proposal and consistent with the common law practice upon which Rule 801(d)(1)(B) is premised, this rule would leave to the trial judge entirely the question of which prior consistent statements rehabilitate. Eliminating standards of proper rehabilitation from the hearsay exemption altogether also aligns with the choice to avoid the almost impossible task of regulating rehabilitation practices under the Rules.[239]

An amendment with a single standard focused on admissibility for rehabilitative purposes tracks the policies articulated in the Advisory

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[238] The emphasis stresses language that differs from the proposed amendment.

[239] *See supra* note 51 and accompanying text.

Committee Note to original Rule 801(d)(1)(B) precisely. Those notes provide that if a prior consistency is going to be admitted *anyway* because the opponent opened the door to it with a particular impeaching technique, the jury might as well be permitted to rely on the statement substantively because it merely echoes previously received trial testimony.[240] The key to those notes, the independent admissibility of the prior consistency for rehabilitation, is also the key to the operation of such a draft rule.

Unlike the proposed amendment adopted by the Advisory Committee and the modest revision suggested above, this version of Rule 801(d)(1)(B) would truly "extend[] the argument made in the original Advisory Committee Note to its logical conclusion" and achieve genuine consistency for all prior consistent statements at trial.[241] If a trial judge finds that a witness's prior consistency rehabilitates a specific impeaching attack, regardless of the type of attack, the prior consistent statement will be admissible to repair, as well as for its truth in all cases. Conversely, if a trial judge finds that a prior consistency fails to repair a specific impeaching attack on the declarant witness, it will be excluded entirely and unavailable to the fact-finder for any purpose.[242] Under a revision like this one, prior consistencies offered to rehabilitate either will be admitted with full use or excluded entirely. There would be no class of inferior prior consistencies—available to repair if accompanied by a limiting instruction, but not for their truth.[243] Furthermore, all admitted prior consistencies would be treated similarly on appeal because none would be accompanied by the confusing limiting instruction that may or may not prevent the fact-finder's reliance on the admitted statement.

This single-standard proposal resembles the draft Rule originally circulated to federal district judges in the Federal Judicial Center survey. In that draft of the amendment, the Advisory Committee proposed a provision allowing substantive use of all prior consistent statements "otherwise admissible to rehabilitate the declarant's credibility as a witness."[244] This originally proposed language also emphasized the condition precedent to substantive use of a prior consistent statement—an assessment of the statement's rehabilitative qualities. However, some federal district judges expressed confusion about the meaning of the

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[240] *See* FED. R. EVID. 801(d)(1)(B) advisory committee's note ("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.").

[241] PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, *supra* note 128, at 218.

[242] It may, of course, be admissible through any other hearsay exceptions applicable to the statement. *See* FED. R. EVID. 802 (stating that hearsay is inadmissible unless specifically provided for by the rules).

[243] *See supra* notes 6–7 and accompanying text.

[244] FJC SURVEY, *supra* note 18, at 2.

language "otherwise admissible."[245] In order to focus judges and litigants on the threshold rehabilitation inquiry necessary under the Rule, an amendment that more explicitly mandates an "independent" finding of "non-hearsay" rehabilitative value in the wake of an identified impeaching attack may eliminate any potential confusion.

Therefore, a positive effect of a single-standard amendment would be to bring logic, simplicity, and uniformity to the evaluation of prior consistent statements. It would best capture the original purpose of the Rule by emphasizing the trial judge's independent rehabilitation assessment as driving operation of the hearsay provision. On the negative side, however, such an amendment would effectively overrule the hard and fast *Tome* premotive standard and alter longstanding practice, to the extent that trial judges could find some postmotive statements rehabilitative—at least in rare cases.[246] Of course, a major obstacle to an amendment like this one would be the certain backlash against any attempt to dismantle the well-established and rigid *Tome* premotive requirement.

To protect against such a backlash, the Advisory Committee Note to such an amendment could reinforce *Tome*'s essential premise that postmotive prior consistent statements rarely serve a rehabilitative purpose that would justify admissibility.[247] That truism notwithstanding, the Advisory Committee Note could clarify the intent of the amendment to leave proper rehabilitation to the independent discretion of the trial judge. Thus, the Rule need not reject *Tome*'s emphasis on the importance of timing in most circumstances, but may nonetheless clarify that the hearsay rules are not designed to regulate proper rehabilitation.

While any amendment that eliminates *Tome*'s rigid approach to the premotive limitation is certain to be controversial, rule-makers should consider thoughtfully the merits and demerits of the rigid *Tome* rule in a post-amendment universe. As described above, maintaining the rigid requirement would defeat genuine consistency in the treatment of admitted prior consistent statements and could generate interpretive disputes at trial. In addition, the value of *Tome* may be diminished by an amendment to Rule 801(d)(1)(B). Indeed, the Supreme Court found the premotive requirement embedded in the Rule to explain the substantive availability of only one type of prior consistent statement under existing Rule 801(d)(1)(B).[248] As specifically explained by the Court: "If consistent

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[245] *See id.* at 19 ("What does 'otherwise admissible' to rehabilitate mean?").

[246] *See* Kirkpatrick, *supra* note 120, at 43 (noting that a proposed amendment like this one "would now make [prior consistencies] substantive evidence, thus doing an end-run around the holding of *Tome*").

[247] *See* Bullock & Gardner, *supra* note 126, at 537 ("It is important to note that in most cases, postmotive prior consistent statements will be inadmissible under the relevancy rules for the reasons originally noted by courts developing common-law evidentiary rules.").

[248] Tome v. United States, 513 U.S. 150, 159 (1995).

statements are admissible without reference to the timeframe we find imbedded in the Rule, there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well."[249]

The Advisory Committee is currently considering expanding substantive use of prior consistent statements to cover these other methods of impeachment and rehabilitation. Should the Rule be expanded to include *all* types of prior consistencies, the premotive requirement would no longer be necessary to distinguish prior consistent statements that are substantively available from those that are not.[250]

Indeed, the premotive requirement may not only be less necessary under an amended Rule, but also inadequate to curb the improper use of prior consistent statements feared by critics of the amendment. In *Tome*, all of the young victim's out-of-court statements accusing her father of abuse were made *after* her parents' divorce required her to spend time alone in her father's care.[251] Where the defense's cross-examination implied that the victim's story of abuse was designed to influence the custody arrangement to allow her to stay with her mother, the victim's prior statements were all made after this alleged motive to fabricate arose.[252] On these facts, the Supreme Court used the premotive requirement to exclude these powerful and damning hearsay statements by the victim.

Close consideration of *Tome* suggests that while the premotive requirement may have served its purpose on the facts of *Tome*, it may be inadequate to protect against improvident use of hearsay in other cases. Suppose the victim in *Tome* had made all of her powerful and damning accusations of abuse *before* her parents' divorce, perhaps precipitating it. Under the analysis in *Tome*, the prosecutor would be permitted to use the victim's premotive consistent statements for their truth in response to defense counsel's questioning about the victim's desire to return to her

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[249] *Id.*; *see also* SALTZBURG ET AL., *supra* note 35, at 801-36 ("If the drafters of the Federal Rules did not intend to impose a pre-motive requirement, then there would have been no need to carve out those statements offered to rebut a charge of fabrication, motive, or influence for special substantive treatment.").

[250] *See Tome*, 513 U.S. at 159 ("Whatever objections can be leveled against limiting the Rule to this designated form of impeachment and confining the rebuttal to those statements made before the fabrication or improper influence or motive arose, it is clear to us that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement."); *id.* at 160 ("The language of the Rule, in its concentration on rebutting charges of recent fabrication or improper influence or motive *to the exclusion of other forms of impeachment*, as well as in its use of wording that follows the language of the common-law cases, suggests that it was intended to carry over the common-law premotive rule." (emphasis added)); *id.* at 168 (Scalia, J., concurring in part and concurring in the judgment) ("[O]nly the premotive-statement limitation makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks.").

[251] *Id.* at 153 (majority opinion).

[252] *Id.* at 155.

mother's custody. While satisfying the premotive requirement, such use of victim hearsay appears inconsistent with the purposes of Rule 801(d)(1)(B).

Although the defense may have opened a door with its challenge to the little girl's motivations, the prior statements were anything but a mere repetition of her trial testimony. Her stilted responses to leading questions failed to paint a persuasive picture of abuse on the stand.[253] To have allowed her detailed out-of-court accusations would implicate the core hearsay risk of substituting hearsay for trial testimony. Furthermore, allowing such statements appears at odds with the policy underlying Rule 801(d)(1)(B) that takes a "why not?" approach to substantive use of prior consistent statements because it assumes that the statements *add nothing* to trial testimony, but merely echo it in a way that repairs an opponent's impeaching attack. The probative value of such premotive statements to rehabilitate would be substantially outweighed by their tendency to add to the prosecution's case against Tome. Therefore, a premotive requirement may not effectively prevent admission of hearsay like that at issue in *Tome.* Rather, a cautious and thoughtful Rule 403 evaluation of prior witness statements to weigh their rehabilitative value against their hearsay risk holds far greater promise for protecting against misuse of Rule 801(d)(1)(B). The proposed Advisory Committee Note emphasizing the importance of a Rule 403 analysis may be far more important in promoting the intended use of Rule 801(d)(1)(B) than a strict premotive limitation.[254]

Even assuming that a rigid premotive requirement appears unnecessary and inadequate, some may balk at any amendment that overturns a standard set by the Supreme Court almost twenty years ago.[255] While this concern merits careful consideration, it is important to emphasize the basis for the *Tome* holding. The majority in *Tome* discovered a premotive requirement in the Rule after examining the Advisory Committee Note to the original Rule and as a result of efforts to divine the intent of the drafters.[256] The premotive requirement resulted from the Court's

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[253] *See id.* at 153 ("For the most part, [the victim's] direct testimony consisted of one- and two-word answers to a series of leading questions.").

[254] *See* Committee Note to Proposed Rule, *supra* note 118, at 833 ("[T]o be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403.").

[255] *See* Memorandum from Daniel J. Capra, Philip Reed Professor of Law, Fordham Univ. Sch. of Law, Reporter, to the Advisory Comm. on Evidence Rules 19 (April 1, 2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2013-05.pdf ("If the Committee is of the view that the *Tome* pre-motive requirement should be rejected, then the proposed amendment would need to be reconsidered on the merits and the Committee should resurrect the initial draft of the proposed amendment . . . .").

[256] *See Tome*, 513 U.S. at 160 ("We have relied on [the Advisory Committee's] well-considered Notes as a useful guide in ascertaining the meaning of the Rules. . . '[T]he Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.'" (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 165 n.9 (1988))).

interpretation of the intent of the Rule's drafters and was not based on constitutional principles binding on rule-makers. To the extent that the intent of the rule-makers has evolved with experience in implementation of the Rule, an amendment that reflects that altered intent may indeed be appropriate.

V. CONCLUSION

Since its enactment, Rule 801(d)(1)(B) has created disparity in the treatment of similarly situated prior consistent statements by trial witnesses. A rule that sets up irrational and confusing distinctions between evidence properly admitted at trial for identical rehabilitative purposes is deleterious to the administration of justice generally and may even generate unfair outcomes in some cases. The policies articulated in support of original Rule 801(d)(1)(B) extend logically to cover other prior consistencies admitted to repair witness credibility. Therefore, an amendment to the Rule that would create uniformity in the treatment of admitted prior consistent statements is in order.

Because of the detailed language describing rehabilitation practice in the original Rule, and the Supreme Court's interpretation of that language in *Tome*, today's trial lawyers and judges may be accustomed to using current Rule 801(d)(1)(B) as a proxy for appropriate rehabilitative and substantive use of prior consistencies. In contrast, the newly added provision in the current proposed draft amendment fails to spell out the particulars of proper rehabilitation and leaves that question for case-by-case consideration by trial judges. If the open-ended language of the current proposal is retained, litigants may seek to use it similarly as a general blessing for admission of prior consistent witness statements following any impeaching attack not covered by the existing Rule. Such use is not in line with the drafters' intent for the amended Rule or with the traditional common-law approach to rehabilitation with prior consistencies. A liberal interpretation of the amended Rule arising out of current practice under the Rule could indeed increase the improper use of pre-trial witness statements as evidence.

The optimal solution would be a revision to the proposed amendment applying a single standard to substantive availability of all prior consistencies, regardless of the impeaching technique employed. Such a rule should highlight expressly the threshold inquiry into proper non-hearsay use for rehabilitative purposes as a condition precedent to substantive availability. To echo the Advisory Committee Note to the original Rule, it is only when the jury *will* have access to the prior consistency for repair purposes that the hearsay exemption makes good common sense. While any amendment that eliminates the long-standing strict *Tome* rule promises to be controversial, this option is best suited to achieve true symmetry and consistency for prior consistent statements in the trial process.