Fall 1995

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ARTICLES

CHILD SEXUAL ABUSE PROSECUTIONS: ADMITTING OUT-OF-COURT STATEMENTS OF CHILD VICTIMS AND WITNESSES IN LOUISIANA*

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Due to their age, immaturity, and intimidation of the courtroom, children are frequently poor witnesses when called to testify at trial. In child abuse cases, this problem is magnified by the lack of other witnesses and the difficulty in obtaining corroborating physical evidence. In light of these difficulties, the out-of-court statements of the child take on added significance since those out-of-court statements often are the only proof that a crime has occurred.[1] The admissibility of such statements has presented substantial difficulties to lawyers and courts.

This article examines when the hearsay rule excludes the out-of-court statements of a child, as well as discusses the commonly used hearsay exceptions and exclusions. The provisions of the Federal

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* This article is based on research done for a presentation at the Louisiana Judicial College. The authors gratefully acknowledge the assistance of Kimberly Johnson, a student at the Florida State University College of Law, in the preparation of this article.

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1. *See, eg.*, Doe v. United States, 976 F.2d 1071, 1074-75 (7th Cir. 1992); Robert G. Marks, Note, *Should We Believe the People Who Believe the Children? The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207 (1995); Judy Yun, Note, *A Comprehensive Approach to Child Hearay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983).

Rules of Evidence, upon which the Louisiana Evidence Code is based, are discussed together with relevant decisions from other jurisdictions. The United States Supreme Court's recent decision in *Tome v. United States*[2] which limits the admissibility of testimony concerning prior consistent statements of a child victim who testifies at trial is analyzed. Finally, the limitations upon otherwise admissible out-of-court statements which are provided by the protections of an accused's right to confront witnesses are analyzed.

I. WHEN A STATEMENT IS HEARSAY

At the outset, a child victim's statement is not hearsay unless it meets a two-part definition.[3] First, it must be "a statement other than one made by the declarant while testifying at the present trial or hearing."[4] Any statement made outside the courtroom during the judicial proceeding in which the testimony is offered meets this definition. This requirement is based on the belief that statements made outside the courtroom are unreliable because the declarant was not subject to cross-examination at the time the statement was made,[5] and the jury did not have the opportunity to observe the declarant's demeanor to judge his or her credibility.[6]

Although the point is often confused, in *Tome v. United States* the Court interpreted Federal Rule of Evidence 801(c) to include within the definition of hearsay out-of-court statements made by a child witness who testifies at the trial.[7] Merely repeating a statement in court does not convert hearsay into non-hearsay. Thus, a child's out-of-court statement to a parent, social worker, or other third party is still hearsay even though the child later testifies at trial and repeats the same statement.[8]

The second part of the hearsay definition requires the statement

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2. 115 S.Ct. 696 (1995).

3. LA. CODE EVID. art. 801(C)(1995) provides: "Hearsay' is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." This definition is identical to that found in the Federal Rule 801(c).

4. LA. CODE. EVID. art. 801(C).

5. JOHN H. WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. ed. 1974) (Wigmore described cross-examination as "beyond doubt the greatest legal invention ever invented for discovery of the truth.").

6. CHARLES MCCORMICK, EVIDENCE § 245, at 426 (4th ed. 1992).

7. Tome, 115 S.Ct. at 704-05.

8. State v. Martin, 356 So. 2d 1370, 1374 (La. 1978) ("[T]he hearsay character of a proffered out-of-court assertion is not altered by the fact that the statement was made by a person who appears in court as a witness.").

be offered in evidence "to prove the truth of the matter asserted."[9] Only when the statement is offered to prove its contents are true does its value rest on the credibility of the out-of-court asserter.[10] If a child makes an out-of-court statement that her uncle sexually abused her, the truth of the matter asserted is whether the uncle actually abused the victim. If offered to prove the uncle committed the abuse, the statement is hearsay, and should be excluded because it was not subject to contemporaneous cross-examination and other safeguards of reliability at the time it was made.[11]

II. OFFERING STATEMENTS FOR PURPOSES OTHER THAN THE TRUTH OF THE MATTER ASSERTED

An out-of-court statement is not hearsay if it is not offered to prove the truth of the matter asserted. Although the principle sounds simple enough, in practice it is often overused and misunderstood.[12] To begin, merely stating that evidence is offered for some purpose other than the truth of the matter asserted does not guarantee admission.[13] The nonhearsay purpose of the testimony must be relevant to a material issue in the case,[14] and, moreover, that relevance must not be outweighed by the statement's prejudicial impact.[15] If the only purpose for which the evidence is relevant is the truth of the contents of the statement, the statement is hearsay. Two common non-hearsay purposes for admitting the statements of child victims are impeachment and proof of state of mind.

A. *Impeachment*

Witness credibility is always a relevant issue at trial. Therefore, prior out-of-court statements are generally admissible to impeach a witness who testifies differently on the stand.[16] In such cases, the out-of-court statement is not hearsay because it is not offered to

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9. LA. CODE EVID. art. 801(C); FED. R. EVID. 801(c).

10. State v. Martin, 458 So. 2d 454, 460 (La. 1984).

11. *See supra* notes 4-5.

12. *See* Longstreth v. State, 832 P.2d 560 (Wyo. 1992) (noting that the practice is often misapplied in trial courts).

13. Martin, 458 So. 2d at 461.

14. *Id.*

15. *See* LA. CODE EVID. art. 403.

16. *See, e.g.*, State v. Bairnsfather, 591 So. 2d 686, 689 (La. 1991); State v. Hoofkin, 476 So. 2d 481 (La. App. 1st Cir. 1985); State v. Nichols, 619 N.E. 2d 80, 84 (Ohio Ct. App. 1993); Kosbruk v. State, 820 P.2d 1082 (Alaska Ct. App. 1991).

prove its contents are true; rather, it is offered to show the witness has previously made an inconsistent statement. Because the witness has given inconsistent versions of material facts, the credibility of the witness is suspect.[17] Child victims, for a variety of reasons, often recant their stories between the time of their initial complaint and their testimony at trial. For this reason, either the defense[18] or the prosecution[19] may desire to put the child's prior inconsistent statement before the jury.

However, lawyers must be cautious in calling child witnesses whom they know will recant their prior testimony. At least one jurisdiction has condemned the tactic of placing a child victim on the stand knowing the victim will give unfavorable testimony, and then "in the guise of impeachment," offering evidence which is otherwise inadmissible.[20] Likewise, federal courts generally prohibit impeachment from being used as a "mere subterfuge" to admit otherwise inadmissible evidence.[21] Such a practice abuses the impeachment procedure because the attorney seeks to have the jury consider the prior inconsistent statement for an inadmissible purpose, i.e., the truth of the prior statement.[22]

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17. 6 JOHN H. WIGMORE, EVIDENCE § 1792, at 326 (Chadbourn rev. ed. 1976); State v. Harper, 625 So. 2d 534 (La. App. 5th Cir. 1993); Bairnsfather, 591 So. 2d at 689. In Louisiana, prior inconsistent statements are admissible *solely* to attack credibility; the statement cannot be considered as substantive evidence unless it otherwise qualifies as nonhearsay or under a hearsay exception. *See* LA. CODE. EVID. art. 607(D)(2).

18. *See, e.g.*, Bairnsfather, 591 So. 2d at 689 (When nine-year-old victim testified at trial that her uncle had molested her, trial court erred by failing to admit the victim's prior out-of-court statement that her uncle had never molested her. "The statement defendant sought to elicit was not hearsay because it was testimony regarding a prior inconsistent statement not offered to prove the truth of the matters asserted but to impeach the victim by showing she had made the previous statement."); Nichols, 619 N.E.2d at 84 (Defense permitted to impeach victim with prior inconsistent statement.).

19. Hoofkin, 476 So. 2d at 481 (where five-year-old boy initially told police the defendant raped him, but at trial testified the defendant had done nothing to harm him, the prosecution was allowed to attempt to impeach the child with the prior statement); *see also* Kosbruk, 820 P.2d at 1082.

20. State v. Tracy, 482 N.W.2d 675 (Iowa 1992); *see also* Hoofkin, 476 So. 2d at 481 (decided before the adoption of the Code of Evidence; court held that under title 15, section 487 of the Louisiana Revised Statutes, attorney may impeach his own witness only if taken by surprise by witness' testimony).

21. *See* United States v. Zackson, 12 F.3d 1178 (2d Cir. 1993); United States v. Kane, 944 F.2d 1406 (7th Cir. 1991); United States v. Frappier, 807 F.2d 257 (1st Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987); Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979).

22. *See* cases cited *supra* note 19. Louisiana commentators have suggested the "mere subterfuge" theory be applied in Louisiana courts. GEORGE W. PUGH, ET. AL., HANDBOOK ON LOUISIANA EVIDENCE, at 297, Comment a (1992).

Before either side offers a statement for impeachment purposes, the attorney must lay a proper predicate by giving the witness a fair opportunity to admit making the inconsistent statement.[23] Also, as the true purpose of the statement is to attack credibility, the trial court has wide discretion to exclude the testimony if the "probative value of the evidence on the issues of credibility is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice."[24]

B. *State of Mind*

Out-of-court statements are frequently offered to prove "state of mind," or merely "the fact the statement was made." While these are occasionally valid grounds for admission, it is important to recognize and distinguish between: (1) statements that circumstantially prove the declarant's state of mind; (2) statements that directly prove the declarant's state of mind; and (3) statements that prove the state of mind of some third person who heard the statement.[25] Once again, the state of mind sought to be proven must be relevant to a material issue in the case, and that relevance must not be outweighed by the statement's prejudicial impact.[26]

First, an out-of-court statement may be offered to circumstantially prove the declarant's own state of mind. Such a statement is not hearsay because it is not offered as testimonial evidence to prove the statement is true; rather, the mere fact the statement was made tends to show some relevant aspect of the speaker's knowledge, intent, or state of mind.[27] Statements of child victims rarely find admission under this theory because the state of mind of a child victim, or any other victim, is generally not relevant in criminal cases.[28] Instead,

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23. LA. CODE EVID. art. 613 provides: "Except as the interests of justice otherwise require, extrinsic evidence of bias, interest, or corruption, prior inconsistent statements, conviction of crime, or defects of capacity is admissible after the proponent has first fairly directed the witness' attention to the statement, act, or matter alleged, and the witness has been given the opportunity to admit the fact alleged and has failed distinctly to do so."

24. LA. CODE EVID. art. 607(D)(2).

25. *See* State v. Martin, 458 So. 2d 454, 460-62 (La. 1984); 6 WIGMORE, *supra* note 17, §§ 1788-92.

26. Martin, 458 So. 2d at 461.

27. WIGMORE, *supra* note 17, § 1790, at 320.

28. *See* Correll v. State, 523 So. 2d 562, 565-66 (Fla. 1988), *cert. denied*, 488 U.S. 871 (1988) (Hearsay statements of victim relating to her fear of defendant were inadmissible because victim's state of mind was not at issue.); James v. Texas Dept. of Human Services, 836 S.W.2d 236 (Tex. Ct. App. 1992) (Children's testimony that they

the defendant's state of mind is the critical issue for the jury.[29] A victim's state of mind is relevant only in rare instances such as homicide cases where the defendant claims self defense, thus making the victim's aggressiveness a relevant issue.[30] Because self defense is not likely to be claimed in a child sexual abuse case, such evidence is seldom admissible.

Some courts, however, have used this theory to admit child victim statements showing explicit knowledge of sexual matters far in advance of a normal child that age.[31] These courts reason the child's unusual knowledge of sexual matters is circumstantially relevant to show the abuse actually happened, i.e., because the child has abnormal knowledge of sexual matters, it can be inferred the child has been abused.[32]

The second category of state of mind evidence is that which directly proves the declarant's own state of mind. In contrast to the first category, these statements are offered to prove the truth of the matter asserted, i.e., the declarant's state of mind, and the statements

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were abused not admissible to prove their state of mind; victim's state of mind not relevant.).

29. *See* cases cited *supra* note 28.

30. *See, e.g.,* State v. Martin, 458 So. 2d 454, 461 (La. 1984) (Where husband murdered wife and claimed self defense, wife's statement indicating fear of defendant was relevant to show she was not the aggressor.).

The Louisiana Supreme Court also found a homicide victim's state of mind relevant in another context. In State v. Raymond, 245 So. 2d 335 (La.), *cert. denied and appeal dismissed,* 404 U.S. 805 (1971), the court allowed the admission of the victim's out-of-court statement indicating revulsion of the defendant due to the defendant's homosexual advances. The majority concluded the statement was nonhearsay evidence of the victim's state of mind circumstantially relevant to prove whether the victim was with the defendant the night of the murder. *Id.* at 340. The concurrence explained the statement was admissible under a rule peculiar to homicide cases: "Where the proof relied upon is entirely circumstantial, conduct or declarations of the decedent shortly before his killing may sometimes be admissible as tending to show immediately antecedent circumstances explanatory of the killing and tending to connect the accused with it." *Id.* at 342. *See also* State v. Tonubbee, 420 So. 2d 126, 135 (La. 1982), *cert. denied* 460 U.S. 1081 (1983). Commentators subsequently criticized *Raymond* because the defendant's, not the victim's, state of mind is the relevant issue in criminal cases. *See* GEORGE W. PUGH, EVIDENCE, 32 LA. L. REV. 344, 353-55 (1972).

31. In re Jean Marie W., 559 A.2d 625, 629 (R.I. 1989) (allowing a four-year-old victim's "verbal and nonverbal conduct [to be] . . . offered to show that she had explicit sexual knowledge . . . far in advance of the knowledge of a normal four-year-old"); In re Dependency of Penelope P., 709 P.2d 1185 (Wash. 1985) (allowing a six-year-old child's statements of 'certain private names for male and female genitalia' to be offered into evidence); Church v. Commonwealth, 335 S.E.2d 823 (Va. 1985) (child's statement that sex is "dirty, nasty and it hurt" is admissible as circumstantial evidence that victim had been abused).

32. *See* cases cited *supra* note 31.

are therefore hearsay.[33] Thus, the statement, "I intend to abuse my daughter" made shortly before the abuse occurs is hearsay if offered to show the defendant intended to abuse his daughter.[34] Despite being hearsay, these types of statements may be admissible under article 803(3), which excepts statements of "then existing mental, emotional, or physical condition."[35]

Statements of child victims rarely find admission under this exception because, once again, the victim's state of mind is generally not a relevant issue.[36] However, some courts have utilized the "statement of physical condition" aspect of the rule to admit child victim statements following an abusive encounter.[37] Thus, a child victim's statement that her "bottom was sore" was admissible as a statement of her then existing physical condition.[38]

The third category of state-of-mind evidence is that which proves the state of mind of a third person who heard the statement. Such statements are not hearsay because they are not offered to prove the truth of their contents; rather, they are offered to show some relevant knowledge, belief, intent or state of mind that ensued in the third person.[39] Thus, in a burglary case, an out-of-court statement to the defendant that the owner of a building had no objection to anyone taking anything they wanted from it was admissible to show the defendant's lack of criminal intent in entering the building.[40] Once again, the third person's state of mind must be relevant to a material issue in the case, and that relevance must not be outweighed by the statement's prejudicial impact.[41] Moreover, to have

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33. *See* 6 WIGMORE, *supra* note 17, § 1714, at 90.

34. *Cf.* State v. Schrader, 518 So. 2d 1024, 1027 (La. 1988) (defendant's statement of intent to burn his house down admissible to prove he intended to burn his house down).

35. LA. CODE. EVID. art. 803(3) provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or future action. A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament."

36. *See* cases cited *supra* note 28.

37. Fleener v. State, 648 N.E.2d 652 (Ind. Ct. App. 1995).

38. *Id.* However, for such a statement to be admissible, an issue must exist whether or not the child was actually abused. If the defense concedes the abuse actually happened, and contests only the identity of the abuser, this statement would be irrelevant and therefore inadmissible.

39. *See* 6 WIGMORE, *supra* note 17 § 1789, at 314.

40. State v. Webb, 372 So. 2d 1209, 1210 (La. 1979).

41. *Id.*; State v. Ford, 368 So. 2d 1074 (La. 1979).

sufficient relevance, proof must exist that the out-of-court statement was actually communicated to the person whose state of mind is sought to be proven.[42]

In child sexual abuse cases, this category of evidence most commonly arises under the rubric of "sequence of events" testimony. For example, a police officer, in explaining why he or she arrested the defendant, may explain the sequence of events and in so doing relay out-of-court statements made to him.[43] A parent may do the same in explaining why he or she became suspicious and reported the defendant to the police.[44] In such cases, courts reason the statements are not hearsay because the witness is not vouching for the credibility of the out-of-court statement; rather, the mere fact the statements were made is relevant to show why the witness took a given course of action.[45]

Courts should be extremely cautious, however, in permitting this type of testimony. It often bears only marginal relevance, and the risk is great that a jury will improperly consider the out-of-court statements for their truth.[46] This danger is illustrated in *State v. Bennett*,[47] where, the court allowed a witness to testify as to out-of-court statements made to her by a four-year-old child sexual abuse victim identifying the defendant as her abuser. The court reasoned that the statements were not offered to prove the defendant actually abused the victim; rather, the statements were nonhearsay because they were offered "for the sole purpose of establishing how the victim's mother . . . became suspicious that the victim had been

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42. *See* State v. Doze, 384 So. 2d 351, 354 (La. 1980) (In murder case where tenant murdered landlady, landlady's statement that she intended to evict the defendant was not admissible to prove the defendant's motive for the murder; insufficient proof existed that landlady ever communicated her intent to the defendant.); State v. Weedon, 342 So. 2d 642, 647 (La. 1977) (Court refused to admit wife's out-of-court statement that she intended to leave her husband to prove the husband's motive for murdering her; insufficient proof existed that wife communicated her intent to husband.).

43. *See* State v. Soler, 93-1042 (La. App. 5th Cir. 4/26/94); 636 So. 2d 1069, 1078 (police detective could testify about child sexual abuse victim's out-of-court statements to explain the sequence of events leading to the defendant's arrest), *cert. denied*, 94-1361 (La. 11/4/94); 644 So. 2d 1055.

44. *See* State v. Bennett, 591 So. 2d 1193, 1196 (La. App. 1st Cir. 1991) (witness was allowed to relay victim's out-of-court statements to show how parent became suspicious victim had been abused).

45. *See* State v. Watson, 449 So. 2d 1321, 1328 (La. 1984) (explaining the concept in relation to police officer testimony), *cert. denied*, 469 U.S. 1181 (1985).

46. MCCORMICK, *supra* note 6, § 249, at 431.

47. 591 So. 2d at 1193.

sexually abused by the defendant."[48] However, the court did not discuss why that point was particularly relevant, nor did it weigh that relevance against the obvious risk that the jury would consider the statement for its truth.

Accordingly, courts should take precautions to limit this type of testimony.[49] In the context of police officers, the Louisiana Supreme Court had earlier held that, "while an officer may testify before a jury that, acting upon information, he did certain things, he may not go further and testify as to precisely what he was told about the particular place or the particular person."[50] This rule provides a proper balance between the probative and prejudicial aspects of such state-of-mind evidence. It should be applied to all "sequence of events" testimony.

III. HEARSAY EXCLUSIONS

Even though a child victim's out-of-court statement meets the hearsay definition, it may nevertheless be admissible under article 801(D)(1), which excludes four types of statements from the hearsay rule.[51] All four require that the declarant testify at trial and be sub-

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48. *Id.* at 1197.

49. *See* MCCORMICK *supra* note 46.

50. State v. Kimble, 36 So. 2d 637, 638 (La. 1948) (quoting Smith v. United States, 105 F.2d 778, 779 (1939)); *see also* MCCORMICK, *supra* note 46 ("In criminal cases, the arresting or investigating officer will often explain his going to the scene of the crime or his interview with the defendant, or search or seizure, by stating he did so 'upon information received' and this of course will not be objectionable as hearsay, but if he becomes more specific by repeating definite complaints of a particular crime by the accused, this is likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay.").

51. LA. CODE EVID. art. 801(D)(1) provides:

> D. Statements which are not hearsay. A statement is not hearsay if:
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> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
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> (a) Inconsistent with his testimony, and was given under oath subject to the penalty of perjury at the accused's preliminary hearing examination or the accused's prior trial and the witness was subject to cross-examination by the accused;
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> (b) Consistent with his testimony and is offered to rebut an express or implied charge
> against him of recent fabrication or improper influence or motive;
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> (c) One of identification of a person made after perceiving him, and which confirms the testimony of the declarant that he had made an identification, except that in cases of amnesia resulting from physical injury from the criminal act, any other person may testify to an out of court identification; or

ject to cross-examination.[52] Two of these provisions deserve discussion in the context of child victim statements: article 801(D)(1)(b) "prior consistent statements" and article 801(D)(1)(d) "initial complaints of sexually assaultive behavior."

A. *Prior Consistent Statements*

Under article 801(D)(1)(b), which is identical to Federal Rule 801(d)(1)(B), an out-of-court statement is not hearsay if the declarant testifies at trial, is available for cross-examination and the statement is "consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive."[53] In practical terms, this provision may allow the introduction of a child victim's prior consistent statement after the opposition has, upon cross-examination, inferred that the victim is lying and that his or her testimony has been coached.[54] Once admitted, the prior consistent statement can be considered not only to rebut the inference of fabrication, but also as substantive evidence.[55]

However, a prior consistent statement is not admissible solely because the witness has repeated the statement on a prior occasion. Generally, the prior consistent statement must have been made *before* the event alleged to give rise to the improper influence or motive.[56] Only then does the statement rebut the inference of fabrication. In-

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(d) Consistent with the declarant's testimony and is one of initial complaint of sexually assaultive behavior.

52. *Id.*

53. For the complete text of the rule *see supra* note 51.

54. *See, e.g.*, State v. Jones, 625 So. 2d 821, 827 (Fla. 1993) (Applying a comparable Florida provision, the court held that the prosecution could introduce the victim's prior consistent statement after defense attorney, on cross-examination, implied that the prosecutors had told the victim what to say on the stand.); State v. Lindner, 419 N.W.2d 352, 357 (Wis. Ct. App. 1987) (prosecution allowed to admit victim's prior consistent statement to rebut inference that she was merely "parroting" what others wanted her to say).

55. PUGH, *supra* note 22, at 349 (noting that prior consistent statement is admissible for its truth as well as corroboration of witness because, in part, jury would not understand an instruction to the contrary); *cf.* FED R. EVID 801(d)(1)(B) Advisory Committee's Notes.

56. MCCORMICK, *supra* note 6, § 49, at 105 ("[T]he applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of bias, interest, influence or incapacity originated."); 4 JOHN H. WIGMORE, EVIDENCE § 1128, at 268 (Chadbourn rev. ed. 1972) ("A consistent statement, at a time prior to the existence of a fact said to indicate bias . . . will effectively explain away the force of the impeaching evidence.").

deed, a prior consistent statement made after the motive to fabricate already arose may evidence only that the witness is a consistent liar.[57] Therefore, if the defense, upon cross-examination, infers a child witness has been coached by the prosecution, the prosecution may introduce the victim's prior consistent statement so long as it was made *before* the victim had an opportunity to meet with the prosecutor.

At common law, the temporal pre-motive requirement was a mandatory function of the prior consistent statement rule.[58] Likewise, before the adoption of the Code of Evidence, Louisiana's rule included the pre-motive requirement.[59] Under article 801(D)(1)(b), however, it is unclear whether the pre-motive requirement remains a mandatory function of the rule itself, or whether it is now a discretionary function of the relevancy rules. The Official Comments to article 801(D)(1) are unclear on this issue.[60] The distinction is crucial because, under the latter interpretation, the trial judge has discretion to find post-motive prior consistent statements relevant and admissible.[61] This is a major change from the common law and

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57. *See* United States v. Tome, 3 F.3d 342, 350 (10th Cir. 1993), *rev'd.*, 115 S.Ct. 696 (1995).

58. *See* Tome, 115 S.Ct. at 700 (citing 4 WIGMORE & MCCORMICK, *supra* note 56).

59. *See* State v. Knapper, 458 So. 2d 1284 (La. 1984). The pre-motive requirement was codified in Louisiana's revised statutes:

> When the testimony of a witness has been assailed to a particular fact stated by him, similar prior statements, *made at an unsuspicious time*, may be received to corroborate his testimony.

LA. R.S. 15:496 (West 1987) (emphasis added).

> Evidence of former consistent statements is inadmissible to sustain a witness who has been impeached by proof of former inconsistent statements, unless the testimony be charged to have been given under the influence of some improper or interested motive, or to be a recent fabrication, in which case, *it is proper to show that the witness made a similar statement at a time when the supposed motive did not exist* and the effect of said statement could not be foreseen. But when a witness has been impeached by evidence of declarations inconsistent with his testimony, he cannot be corroborated by statements made subsequent to such declarations.

LA. R.S. 15:497 (emphasis added).

60. The Comments to article 801(D)(1) first provide that, although the new rule "changes the theory underlying prior Louisiana Law, it is not intended to effect any substantial practical change." This Comment leads to the conclusion that the mandatory pre-motive requirement remains. However, the next sentence of the Comment provides: "In this Article the requirement that the statement have been made at an unsuspicious time has been eliminated. But see Article 403." This sentence leads to the conclusion that the mandatory pre-motive requirement has been abandoned and is now a discretionary function of the relevancy rules. *See also* PUGH, *supra* note 22, at 349 ("Statements consistent with testimony made subsequent to the prior inconsistent statement or circumstances suggesting a motive to fabricate generally have insufficient relevancy to be admissible.").

61. Before *Tome*, many federal courts held the pre-motive requirement was not

Louisiana's prior rule.

In *Tome v. United States*,[62] the United States Supreme Court recently confronted this issue as it applies to Federal Rule of Evidence 801(d)(1)(B), upon which Louisiana's rule is based. In *Tome*, the defendant was charged with sexually abusing his four-year-old daughter.[63] The defense theory throughout was that the victim concocted the story so that she could remain in the custody of her mother, from whom the defendant was divorced.[64] The prosecution called six witnesses who recounted out-of-court statements that the victim made about the alleged assault while she was living with her mother. The trial court admitted the statements under Federal Rule 801(d)(1)(B) to rebut the implicit charge the witness had fabricated her story out of a desire to live with her mother, even though the statements had been made *after* the motive to fabricate arose.[65]

The Tenth Circuit reasoned the pre-motive requirement was a function of the relevancy rules, not the hearsay rules.[66] Thus, rather than adopting a strict rule that prior consistent statements are never admissible when made before the motive or influence arose, the court adopted a balancing approach whereby the court must evaluate "the strength of the motive to lie, the circumstances under which the statement was made, and the declarant's demonstrated propensity to lie."[67] Applying this balancing test, the court affirmed the district court's decision to admit the statements.[68]

A five to four majority reversed reasoning that the temporal pre-motive requirement was part of the common law rule for more than a century before the adoption of the Federal Rules of Evidence.[69] Relying on the Advisory Committee Notes, the Court further reasoned

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embodied in FED. R. EVID. 801(d)(1)(B), but rather, was a function of the relevancy rules. These courts recognized that post-motive prior consistent statements could be both relevant and admissible. *See* United States v. Tome, 3 F.3d 342, 350 (10th Cir. 1993), *rev'd*, 115 S.Ct. 696 (1995); United States v. Montague, 958 F.2d 1094, 1098 (D.C. Cir. 1992); United States v. Miller, 874 F.2d 1255, 1272 (9th Cir. 1989); United States v. Anderson, 782 F.2d 908, 915-16 (11th Cir. 1986); United States v. Parry, 649 F.2d 292, 296 (5th Cir. 1981).

62. 115 S.Ct. 696 (1995).

63. *Id.* at 699. The case arose on a Navajo Indian Reservation in New Mexico; therefore it was brought in federal court rather than state court.

64. *Id.* at 699.

65. *Id.* at 700.

66. *Id.* at 350.

67. *Id.*

68. *Id.* at 351.

69. 115 S.Ct. 696, 700 (citing MCCORMICK, *supra* note 6, § 49, at 105 & 4 WIGMORE, *supra* note 56).

Rule 801(d)(1)(B) incorporates that common law requirement.[70] In so ruling, the Court rejected the view that the pre-motive requirement is a function of the relevancy rules, under which the pre-motive requirement would have to be determined on a case-by-case basis.[71] That approach, the Court reasoned, creates precisely the dangers the Advisory Committee sought to avoid: "It involves judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation."[72] The Court also emphasized the importance of adhering to the pre-motive requirement, particularly in criminal cases, given that Rule 801(d)(1)(B) allows prior consistent statements to be used as substantive evidence.[73]

Because Louisiana Code of Evidence article 801(D)(1)(b) is based on the federal rule,[74] Louisiana's courts should find *Tome*'s analysis persuasive. Because the federal rule incorporates the pre-motive requirement, Louisiana's courts should reason that article 801(D)(1)(b) similarly incorporates the pre-motive requirement as a function of the rule itself rather than as a function of the relevancy rules. This result would conform to the Louisiana Advisory Committee's intent that article 801(D)(1)(b) effect no substantial practical change to prior Louisiana law.[75] Likewise, this result would conform with Louisiana's historical application of the prior consistent statement doctrine.[76]

B. *Initial Complaints of Sexually Assaultive Behavior*

Before the Code of Evidence was adopted, Louisiana's most commonly used vehicle for admitting the out-of-court statements of child victims was the "prompt complaint" doctrine, under which the first complaint of a rape victim was generally admissible.[77] Because Louisiana's courts failed to articulate a consistent theory of admissi-

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70. *Id.* at 700-04. Justice Scalia dissented from that part of the majority's opinion that held the "purpose" of the Federal Rules of Evidence could be determined from the Advisory Committee's Notes. *Id.* at 706 (Scalia, J., concurring). In Justice Scalia's opinion the meaning of the rules must be interpreted from the language of the rules themselves; the committee's are useful as scholarly commentary only.

71. *Id.* at 704.

72. *Id.* at 705-06 (citing Advisory Committee's Introduction to Article VIII, 28 U.S.C. App. p. 771).

73. *Id.* at 705.

74. *See* LA. CODE EVID. art. 801(D)(1) Comment b.

75. *Id.*

76. *See supra* note 59 and accompanying text.

77. *See* discussion *infra* part III.B.2.

bility,[78] article 801(D)(1)(d) was enacted to clarify the doctrine's application. This section examines the common law history of the prompt complaint rule and Louisiana's application of it, both before and after the adoption of the Code of Evidence.

1. Common Law History

The doctrine of prompt complaint, also known as "early complaint," "fresh complaint," or "first complaint" pre-dates the law of hearsay itself.[79] At English common law, proof that the victim made a prompt complaint, or raised "hue and cry," was an essential element of the prosecution's case in all violent crimes, including rape.[80] Eventually, the "hue and cry" requirement was abandoned, but courts continued to admit prompt complaints as a matter of tradition, "with little or no thought of any principles to support it."[81] As the law of hearsay developed, three evidentiary theories emerged to justify the admission of prompt complaints, each theory containing its own limitations.[82]

First, prompt complaints were admitted under the theory they were necessary to rebut the natural inference that, unless a woman promptly complained of a rape, she must have consented to it.[83] As the Louisiana Supreme Court reasoned in 1903, "[t]he failure, when unaccounted for, of the victim of a rape to complain of the outrage, throws suspicion on the case of the prosecution."[84] Because the common law presumed a jury would naturally make this inference, evidence of the complaint was admissible on direct examination.[85] Only the fact of the complaint being made was admissible under this theory; the details of the complaint, including the identity of the assailant, were not admissible.[86]

Under a second theory, prompt complaint evidence was admitted

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78. *Id.*

79. 6 WIGMORE, *supra* note 17, § 1760, at 240 ; *see also* Michael H. Graham, *The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence*, 19 WILLIAMETTE L. REV. 489, 491 (1983).

80. 6 WIGMORE, *supra* note 17, § 1760, at 240.

81. 4 WIGMORE, *supra* note 56, § 1134, at 298.

82. *Id.*

83. *Id.*

84. State v. McCoy, 33 So. 730, 731 (La. 1903).

85. 4 WIGMORE, *supra* note 56, § 1134, at 298.

86. *Id.*; State v. Langford, 14 So. 181 (La. 1893) (Unless a prompt complaint can independently qualify as *res gestae*, only the fact of the complaint having been made is admissible under the prompt complaint doctrine.)

to corroborate the victim's in court testimony, once it had been properly impeached.[87] Unlike the first theory, the details of the complaint, including the identity of the assailant, were fully admissible under this theory.[88] However, the victim had to appear as a witness in the trial and first be properly impeached.[89]

Under a third theory, prompt complaints were admissible as *res gestae*.[90] Thus, the complaint was admissible so long as it was made spontaneously and in response to a startling event or occurrence.[91] Under this theory, all the details of the complaint, including the identity of the defendant, were fully admissible, and, moreover, the victim need not have been a witness at trial.[92]

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87. 4 WIGMORE, *supra* note 56, § 1134, at 311. This theory is now codified as the prior consistent statement exclusion, LA. CODE EVID. art. 801(D)(1)(b). *See* discussion *supra* part III.A.

South Carolina applies a variation of this theory under which evidence of other witnesses that the victim "complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault and excluding details or particulars." *Jolly v. State*, 443 S.E.2d 566, 568 (S.C. 1994).

88. 4 WIGMORE, *supra* note 56, § 1134, at 311.

89. *Id.*

90. *Id.; Res Gestae*, which literally means "things done," was a widely used hearsay exception at common law. Louisiana's prior definition of the concept was typical:

> Res Gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive or spontaneous words and acts of the participants, and not the words of the participants when narrating the events. What forms any part of the res gestae is always admissible in evidence.

LA. R.S. § 15:447. Res Gestae was widely criticized because it was vague and difficult to apply with any precision. As Wigmore stated:

> The phase "res gestae" has long been not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has ever been applied exists as part of some other well established principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology.

6 WIGMORE, *supra* note 17, § 1767, at 255. Judge Learned Hand was similarly critical of the concept: "[A]s for 'res gestae' . . . If it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms." United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944).

Res gestae has been abolished in the Federal Rules of Evidence in favor of more specific hearsay exceptions. Similarly Louisiana tried to abolish the concept, but it was retained in article 801(D)(4) as a result of compromise discussions. *See* Gerard A. Rault, *An Overview of the New Louisiana Code of Evidence - - Its Imperfections and Uncertainties*, 49 LA. L. REV. 697, 726 (1989) (referring to article 801(D)(4) as an "unfortunate" provision). Commentators have urged that article 801(D)(4) be interpreted narrowly. *See* Pugh, supra note 22, at 357 (Author's Notes to 803(1).

91. 4 WIGMORE, *supra* note 56, § 1139, at 313.

92. *Id.* at 314.

2. *Pre-Evidence Code*

Like many states, Louisiana's courts often confused the underlying theories of admissibility and inconsistently applied the prompt complaint doctrine.[93] At times, the Louisiana Supreme Court characterized prompt complaint evidence as *res gestae*;[94] at other times, the Court simply admitted such evidence under a special hearsay exception for "early complaints of rape victims."[95] The Court often stated that first complaints were not admissible unless made spontaneously and with no unexplained lapse of time.[96] However, the Court also held the first complaint of a child victim could be made at the "first reasonable opportunity under the particular facts and circumstances of the case."[97]

Thus, under the rubric of *res gestae*, the first complaint need not have been made immediately after the abusive incident; rather, it could be made days later depending on when the child first found someone whom he or she could trust,[98] or when an adult first fully questioned the child about the abuse.[99] Moreover, a complaint need not have been made spontaneously, but could be made in response to

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93. *See* LA. CODE EVID. art. 801(D)(1) Comment d; *see also* Comment, *Going to Extremes: The Doctrine of Prompt Complaint and Louisiana Code of Evidence Article 801(D)(1)(d)*, 39 LOY. L. REV. 151, 154 (1993); Note, State v. Hatcher*: The Continued Misunderstanding of the Recent Sexual Assault Complaint Exception to the Hearsay Rule*, 40 LA. L. REV. 1036, 1037 (1980).

94. *See* State v. Middlebrook, 409 So. 2d 588, 590 (La. 1982) (citing State v. Adams, 394 So. 2d 1204, 1212 (La. 1981); State v. Brown, 302 So. 2d 290, 293 (La. 1974)).

95. *Id.* (citing State v. Hatcher, 372 So. 2d 1024 (La. 1979); State v. Elzie, 351 So. 2d 1174 (La. 1977)).

96. *Id.*; Elzie, 351 So. 2d at 1175; Hatcher, 372 So. 2d at 1031.

97. Prestridge, 399 So. 2d 572; *see also* Adams, 394 So. 2d at 1212; State v. Pace, 301 So. 2d 323; State v. Noble, 342 So. 2d 170 (La. 1977).

98. *See* Noble, 342 So. 2d at 170 (child did not have reasonable opportunity to complain until two days after attack when she saw her grandmother—a person outside the home whom she trusted); State v. Casimier, 454 So. 2d 1199, 1206 (La. App. 4th Cir. 1984) (child did not have reasonable opportunity to complain until a day after the attack when she saw a hospital social worker because "it was probable that the child would not want to tell her mother about the attack because the offense was perpetrated by her mother's boyfriend).

99. *See* State v. Anderson, 526 So. 2d 499, 502 (La. App. 1st Cir. 1988) (child's statements to a police officer was the "first complaint" even though the child had made a previous complaint to her father because the father did not fully question the daughter about the complaint), *cert. denied*, 537 So. 2d 1160 (La. 1989); State v. Garay, 453 So. 2d 1003 (La. App. 4th Cir. 1984) (even though victim first attempted to tell her story to several other adults in the nursery, the "first complaint" was made to the adult who pulled the victim aside, reassured her, and told her she wanted to hear what the victim had to say).

adult questioning.[100] Likewise, the complaint need not have been made at one time, but could be relayed detail-by-detail over a long period of time.[101]

These opinions seldom discussed or distinguished between the three underlying common law theories of admission for prompt complaint evidence. The result led one commentator to note that the first complaint of a rape victim, including all the details, seemed automatically admissible in Louisiana's courts regardless of the time and conditions under which it was made and regardless of whether or not the victim testified at trial.[102] In addition to straying from the logical basis of the common law doctrine, this result posed substantial Sixth Amendment problems.[103]

3. Article 801(D)(1)(d)

The adoption of article 801(D)(1)(d) greatly simplified the confusion. This provision which is not included in the Federal Rules,[104] sets up a two part test for admission of prompt complaint evidence.[105] First, the victim must testify at trial consistently with the content of the initial complaint, and be subject to cross-examination.[106] Second, the victim's prior statement must be "an initial complaint of sexually assaultive behavior."[107] Unlike the prior rule, the initial complaint need not be made spontaneously or with no

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100. Garay, 453 So. 2d at 1007 ("Because the child has no clear understanding of what has been done to her, her 'original complaint' often consists of responses to the questioning of a patient, persistent adult who draws the story from her.")

101. *See* State v. Hillman, 613 So. 2d 1053, 1061 (La. App. 3d Cir.) (decided under the Code of Evidence), *writ denied*, 617 So. 2d 1181 (La. 1993); Garay, 453 So.2d at 1007.

102. Note, *supra* note 93, at 1041.

103. The Sixth Amendment to the United States Constitution grants an accused the right to confront the witnesses against him. *See* Idaho v. Wright, 497 U.S. 805, 813 (1990). When a witness does not testify at trial, the admission of that witness' hearsay statements violates the Sixth Amendment unless those statements fall into a "firmly rooted hearsay exception" or bear some other "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980). Louisiana's prior misapplication of the *res gestae* and prompt complaint concepts probably ran afoul of this right. For more discussion of the Sixth Amendment, *see infra* part V.

104. A similar provision was proposed by Professor Graham as an amendment to the Federal Rules of Evidence. *See* Graham, supra note 79.

105. For the complete text of LA. CODE EVID. art. 801(D)(1)(d), *see supra* note 51.

106. LA. CODE EVID. art. 801(D)(1)(d); *see also* State v. Moran, 584 So. 2d 318 (La. App. 4th Cir.), *cert. denied*, 585 So. 2d 571 (La. 1991).

107. LA. CODE EVID. art. 801(D)(1)(d) ; Moran, 584 So. 2d at 318.

unexplained lapse of time.[108] Instead, any delay in reporting the complaint goes only to the credibility of the witness, not admissibility.[109] All the details of the initial complaint, including the identity of the assailant, are admissible.[110]

Two aspects of article 801(D)(1)(d) deserve discussion. First, the rule's most significant feature is its requirement that the victim testify in court consistent with the initial complaint. This requirement alleviates both the Confrontation Clause[111] and reliability[112] problems posed by Louisiana's prior use of the prompt complaint doctrine. It is crucial, therefore, that courts admit initial complaint evidence only to the extent it is consistent with the victim's in-court testimony. If the victim fails to testify consistently, either by failing to recall the event or by testifying to a different version of the events, the initial complaint should be excluded.[113] For this reason, the trial court cannot rule on the admissibility of initial complaint evidence until it first hears the content of the victim's in-court testimony.[114]

Second, the definition of "initial complaint" should be strictly construed under article 801(D)(1)(d).[115] Only the first complaint of the victim is admissible; "[s]ubsequent complaints or reports about the same crime would not be admissible under it."[116] The Official Comments to the rule emphasize that this point may change prior

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108. Moran, 583 So. 2d at 323 (citing Graham, *supra* note 79, at 510).

109. *Id.*; Graham, *supra* note 79.

110. Graham, *supra* note 79, at 510.

Many jurisdictions allow only the fact of the complaint to be admitted in the prosecution's case in chief if the victim testifies. The details of the complaint are not admissible until the victim's credibility has been attached. *See* State v. Kendricks, 891 S.W.2d 597 (Tenn. 1994) (collecting cases). The decision suggests that the due process rights of an accused might be violated if the details were admitted. 891 S.W.2d at 603.

111. The Confrontation Clause is not offended when the witness testifies at trial and the accused has an opportunity to cross-examine the witness as to the out-of-court statements. *See* United States v. Owens, 484 U.S. 554, 560 (1988).

112. Out of court statements that are consistent with a witness' in-court testimony do not pose the same reliability problems as ordinary hearsay. Graham, *supra* note 79, at 511.

113. Moran, 584 So. 2d at 324 (citing Graham, *supra* note 79, at 511). In *Moran*, however, the court permitted admission of an out-of-court initial complaint that contained slightly more detail than the victim's in-court testimony. The court reasoned: "The existence of additional information in a prior out-of-court statement, all other statements being consistent, does not render the witness' testimony inconsistent for purposes of Art. 801(D)(1)."

114. *See* State v. Jackson, 601 So. 2d 730, 734-35 (La. App. 5th Cir. 1992).

115. Graham, *supra* note 79, at 511; State v. Henderson, 607 So. 2d 733, 735 (La. App. 4th Cir. 1992) (refusing to admit complaint of child victim made to mother after child had already made statements to a police detective and a doctor).

116. LA. CODE EVID. art. 801(D)(1) Official Comment (e).

Louisiana law.[117]

4. *Continuing Concerns*

Despite the improvement that article 801(D)(1)(d) made over prior treatment of the prompt complaint doctrine in Louisiana, three points must be made regarding its continued application. First, as article 801(D)(1)(d) is currently used, none of the three underlying common law theories of admission justify admitting the *details* of the initial complaint. Because the corroboration and *res gestae* theories are now codified under independent provisions,[118] the "inherent inference" theory remains as the only basis of the article.[119] That theory does not permit admission of the details of the initial complaint; rather, only the fact the complaint was made can be used to rebut the inference of consent.[120] However, the reliability problems posed by this departure from the common law rule is alleviated by article 801(D)(1)(d)'s requirement that the witness testify in court consistent with the details that are admitted.[121] Nevertheless, the current rule differs from its common law origin to that extent.

Second, the inherent inference theory which underlies the logic of the rule is questionable in itself. The presumption that a woman who has been raped will immediately report the incident, and that a woman who fails to do so must have consented to the encounter, must be recognized as an archaic notion.[122] Moreover, it has been

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117. *Id.* Despite the comment, some courts continue to stretch the definition of "initial complaint" in child sexual abuse cases. *See* State v. Free, 26,267 (La. App. 2d Cir. 9/21/94); 643 So. 2d 767, 777 (first complaint was made to fourth adult whom child talked to regarding abuse); State v. Hillman, 613 So. 2d 1053, 1061 (La. App. 3rd Cir.) (first complaint can be made detail-by-detail over a period of time rather than all at once), *cert. denied*, 617 So. 2d 1181 (La. 1993).

118. *See, respectively*, LA. CODE EVID. arts. 801(D)(1)(d) & 803(1)-(4).

119. For a discussion of the inherent inference theory, *see supra* notes 80-86 and accompanying text.

120. *See supra* notes 80-86 and accompanying text.

121. *See* Graham, *supra* note 79, at 511 (recognizing that hearsay statements have less reliability problems when witness testifies in-court consistent with the out-of-court statements).

122. *See* Comment, *supra* note 93. Modern research indicates as few as seven percent of all rapes are reported. *Id.* at 163 (citing KOSS, WOODRUFF, & KOSS, A CRIMINOLOGY STUDY (1990)). The reasons for lack of reporting may range from the relationship to the attacker, to negative attitudes toward the criminal justice system to psychological factors. *Id.* at 164-65. Likewise, a modern jury may not be as likely as its thirteenth century counterpart to infer that a woman consented to a sexual encounter unless it hears evidence of a prompt complaint. Therefore, prompt complaint evidence is not necessary to rebut such an inference.

suggested that young children may not understand that sexual abuse is wrong and, therefore, not make a complaint.[123] In sum, whatever purpose prompt complaint evidence currently serves, it probably does not serve the purpose for which it was intended at common law.

Third, even assuming prompt complaint evidence serves a needed purpose by rebutting the inference of consent in a rape case, consent is irrelevant in child sexual abuse cases. Under Louisiana law, consent is not a defense to carnal knowledge of a juvenile,[124] or to sexual battery on a person less than fifteen years of age.[125] The law simply presumes a minor cannot consent to sexual activity. Therefore, a jury could never properly infer a minor victim consented to a sexual encounter. Consequently, the prompt complaint is not needed to rebut an inference of consent.[126] As one court noted: "Where . . . the girl assaulted is under legal age to yield consent to her degradation, no such inference can arise, and her failure to make complaint is immaterial."[127] Given these problems, the continued use of article 801(D)(1)(d), especially when applied to children, may be questionable.

Under article 803 of the Code, several categories of out-of-court statements are deemed so inherently reliable that they are excepted from the hearsay rule. Unlike article 801 hearsay exclusions, statements that qualify as article 803 hearsay exceptions are admissible even though the declarant does not testify at trial and is not subject to cross-examination. This section examines two commonly used hearsay exceptions for admitting statements of child victims—article 803(2) "excited utterances" and article 803(4) "statements for purposes of medical treatment and diagnosis in connection with treatment." The section also reviews the approach many states have taken in adopting special hearsay exceptions for statements made by child victims of sexual abuse.

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123. State v. Wells, 522 N.W.2d 304, 308 (Ia. 1994).

124. LA. R.S. 14:80 (1995).

125. LA. R.S. 14:43.1.

126. *See* 4 WIGMORE, *supra* note 56, § 1135, at 304-05.

127. State v. Whitman, 143 P. 1121 (1914). Many courts are nevertheless reluctant to exclude first complaints of minor sexual assault victims based on this reasoning. *See* 4 WIGMORE, *supra* note 56, § 1135, at 304-05 (collecting cases for and against the proposition). Thus, courts often circumvent the rule by reasoning, for example, that the initial complaint is not being admitted to rebut the inference of consent, but rather to corroborate the victim's testimony that force was used. *See* State v. Richardson, 163 S.W. (1942).

C. *Excited Utterances*

Article 803(2) excepts from the hearsay rule statements that relate "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[128] Originally recognized as a form of *res gestae*,[129] excited utterances are considered reliable on the theory that extreme stress or excitement renders normal reflective thought processes inoperative; therefore, statements made under such circumstances are inherently trustworthy.[130] Statements of child sexual abuse victims made in response to abusive incidents frequently find admission under this exception.[131]

Before a hearsay statement is admitted under article 803(2), two requirements must be satisfied. First, the child must make the statement while under the influence of a startling event or condition.[132] This requirement assures that the statement is not the result of reflective thought.[133] Although no single factor is determinative in meeting this requirement, courts generally regard the time between the startling event and the statement as the most important indicator.[134] Thus, in *State v. Reaves*,[135] statements of a rape victim made moments after the rape occurred were admissible as an excited utterance; statements made forty-five minutes after the rape were also admissible; however, statements made two hours later no longer qualified as "excited."[136] In most cases, the statement will closely follow the actual act of abuse or molestation.[137]

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128. LA. CODE EVID. art. 803(2).

129. For a discussion of the common law theory of *res gestae* and Louisiana's continued use of it, *see supra* note 90.

130. *See* State v. Brown, 395 So. 2d 1301, 1307 (La. 1981); 6 WIGMORE, *supra* note 17, § 1747, at 195.

131. *See, e.g.*, Greenlee v. State, 884 S.W. 2d 947 (Ark. 1994); Baine v. State, 606 So. 2d 1076, 1079 (Miss. 1992); State v. Edward, 485 N.W.2d 911, 914 (Minn. 1992); *see also* Yun, *supra* note 1, at 1753.

132. *See* State v. Henderson, 362 So. 2d 1358, 1362 (La. 1978).

133. *Id.*; State v. Reaves, 569 So. 2d 650 (La. App. 2d Cir. 1990), *cert. denied*, 576 So. 2d 25 (La. 1991).

134. Reaves, 569 So. 2d at 653; *see also* State v. Mays, 612 So. 2d 1040, 1045 (La. App. 2d Cir.) (statement qualified as excited utterance when one minute passed between time of shooting and declaration), *writ. denied*, 619 So. 2d 576 (La. 1993); State v. Bean, 582 So. 2d 947, 950 (La. App. 2d Cir.) (In murder prosecution, four-year-old's statement identifying the defendant made immediately after the child's mother had been shot was admissible as an excited utterance.), *writ. denied*, 586 So. 2d 567 (La. 1991).

135. 569 So. 2d at 650.

136. *Id.*

137. *But see* George v. State, 813 S.W.2d 792, 796 (1991) (court concluded that a

In the context of children, it is important to recognize the "startling event or condition" must be measured from the declarant's point of view. While most people regard sexual assault or molestation as a startling event, children frequently do not.[138] Particularly in cases of long term incest, children often do no realize what has happened to them is wrong or even unusual.[139] Thus, children do not always convey a report of sexual abuse in an excited or spontaneous state, such as in *Brown v. United States*,[140] where the three-year-old victim calmly reported a sexual assault during a normal dinnertime conversation.[141] In such cases, the statement cannot be admitted as an excited utterance because the underlying guarantee of reliability, *i.e.*, an excited state, is absent.

As a second requirement for admission under article 803(2), the excited utterance must relate to the startling event or condition.[142] Presumably, a statement not relating to the startling event or condition is less reliable because, at some previous time, the declarant may have had an opportunity to reflect upon the content of the statement.[143] Thus, a child's spontaneous statement that her uncle sexually abused her will not be admissible under this exception if the statement is made in response to an event unrelated to the abuse, such as nearly being run over by a car.

D. *Statements for Purposes of Medical Treatment and Medical Diagnosis in Connection with Treatment*

The second hearsay exception commonly used to admit child victim statements is article 803(4), which excepts statements made for purposes of medical treatment and medical diagnosis in connection with treatment. Like the excited utterance exception, this exception was first recognized as a form of *res gestae*.[144] Statements fall-

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child's statement made immediately upon awaking from a nightmare dealing with a past sexual assault qualified as an excited utterance).

138. Yun, *supra* note 1, at 1753 (citing T. MCCAHILL, ET. AL., THE AFTERMATH OF RAPE 44 (1979)).

139. *Id.*

140. 152 F.2d 138 (D.C. Cir. 1945).

141. *Id.*; *see* Yun, *supra* note 1.

142. State v. Henderson, 362 So. 2d 1358, 1362 (La. 1978); *see also* PUGH, ET AL., *supra* note 22, at 278.

143. *See* 6 WIGMORE, *supra* note 17, § 1750, at 222 (noting that in many situations there is no less reason to trust spontaneous statements not relating to the startling event or condition).

144. Auzene v. Gulf Public Service Co., 188 So. 512, 514 (La. App. 1st Cir. 1939)

ing under the exception are considered reliable on the theory that patients seeking medical treatment have a powerful motive to speak truthfully and accurately because the medical treatment depends, in part, on the information conveyed.[145] Under the current version of the rule, the scope of admissible statements includes "medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or medical diagnosis in connection with treatment."[146] The statement need not be made to a physician in order to qualify under the exception.[147] Moreover, unlike its federal counterpart,[148] article 803(4) does not permit statements made *solely* for the purpose of medical diagnosis; the statement must be made in connection with *treatment* in order to qualify.[149]

Child victims of sexual abuse frequently make statements to doctors, nurses, child protection team workers, and other adults in connection with medical treatment that may be admissible under this provision.[150] In applying the exception to children, however, two issues deserve discussion. First, courts should take special precautions to assure that the child declarant's state of mind is consistent with that of a patient seeking medical treatment. Second, courts should not allow the admission of statements relating to the cause of

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(Testimony of physician, who attended patient shortly after injury, that patient stated to him that the injury was caused by an explosion of bottled beverage in his hand, was properly admitted as part of *res gestae*.). For a discussion of the common law doctrine of *res gestae* and Louisiana's continued application of it, see *supra* note 90.

145. *See* State v. Watley, 301 So. 2d 332, 335 (La. 1974) (A patient is expected to tell the truth in order to get well.); United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980) (interpreting FED. R. EVID. 803 (4)), *cert. denied*, 450 U.S. 1001.

146. LA. CODE EVID. art. 803(4).

147. *Id.* at Comment (e).

148. FED. R. EVID. 803(4) defines the scope of admissible testimony as:

> Statements made for *medical diagnosis or treatment* and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. (emphasis added).

149. LA. CODE. EVID. art. 803(4) Comment (a) provides:

> Unlike Federal Rule 803(4), this Paragraph excludes from its coverage statements made solely for the purpose of diagnosis. The reliability deemed generally to inhere in statements made for purposes of medical treatment does not extend to statements made solely for diagnosis.

150. *See, e.g.*, State v. Bell, 639 So. 2d 856, 857 (La. App. 5th Cir. 1994); State v. Thom, 615 So. 2d 355, 363 (La. App. 5th Cir. 1993); *see also* Doe v. Doe, 644 So. 2d 1199, 1205 (Miss. 1994); State v. Booth, 862 P.2d 518 (Or. Ct. App. 1993), *review denied*, 876 P.2d 783 (Or.), *cert. denied*, 115 S.Ct. 372 (1994).

the injuries—particularly testimony indicating the identity of the assailant—unless those statements are reasonably pertinent to medical treatment or diagnosis in connection with treatment.

1. Declarant's State of Mind

As with any hearsay exception, the declarant's state of mind is the key to admissibility under article 803(4).[151] A statement is admissible under this exception only because the law presumes the declarant will speak truthfully in order to get well.[152] In child sexual abuse cases, the principle is important because young children frequently do not recognize the cause and effect relationship between providing accurate information and receiving effective medical treatment.[153] Thus, in *Cassidy v. State*,[154] where the examining physician testified he did not believe the two-year-old victim understood why he was asking her questions about her injuries, a Maryland court found the victim's statements inadmissible under that State's version of the rule.[155] The court reasoned the two-year-old child was not mature enough to possess the physical self interest that insures the reliability of statements admitted under this exception.[156] Before admitting a child's testimony under this provision, courts should verify that the child has the necessary state of mind to make his or her statement reliable, *i.e.*, he or she knows and appreciates the importance of providing truthful and accurate information in connection with medical treatment.[157]

Even if the victim understands the importance of giving truthful

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151. *See* Cassidy v. State, 536 A.2d 666, 684 (Md. Ct. App.) (declarant's state of mind is the *sine qua non* of all hearsay exceptions), *cert. denied*, 541 A.2d 965 (Md. 1988).

152. *See* cases cited *supra* note 146.

153. *See* Cassidy, 536 A.2d at 680; *see also* Robert P. Mosteller, *Child Sexual Abuse and Statements for Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 266 (1989).

154. 536 A.2d at 680.

155. *Id.*

156. *Id.* Similarly, in Morgan v. Forteich, 846 F.2d 941 (4th Cir. 1988), former Supreme Court Justice Lewis Powell, sitting by designation on the United States Court of Appeals for the Fourth Circuit, dissented from a holding that admitted a child's hearsay statements under Rule 803(4). Justice Powell reasoned the declarant was only four years old, and there was no evidence in the record "that her frame of mind was comparable to a patient seeking treatment." *Id.* at 952. (Powell, J., dissenting).

157. In this regard, it is helpful if the physician, before asking the victim any questions, first explains the purpose of the questions and the importance of truthful answers. *See* United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985).

information in connection with medical treatment, problems nonetheless arise when the victim has suffered not only bodily harm, but emotional or psychological harm as well. In this regard, both the Federal and Louisiana rules allow statements for purposes of "medical treatment," but neither defines the term "medical."[158] The state of mind of a patient seeking treatment for a bodily injury, such as a broken bone, may be different from that of a patient seeking treatment for emotional or psychological injuries.[159] As Professor McCormick points out, statements made by a patient seeking psychiatric treatment may be less reliable because the statements "may be skewed by the very condition under inquiry."[160]

The problem is particularly apparent in child sexual abuse cases where the victim is abused by a parent. Far from having a motive to tell the truth to emotional or psychological care providers, the victim may have a motive to lie.[161] "Truthful answers as to the identity of the abuser may well wrench a child from the reassuring presence of its mother or father or both. It is highly unlikely that there operates in the mind of an infant declarant a compelling desire to bring about such a result."[162] For these reasons, once again, courts must take special precautions to assure the child has the necessary state of mind to make statements admitted under this exception reliable. Failure to do so will result in misapplication of the rule.

2. *Reasonable Pertinence to Medical Treatment or Diagnosis in Connection with Treatment—Statements of Identity*

Only those statements that are reasonably pertinent to medical treatment or diagnosis in connection with treatment can be admitted.[163] In this regard, although the declarant may testify as to the general cause of his or her injuries, the declarant cannot make specific statements of fault.[164] Thus, in a personal injury case, "a patient's statement that he was struck by an automobile would quali-

158. *See* LA. CODE EVID. art. 803(4); FED. R. EVID. 803(4).

159. *See* Mosteller, *supra* note 154, at 268; Cassidy, 536 A.2d at 682. Under the Uniform Rules of Evidence, which pre-dated the Federal Rules, statements admissible under this exception had to be "relevant to an issue of declarant's *bodily condition*." *See* UNIF. R. EVID. 63(12)(c) (emphasis added).

160. MCCORMICK, *supra* note 6, § 277, at 247 n.8.

161. Cassidy, 536 A.2d at 684.

162. *Id.*

163. LA. CODE EVID. art. 803(4).

164. *See* FED. R. EVID. 803(4).

fy, but not his statement that the car was driven through a red light."[165]

In child sexual abuse cases, a child's statements describing the abusive act may be admissible under 803(4), however, a recurring issue is whether a victim's statement indicating the identity of his or her assailant is an inadmissible statement of fault or "reasonably pertinent" to medical treatment and/or diagnosis so that it can be admitted under this exception. In the leading case, *United States v. Renville*,[166] the Eighth Circuit Court of Appeals allowed a physician to testify under Federal Rule of Evidence 803(4) as to statements made to him by an eleven-year-old child sexual abuse victim identifying her stepfather as her attacker.[167] Acknowledging that statements of fault or identity are "seldom" pertinent to diagnosis or treatment, the court nonetheless reasoned that when the victim's attacker is a member of the household, identity is crucial to medical treatment and diagnosis for two reasons.[168] First, "[t]he exact nature and extent of the psychological problems which ensue from child abuse often depend on the identity of the abuser."[169] Second, the physician has an obligation, as part of treatment, to remove the child from an abusive household to prevent recurrent abuse.[170]

Although a majority of state courts have followed *Renville*,[171] a minority has rejected this extension on the ground that these statements of identity lack the necessary reliability.[172] When Louisiana's courts squarely confront the issue,[173] they may be hesitant to adopt

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165. *Id.*; *see also* United States v. Narciso, 446 F. Supp. 252, 289 (E.D. Mich. 1976) (In a criminal case, a patient's statement that he was shot would be admissible, but a patient's statement that he was shot by a white man does not qualify.); *cf.* State v. Bennett, 591 So. 2d 783 (La. App. 4th Cir. 1991) (in rape case, victim's statements to doctor that she had been held by the neck and forced to sit on the assailant's penis were reasonably pertinent to treatment; however, statement that she had been forced to drive to a secluded area were not pertinent to treatment and were therefore inadmissable).

166. 779 F.2d 430 (8th Cir. 1985).

167. *Id.*

168. *Id.*

169. *Id.* at 437.

170. *Id.* at 438.

171. *See* Stallnacker v. State, 715 S.W.2d 883, 885 (Ark. 1986); State v. Tracy, 482 N.W.2d 675 (Iowa 1992); Edwards v. Commonwealth, 833 S.W.2d 842 (Ky. 1992); State v. Aguallo, 350 S.E.2d 76 (N.C. 1986); State v. Robinson, 735 P.2d 801, 810 (Ariz. 1987); People v. Galloway, 726 P.2d 249 (Colo. Ct. App. 1986); Goldade v. State, 674 P.2d 721 (Wyo. 1983), *cert. denied*, 467 U.S. 1253 (1984); State v. Maldonado, 536 A.2d 600, 603 (Conn. Ct. App.), *appeal denied*, 541 A.2d 1239 (Conn. 1988); People v. Wilkins, 349 N.W.2d 815 (Mich. 1984).

172. *See, e.g.*, State v. Jones, 625 So. 2d 821 (Fla. 1993); Cassidy v. State, 536 A.2d 666 (Md. 1988); *see also* Marks, *supra* note 1, at 231.

173. Arguably, the Fourth Circuit backed into *Renville* in Interest of Gray, 454 So.

Renville's analysis due to a distinction between the Federal rule and Louisiana's rule. Federal Rule 803(4) has abolished the distinction between treating and examining physicians, so that under the Federal rules, statements made *solely* for purposes of medical diagnosis are admissible.[174] The drafters of the Federal Rules abolished the distinction reasoning that, pursuant to Federal Rule of Evidence 703,[175] examining physicians were allowed to disclose out-of-court statements made to them by the patient in order to show the basis of the examining physician's expert opinion; although the statements were not admissible as substantive evidence, in most cases, juries did not draw the distinction.[176] Because of this change, Federal Rule 803(4) now contains two distinct theories of admission: (1) the traditional theory that a patient will speak truthfully in providing medical information; and (2) a new theory, patterned after Rule 703, which admits out-of-court statements to the extent an examining physician

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2d 307 (La. App. 4th Cir. 1984), a case involving a proceeding to place two physically abused a children in the care of the Department of Health and Human Resources. There, the court allowed an examining doctor to testify as to the childrens' statements identifying their parents as their attackers. *Id.* at 310. In support of its holding, the court stated: "Hearsay history of a case related to a physician is admissible under federal law, FED. R. EVID. 803(4), and under Louisiana criminal jurisprudence, State v. Watley, 301 So. 2d 332 (La. 1974)." *Id.* However, the case cited by the *Gray* court—*State v. Watley*—did not allow the physician to testify under the hearsay exception for statements made for medical treatment; rather, it admitted the hearsay as the basis of the doctor's expert opinion. Accordingly, *Gray's* precedential value on the *Renville* issue is limited.

Elsewhere, Louisiana courts have admitted victim testimony under article 803(4), but the opinions do not discuss whether statements of identity were included. *See* State v. Bell, 639 So. 2d 856, 857 (La. App. 5th Cir. 1994) (Doctor could testify as to victim's statements about "how the sexual abuse occurred."); State v. Thom, 615 So. 2d 355, 363 (La. App. 5th Cir. 1993) (Nurse could testify about victim's statements as to "how the victim's attack occurred.").

174. *See* FED. R. EVID. 803(4) Advisory Committee Note. This view departs from the traditional common law notion that such statements are not as reliable because there is no guarantee the declarant will actually be treated based on the statements he or she makes. *See* LA. CODE EVID. art. 803(4) Comment (a).

175. FED. R. EVID. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by expert in the particular field in forming their opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

176. FED. R. EVID. 803(4) Advisory Committee Notes provide:

> Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements made to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was most unlikely to be made by juries.

would reasonably rely upon them in forming a diagnosis or course of treatment.[177]

This second theory of admissibility, which does not apply under Louisiana's rule, underlies much of *Renville's* analysis.[178] More importantly, this second theory shifts the focus of the hearsay inquiry away from the declarant's state of mind—which is the traditional key to all hearsay exceptions—and instead focuses on the treating physician's state of mind.[179] Thus, in analyzing whether the child victim's statements were "reasonably pertinent to medical treatment or diagnosis," the *Renville* court focused on the physician's state of mind, *i.e.*, whether a physician would reasonably rely on such statements in forming a diagnosis or course of treatment.[180] Because the court concluded a physician would so rely on the child's statements, it found such statements admissible.[181]

Such a result could not be reached under Louisiana's rule. Article 803(4) does not permit statements made *solely* for medical diagnosis; therefore, the state of mind of the physician is not relevant in determining admissibility.[182] Instead, the child declarant's state of mind, *i.e.*, his or her desire to answer truthfully in order to get well, assures the reliability of statements admitted under this exception. Therefore, the relevant inquiry in Louisiana should be whether the victim, or a reasonable person in the victim's position, would believe the identity of the assailant is "reasonably pertinent to medical treatment or diagnosis in connection with treatment."[183]

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177. *See* Mosteller, *supra* note 154, at 259.

178. *See* Cassidy v. State, 536 A.2d 666 (Md. 1988) (rejecting Renville because Maryland's hearsay exception, like Louisiana's, does not allow statements made solely for the purpose of medical diagnosis).

179. Cassidy, 536 A.2d at 687 (In focusing on whether the statements are of a type reasonably relied upon by experts in forming their opinions, "for the first time in the history of hearsay law, the state of mind of the declarant is effectively ignored.").

180. Renville, 779 F.2d at 438.

181. *Id.*

182. The Comments to LA. CODE EVID. art. 803(4) provide that "[t]he phrase 'reasonably pertinent to treatment or diagnosis in connection with treatment' has been interpreted to limit the scope of this exception to the kind of statements that are usually relied upon by physician's in their diagnosis and treatment of patients." In support, the comment cites a Federal case—United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). For the reasons discussed herein, the authors urge this view cannot be properly applied under article 803(4).

183. *See* Mosteller, *supra* note 153, at 265 (reasonable pertinency is a "somewhat imprecise, although rather easily applied, objective standard used to indicate a subjective belief of the declarant.").

E. *New Hearsay Exceptions*

Recognizing that traditional hearsay exceptions are often inadequate in dealing with out-of-court statements of child sexual abuse victims and witnesses, many states have adopted new hearsay exceptions under which out-of-court statements of child victims and witnesses may be admissible. Some states have enacted a relatively new tender years exception for reliable statements of young child victims. Others have a residual or catch-all exception which is applicable in criminal cases. While some jurisdictions have both of these exceptions, Louisiana has neither.

1. Tender Years Exceptions

A majority of states have adopted a new hearsay exception which generally provides for the admission of reliable hearsay statements of a child under a certain age.[184] While these statutes are not uniform, the most frequently adopted exception provides that the hearsay of a child is admissible if: (1) the trial judge finds the statement is reliable; (2) the accused has notice; and (3) the child either (a) testifies or (b) is unavailable and there is corroboration that the act occurred.[185] Usually, significant emotional distress as a result of testifying in the presence of the accused is included within the definition of unavailability. Reliable hearsay statements of the child are admissible if the child testifies or there is corroboration that the act occurred. The child is encouraged to testify since corroborating evidence is required if the child does not.

2. Residual Exceptions

The Federal Rules contain two identical exceptions providing for the admission of hearsay having "circumstantial guarantees of trustworthiness" that are "equivalent" to the other enumerated exceptions.[186] The only difference is that Rule 804(b)(5) requires that the speaker of the out-of-court statement be unavailable to testify. These catch-all exceptions apply only when the statement is offered to prove a material fact and the evidence is more probative than other

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184. Marks, *supra* note 1, at 236-46 (Lists thirty-four states that have a tender-years exception).

185. *Id.* at 239. For an analysis of this type of statute, see Townsend v. State, 635 So. 2d 949 (Fla. 1994); Buckley v. State, 786 S.W.2d 357 (Tex. Ct. Crim. App. 1990).

186. FED. R. EVID. 803(23) & 804(b)(5).

evidence that the proponent can "procure through reasonable efforts." The opponent must have appropriate notice that the out-of-court statement will be offered. Although the Federal Rules do not have a specific exception for child hearsay, the catch-all, or residual, exceptions have been used for statements describing sexual and physical abuse.[187] Their use has given trial courts broad discretion in determining whether the statements will be admitted under these exceptions.[188] Louisiana recognizes a catch-all exception for unavailable witnesses but limits its applicability to civil cases.[189]

IV. CONFRONTATION CONCERNS

The Confrontation Clause of the Sixth Amendment to the United States Constitution imposes several limitations on the use of hearsay that must be considered in the context of child sexual abuse victims.[190] Designed to promote reliability in the criminal fact-finding process, the Confrontation Clause gives criminal defendants the right to confront and cross-examine the witnesses against them.[191] Although the Confrontation Clause and the rule against hearsay promote similar values,[192] a tension nonetheless exists between the two. Thus, the Sixth Amendment may preclude the admission of out-of-court statements that would otherwise be admissible under a hearsay exception. A series of recent Supreme Court decisions has defined the Sixth Amendment parameters as they effect the admissibility of hearsay evidence in child sexual abuse prosecutions.

In *United States v. Owens*,[193] the Court held that the Sixth Amendment is not offended by the admission of a declarant's out-of-

187. *See, e.g.*, Idaho v. Wright, 497 U.S. 805 (1990) (Idaho residual exception); United States v. Grooms, 978 F.2d. 425, 427-28 (8th Cir. 1992); Doe v. United States, 976 F.2d 1071 (7th Cir. 1992); State v. Rojas, 524 N.W.2d 659 (Iowa 1994).

188. *See* Marks, *supra* note 1, at 234-36 (criticizing the use of the catch-all or residual exceptions).

189. LA. CODE EVID. art. 804(B)(6).

190. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." For a good discussion of Confrontation Clause issues and child sexual abuse cases, see Carol A. Chase, *Confronting Supreme Confusion: Balancing Defendants' Confrontation Clause Rights Against the Need to Protect Child Abuse Victims*, 2 UTAH L. REV. 407 (1993); Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 524 MINN. L. REV. 523 (1988).

191. If read literally, the Sixth Amendment would exclude all statements made by declarants not present at trial. Ohio v. Roberts, 448 U.S. 56, 66 (1980). The Supreme Court, however, has long since abandoned that interpretation. *Id.*

192. Roberts, 448 U.S. at 66.

193. 484 U.S. 554 (1988).

court statement when the declarant also testifies at trial and is subject to cross-examination.[194] In such a case, the Court reasoned that the traditional protections of the oath, cross-examination, and the opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements.[195] The Court emphasized that the Sixth Amendment protects only the *opportunity* for cross-examination; it does not guarantee the right to an *effective* cross-examination.[196] Thus, in *Owens*, the Court found the defendant's confrontation rights were not violated when the victim testified, but, due to memory loss, was unable to answer cross-examination questions as to the basis of his prior out-of-court statement.[197]

In Louisiana, the admission of article 801(D)(1)(b) "prior consistent statements"[198] and article 801(D)(1)(d) "initial complaints of sexually assaultive behavior"[199] pose no Confrontation Clause problems. Each of these hearsay exclusions requires that the defendant testify at trial and be subject to cross-examination.[200] So long as the declarant testifies at trial consistently with the out-of-court statement and the opposition has an opportunity to cross-examine the declarant, the Sixth Amendment is satisfied. No additional examination of the reliability of the out-of-court statement is constitutionally required.

When the declarant does not testify at trial, however, the Sixth Amendment places several limitations on the admission of out-of-court statements. The Court set forth the general framework in *Ohio v. Roberts*,[201] where it held that the introduction of hearsay testimony violates the Confrontation Clause unless such testimony bears "adequate indicia of reliability."[202] This requirement can be satis-

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194. *Id.* (holding that, for confrontation purposes, the analysis is the same regardless of whether the rules of evidence treat the statement as hearsay); United States v. Inadi, 106 S.Ct 1121, 1128 n.12 (1986) (recognizing that similar confrontation concerns exist even though out-of-court statements are treated as exemptions from, rather than exceptions to, the hearsay rule); *see* California v. Green, 399 U.S. 149 (1970).

195. *Id.* at 560.

196. *Id.* at 559 (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)).

197. *Id.*

198. *See supra* part III.A.

199. *See supra* part III.B.

200. *See supra* part III.

201. 448 U.S. 56 (1980).

202. *Id.* at 66. The *Roberts* opinion, which dealt with the admissibility of sworn testimony given at a prior judicial proceeding, also held the Sixth Amendment requires, as a precondition to the admissibility, a showing that the witness is "unavailable." *Id.* at 65. In White v. Illinois, 502 U.S. 346 (1992), however, the Court clarified that the showing of unavailability is not necessary when the statement falls within a "firmly rooted" hearsay

fied in either one of two ways. First, the statement may fall into a "firmly rooted hearsay exception."[203] Second, and alternatively, the statement may bear "particularized guarantees of trustworthiness."[204]

In determining whether a given hearsay exception is "firmly rooted," the Court looks to factors such as the length of time the exception has been recognized and the number of jurisdictions that adopt it.[205] Thus, the Court has recognized the exceptions for statements of co-conspirators,[206] spontaneous declarations,[207] and statements made for purposes of medical treatment or diagnosis[208] to be "firmly rooted." On the other hand, the Court has found the catch-all or residual exception not to be "firmly rooted."[209]

In recent years, the use of the exception for statements made for purposes of medical treatment or diagnosis has been expanded to admit a broad range of statements made by child sexual abuse victims.[210] Such an expansion of the use of the rule "challenges the wisdom of its extension to cover statements made without any treatment purpose."[211] In addition to confrontational problems that may arise with the expanded use of the rule, the transformation of this hearsay exception may defeat its status as "firmly rooted".[212]

When the hearsay exception under which a statement gains admissibility is not "firmly rooted," the statement may nonetheless survive Sixth Amendment scrutiny if it contains "particularized guarantees of trustworthiness."[213] In making this determination, the

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exception, *see infra* notes 201-05 and accompanying text. The decision left open the question whether a showing of unavailability is required for admission of statements not falling within a "firmly rooted" hearsay exception. *See* Chase, *supra* note 190, at 416.

203. Roberts, 484 U.S. at 66.

204. *Id.*

205. *See* White v. Illinois, 502 U.S. 346 (1992) (finding spontaneous declaration exception to be "firmly rooted" because it is at least two centuries old and has been adopted by four fifths of the states; statements made for medical diagnosis or treatment also widely accepted among the states.).

206. Bourjaily v. United States, 483 U.S. 171, 182-84 (1984).

207. White, 502 U.S. at 346 n.8.

208. *Id.*

209. Idaho v. Wright, 497 U.S. 805, 817 (1990) (dealing with the State of Idaho's Rules of Evidence); Townsend v. State, 635 So. 2d 949 (Fla. 1994) (finding the tender years exception, *supra* part IV.B.3., is not "firmly rooted" for constitutional purposes.

210. *See, e.g.*, United States v. Renville, 779 F.2d 430 (8th Cir. 1985) (admitting a statement of identification under the rationale that it was pertinent to the treatment of the child victim).

211. MCCORMICK, *supra* note 6, § 278, at 252.

212. *See* Mosteller, *supra* note 153, at 285-90.

213. Roberts, 448 U.S. at 66.

Court has looked to the "totality of the circumstances" surrounding the making of the statement.[214] In *Idaho v. Wright*,[215] a case involving a pediatrician's testimony as to statements made to him during an interview with a five-and-one-half-year-old child victim of sexual abuse, Justice O'Connor identified several factors to be considered in determining whether a given statement bears particularized guarantees of trustworthiness: the spontaneity of the statement,[216] the mental state of the child,[217] the use of terminology unexpected of a child of similar age,[218] and the child's lack of a motive to fabricate.[219] Justice O'Connor cautioned, however, that external evidence corroborating the truth of the statement should not be considered in determining Confrontation Clause trustworthiness; the hearsay statement must possess adequate indicia of reliability by virtue of its own inherent trustworthiness. Medical evidence of abuse cannot be considered for this purpose.[220]

The proper application of the excited utterance exception[221] and statements for purposes of medical treatment and diagnosis in connection with treatment[222] should pose no Confrontation Clause problems. In *White v. Illinois*, the Supreme Court recognized both to be firmly rooted hearsay exceptions.[223] As to article 803(4), however, the Court did not discuss Federal Rule of Evidence 803(4)'s recent expansion to include statements made solely for medical diagnosis,[224] nor did it discuss the controversy surrounding statements of identity under this exception.[225] Thus, if statements of identity are admissible under article 803(4), such statements might not be admitted under a "firmly rooted" hearsay exception. In such a case, the statements would have to pass the "particularized guarantees of trustworthiness" test to survive Sixth Amendment analysis. This analysis of reliability is unnecessary if the witness testifies at trial.

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214. Wright, 497 U.S. at 819.
215. *Id.*
216. *Id.* (citing State v. Robinson, 735 P.2d 801 (Ariz. 1987).
217. *Id.* (citing Morgan v. Forteich, 846 F.2d 941, 948 (4th Cir. 1988).
218. *Id.* (citing State v. Sorenson, 421 N.W.2d 77 (Wis. 1988)).
219. *Id.* (citing State v. Kuone, 757 P.2d 289 (Kan. 1988).
220. *Id.* at 822.
221. *See supra* part IV.A.
222. *See supra* part IV.B.
223. *See supra* part IV.B.
224. *See supra* notes 175-78 and accompanying text.
225. *See supra* part IV.B.2

V. CONCLUSION

Hearsay statements of child victims frequently do not fall within traditional hearsay exceptions or exclusions. The perceived need for these statements has resulted in the new tender years hearsay exception being recognized in many jurisdictions. In other jurisdictions, the residual, or catch-all, exception has been used as a basis for admission. Because Louisiana has chosen not to adopt either of the new exceptions in criminal cases, the initial complaint provision has been broadly interpreted in order to achieve the same result. Clear limits have not been established for the exception for statements made for the purpose of medical diagnosis and treatment. The lack of analysis in the appellate opinions interpreting these provisions may be caused by result-driven decisions.

The Louisiana initial complaint provision provides protection to the accused when it requires both the child to testify and the testimony to be consistent with the child's out-of-court statements. As the judicial interpretation of article 801(D)(1)(d) develops, care should be taken to insure that the provisions of the statute are not construed so broadly as to diminish these protections. Confrontation concerns are diminished if the exceptions are not expanded beyond the traditional rationale which supplies the necessary reliability to these out-of-court statements. If a determination is made that societal interests are best served by admitting a wider range of child hearsay, the judicial system would be well served if a tender years exception were adopted which would balance the needs of society and the child against the protections afforded an accused.