NITZ V. STATE: SKewing THE EVIDENTIARY RULES TO PROSECUTE CHILD MOLESTERS

I. INTRODUCTION

In Nitz v. State, the Alaska Court of Appeals faced the difficult problem of determining the extent to which evidence of prior consistent statements and of prompt complaints of sexual assault may be admitted to bolster the testimony of the alleged victim of a crime. In Nitz the defendant, Richard Nitz, appealed a jury conviction on four counts of lewd and lascivious acts towards children, three counts of sexual assault in the first degree, and two counts of sexual abuse of a minor. The convictions resulted from charges that, over a period of approximately four years, Nitz committed a series of sexual assaults against his stepdaughter, T.K. She was seven years old when the assaults began and almost eleven years old when they ended.

On appeal, the court of appeals reversed all the convictions and remanded for a retrial. The court's opinion in Nitz contained two confusing evidentiary rulings, the first involving prior consistent statements, and the second involving the doctrine of prompt complaints of sexual assault. The court of appeals found that T.K.'s prior consistent statements, which had been offered before she had testified at trial,

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2. A prior consistent statement is testimony by a third party of an earlier statement by the declarant which is consistent with the declarant's testimony at trial. It is offered to rebut a charge that the declarant fabricated his testimony by revealing to the jury that the declarant had made a similar statement at an earlier point in time. Although a prior consistent statement could be considered hearsay, since it enters into evidence through the testimony of a third party, an exception exists where it is not treated as hearsay as long as the requirements for its admission are met. See, e.g., Travers, Prior Consistent Statements, 57 Neb. L. Rev. 974 (1978).
3. A prompt complaint is a statement in which a third party testifies to having heard an alleged victim to a sexual assault complain of having been assaulted shortly after the sexual assault was supposed to have occurred. Like a prior consistent statement, a prompt complaint is technically hearsay, but because of a traditional exception to the hearsay rule it is not excluded from evidence. See, e.g., 4 J. Wigmore, Evidence § 1123 (Chadbourn rev. 1974).
5. Id.
6. Id.
were not properly admissible. Although this decision was consistent with the applicable Alaska Rule of Evidence, the court's analysis of the prior consistent statements made by the victim and introduced during trial marked a departure from the common law by holding that prior consistent statements made after a motive to testify falsely has arisen are not subject to automatic exclusion. Rather, the court held that, "the admission of prior consistent statements made after a motive to falsify has arisen should be treated as a question of relevance, or determination on a case-by-case basis." The court elaborated on the process for determining whether a prior consistent statement is admissible as evidence:

In each instance where admission is sought, the trial court must begin by determining whether the prior statement is actually relevant to rebut an express or implied charge... of recent fabrication or improper influence of motive.... Next, if the court finds the statement to be actually relevant, it must proceed to balance the probative value of the statement against its potential for creating unfair prejudice.... Finally, if the court determines the statement to be admissible, it must instruct the jury that the statement should be considered for the limited purpose of determining the credibility of the declarant's trial testimony and that it should not be considered directly as proof that the matters asserted in it are true.

*Nitz* not only established a new interpretation of Alaska Rule of Evidence 801(d)(1)(B) as it applies to prior consistent statements, it also enunciated a confusing and inconsistent interpretation of the traditional, common law doctrine of prompt complaint to sexual assault. At common law, the prompt complaint doctrine allowed the victim's complaint of sexual abuse to be admitted into evidence through the testimony of a third person, who was informed of the attack by the victim shortly after it occurred. Such evidence was admitted, despite its inherently unreliable hearsay quality, in situations in which its absence would lead the jury to infer that the victim's complaint was fabricated, or where it qualified as an excited utterance.

In *Nitz*, however, the court of appeals upheld the admission of prompt complaint testimony when neither of these conditions was present. Instead, the *Nitz* court, relying upon an earlier decision by the Alaska

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7. Id. at 69.
10. Id.
11. Id. at 62-63.
13. Id. at 489-90.
Supreme Court in *Greenway v. State*,¹⁴ disregarded the absence of a prompt complaint exception in the Alaska Rules of Evidence, and held that this absence was “merely an oversight” by the drafters.¹⁵ Furthermore, the court of appeals allowed significant details of T.K.’s first complaint to come into testimony, whereas the traditional doctrine simply allowed testimony of the fact of the complaint. As a result, it appears that the court of appeals overlooked the historical precedent against admission of hearsay evidence, except in limited situations where the evidence possesses clear indicia of reliability. Finally, the *Nitz* court failed to determine what should be considered a “prompt” period of time after a sexual assault for purposes of the prompt complaint doctrine.

Taken in concert, the two holdings in *Nitz* represent a reaction by the Alaska Court of Appeals to the now visible problem of child sexual assault, and to some of the evidentiary problems that arise in such cases. In its zeal to respond to the problems attendant upon child sexual abuse, the court of appeals has neglected to consider the historical justifications for limited admissibility of prior consistent statements and for cries of prompt complaint. As a result, the court has enunciated standards that unnecessarily skew the logic of allowing into evidence such statements. Furthermore, its decision to create, in effect, an exception to the rule against hearsay for child sexual assault cases brings into question the uniformity of the evidentiary rules.

While this note argues that the courts should primarily be concerned with maintaining the uniform application of evidentiary rules, it is unrealistic to assume that courts should, or can, completely ignore the consequences of a strict application of hearsay standards in child molestation cases. The number of cases alleging sexual abuse of young children has increased dramatically in recent years.¹⁶ Whether the incidence or merely the recognition of sexual abuse is increasing,¹⁷ the subject is one that has recently come under increased public scrutiny. The admissibility of hearsay evidence is but one of several evidentiary considerations common to sexual abuse cases.¹⁸ It is estimated that

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¹⁴. 626 P.2d 1060 (Alaska 1980).
¹⁶. *See* D. Finkelhor, *Sexually Victimized Children* 53 (1979) (citing survey results which indicate that one in five females and one in 11 males are sexually victimized as children).
¹⁸. There are several aspects common to sexual abuse cases that raise hearsay issues. One is the use of leading questions. *See* Note, *The Unreliability of Expert
sexual abuse occurs in one out of four families. Twenty to thirty percent of all girls and ten percent of all boys will be victimized by age sixteen; seventy percent of these children will be victimized at the hands of their parents or family members. Alaska has a higher rate of child abuse/neglect cases than any other state in the country. Thus, the perception of an Alaska sexual abuse epidemic raises complex issues that both the Alaska courts and the Alaska Legislature must consider seriously and comprehensively.

Section II of this note summarizes the common law of prior consistent statements in order to provide an historical context for the complexity engendered in their use. Section III provides an overview of the status of prior consistent statements since the enactment of the Federal Rules of Evidence, as well as an analysis of the varying requirements for their use developed by both federal and state courts. Section IV considers the position taken by the Alaska Court of Appeals in Nitz on whether a declarant’s motive to fabricate must have arisen before the prior statement was made in order to admit that prior statement into evidence. Particularly, it criticizes the Nitz criteria for the admissibility of prior consistent statements as well as the Nitz court’s illogical distinction between substantive evidence and rehabilitative evidence. Furthermore, it debunks the Nitz court’s faith in the efficacy of limiting instructions to distinguish different qualities of evidence for the jury. Section V focuses on the prompt complaint doctrine and its common law roots. Section VI analyzes the interpretation of the prompt complaint doctrine in Alaska under Nitz and its progeny. Finally, section VII forwards a suggested amendment to the Alaska Rules of Evidence, and recommends a limited child hearsay exception for prompt complaints, which would protect the underlying interest seemingly guiding the Nitz court: the protection of child sexual assault victims from unduly traumatic impeachment.

Testimony on the Typical Characteristics of Sexual Abuse Victims, 74 GEO. L.J. 429 (1985) [hereinafter Note, The Unreliability of Expert Testimony]. Another issue is the competence of children to testify at trial. See A. YARNEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 204-05 (1979) (arguing that children possess inferior long-term and short-term memories). But see Melton, Children’s Competency to Testify, 5 LAW & HUM. BEHAV., 73, 76-77 (1981) (citing studies indicating that children remember facts as well as adults do). A third concern is the admissibility of expert testimony to show that the child’s behavior typifies the behavior of sexual assault victims. See Note, The Unreliability of Expert Testimony, supra.

19. PARENTS UNITED, INC., HELP FOR SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES (1986).
20. Id.
II. **Common Law History of Prior Consistent Statements**

The historical development of the rules surrounding the employment of a prior consistent statement closely parallels the fashioning of the rule against hearsay. Until the early sixteenth century, juries rarely were instructed to depend upon the testimony of witnesses in order to reach a verdict. The modern concept of the witness did not become a feature of jury trials until the early sixteenth century. As the relevancy of a witness' testimony increased in importance, however, the procedure for admitting such evidence became a point of debate. Among those facts admissible as evidence were testimony of the witness regarding statements made by another person. These hearsay statements were admitted as substantive evidence into the seventeenth century, though often over the objection of the accused.

By the early eighteenth century the notion prevailed in English common law that a witness' testimony could always be corroborated by evidence of his having made statements consistent with the ones he made in court. The development of this notion reflected the belief in the instinctive logic that such evidence provided truly corroborative support to the in-court statement. By the end of the eighteenth century, however, the cumulative concerns of jurists who valued the reliability of in-court testimony coalesced into a trend favoring the notion that such evidence was violative of the concept of hearsay. As a result, a third variety of out-of-court statement, now known as the prior consistent statement, came to be categorized as hearsay. Despite its status as hearsay, however, prior consistent statements could be introduced on direct examination of the witness in order to corroborate his in-court testimony.

In the early nineteenth century further objections arose to the use of prior consistent statements, despite their classification as hearsay. As a result, the principle developed of not allowing the testimony of a witness to be corroborated on direct examination with the use of in-
court testimony of a prior consistent statement. The rules began to acquire the now-familiar characteristic of allowing such statements into evidence solely to rebut evidence aimed at impeaching the credibility of the witness. Furthermore, the statement was admitted to rehabilitate a witness' credibility, and not as substantive evidence of the matter asserted by the witness. These factors remained the dominant characteristics of the law of prior consistent statements until the promulgation of the Federal Rules of Evidence in 1975. It is important to note, however, that for nearly two hundred years, both English and American courts have enforced, except in the very limited circumstances delineated above, a general prohibition against the use of prior consistent statements.

III. PRIOR CONSISTENT STATEMENTS UNDER THE FEDERAL RULES OF EVIDENCE AND THE ALASKA RULES OF EVIDENCE

The promulgation of the Federal Rules of Evidence in 1975 marked a new period of development in the history of prior consistent statements. The Federal Rules of Evidence allow the admission of prior consistent statements in the federal courts as substantive evidence in both criminal and civil matters, as long as the evidence is relevant to rebut specified attacks upon the credibility of the in-court witness. In contrast to the common law, Federal Rule 801(d)(1)(B) classifies a prior consistent statement as "non-hearsay," thereby affording these statements the qualitative status of substantive evidence. Specifically, the Rule provides that a statement is not hearsay if:

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with this testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

The text of Federal Rule 801(d)(1)(B) has been interpreted to require three specific conditions to be met for the prior statement to be

32. Id. §§ 1123-1124.
33. Graham, Prior Consistent Statements, supra note 21, at 578.
34. Id.
37. Id.
38. Id. Considerable debate has arisen in the federal circuits as to the meaning of the terms "recent fabrication" and "improper influence or motive" within the Rule. For discussion of these issues, see S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 723 (1986).
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classified as non-hearsay. First, the declarant must testify at the trial and must be subject to cross-examination. Second, the testimony of the witness as to the prior statement must have been consistent with the declarant’s testimony as a witness. Third, the prior statement must have been offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Many courts have extrapolated a fourth requirement out of the language of rule 801(d)(1)(B), holding that the prior consistent statement must be made before the time that the suggested motive to falsify arose. The general argument for this fourth requirement is that any prior statement made after a motive to fabricate arose is cumulative in value, and is of no more value than the original recitation of the similar statement at trial. Specifically, courts in the Second, Seventh, Ninth, and District of Columbia Circuits have taken the position

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39. See Fed. R. Evid. 801(d)(1)(B). See also United States v. Strand, 547 F.2d 993 (9th Cir. 1978) (prior statements to disprove bribery charge held inadmissible under Rule 801(d)(1)(B) since the accused had not yet testified).

40. See Fed. R. Evid. Rule 801(d)(1)(B). See also United States v. Check, 582 F.2d 668 (2d Cir. 1978) (prior statement of unavailable witness to a narcotics sale held inadmissible since the in-court testimony was not consistent with prior testimony).

41. Federal Rule of Evidence 801(d)(1)(B) treats both express and implied impeachment of cross-examination similarly. For delineation of the distinction between the two terms, see Graham, Prior Consistent Statements, supra note 21, at 585-86.

42. The use of the word “recent” in Rule 801(d)(1)(B) is superfluous, as the fabrication implied on cross-examination exists in the jury's mind regardless of when the fabrication is determined to have crystallized in the witness' mind. See Graham, Prior Consistent Statements, supra note 21, at 582-83.

43. See Fed. R. Evid. 801(d)(1)(B). See also United States v. Lombardi, 550 F.2d 827 (2d Cir. 1977) (government allowed to show that its witness' in-court statement was credible through introduction of prior statement after defense called into question the validity and credibility of the in-court statement on cross-examination); United States v. Majors, 584 F.2d 110 (5th Cir. 1978) (prior statement allowed into evidence even where it constituted an effort to discredit declarant's testimony). For a discussion of the definition of the terms “improper influence” and “motive,” see Graham, Prior Consistent Statements, supra note 21, at 584-85.

44. See United States v. James, 609 F.2d 36, 49-50 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980) (a witness' grand jury testimony occurred before motive to fabricate story about defendant arose, thereby allowing admission of the prior statement made before the grand jury); United States v. Quinto, 582 F.2d 224, 232-34 (2d Cir. 1978) (reversal of conviction for tax evasion; the court stated that the “proponent must demonstrate that the prior consistent statement was made prior to the time that the supposed motive to falsify arose”).

45. See United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979) (rebuttal testimony not admissible where the prior statement did not predate the motive to fabricate); United States v. McPartlin, 595 F.2d 1321, 1351-52 (7th Cir. 1979) (rebuttal testimony of defendant's accountant that defendant earlier received bribe money was ruled inadmissible since it did not predate motive to fabricate).

46. United States v. Gualtnes, 790 F.2d 1327, 1384 (9th Cir. 1986) (citing United States v. Rohrer, 708 F.2d 429 (9th Cir. 1983)); United States v. DeCoito, 764 F.2d 690 (9th Cir. 1985) (citing Rohrer, 708 F.2d 429).
that a prior consistent statement made after the supposed motive to falsify arose is of no value, since it was subject to the same influences to falsify as the trial testimony. Courts in the Fourth,\textsuperscript{48} Fifth,\textsuperscript{49} Sixth,\textsuperscript{50} Seventh,\textsuperscript{51} Eighth,\textsuperscript{52} Tenth,\textsuperscript{53} and Eleventh\textsuperscript{54} Circuits, however, have admitted prior consistent statements without the limitation that they must have been made before the existence of a motive to fabricate. The First and Third Circuits have not decided the issue.

Nineteen states have adopted Federal Rule 801(d)(1)(B) verbatim.\textsuperscript{55} Arkansas has adopted the 1974 Uniform Rule, which is identical to the federal rule.\textsuperscript{56} Additionally, Hawaii,\textsuperscript{57} Maine,\textsuperscript{58} Montana,\textsuperscript{59} Nevada,\textsuperscript{60} and Oregon\textsuperscript{61} have enacted rules that are substantially similar to the federal rule. Thus, at least twenty-five states have enacted evidentiary rules that are similar to Federal Rule 801(d)(1)(B) in their description of a prior consistent statement. Furthermore, a number of

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  \item \textsuperscript{47} United States v. Sampole, 636 F.2d 621 (D.C. Cir. 1980).
  \item \textsuperscript{48} United States v. Parodi, 793 F.2d 768 (4th Cir. 1983).
  \item \textsuperscript{49} United States v. Parry, 649 F.2d 292 (5th Cir. 1981); United States v. Williams, 573 F.2d 284, 289 n.3 (5th Cir. 1978) (prior statement may be made to rebut charge of improper motive even though statement was made after alleged motive arose; statement used substantively).
  \item \textsuperscript{50} United States v. Hamilton, 689 F.2d 1262, 1273-74 (6th Cir. 1982), \textit{cert. denied}, 459 U.S. 1117 (1983) (rebuttal evidence allowed even where impeached prosecution witness could not be rehabilitated by evidence predating the implication of his motive to fabricate in order to gain plea bargain).
  \item \textsuperscript{51} United States v. Harris, 761 F.2d 394, 398-99 (7th Cir. 1985) (holding that prior statement is outside the scope of 801(d)(1)(B) because it was offered as "rehabilitative evidence;" thus, the fact that it did not predate motive to fabricate was considered irrelevant).
  \item \textsuperscript{52} United States v. Scholle, 553 F.2d 1109, 1121-22 (8th Cir.), \textit{cert. denied}, 434 U.S. 940 (1978) (holding that the requirement for prior statement to predate the motive to fabricate is an "unnecessary refinement").
  \item \textsuperscript{53} United States v. Rios, 611 F.2d 1335, 1349 (10th Cir. 1979), \textit{cert. denied}, 452 U.S. 918 (1981) (following \textit{Scholle}, 553 F.2d 1109).
  \item \textsuperscript{54} United States v. Anderson, 782 F.2d 908, 915-16 (11th Cir. 1986) (holding that a prior consistent statement is inadmissible merely because it was made after the declarant developed a motive to fabricate).
  \item \textsuperscript{55} See 4. J. \textsc{Weinstein} & M. \textsc{Berger}, \textsc{Weinstein's Evidence} § 801(d)(1)(B) [01] (1986 supplement). The nineteen states are: Alaska, Arizona, Colorado, Delaware, Florida, Iowa, Minnesota, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.
  \item \textsuperscript{56} \textsc{Ark. Stat. Ann.} § 28-1001 (1979); \textsc{Unif. R. Evid.} 801(d)(1)(B) (amended 1974).
  \item \textsuperscript{57} \textsc{Haw. R. Evid.} 802.1(2).
  \item \textsuperscript{58} \textsc{Maine R. Evid.} 801(d)(1)(B).
  \item \textsuperscript{59} \textsc{Mont. R. Evid.} 801(d)(1)(B).
  \item \textsuperscript{60} \textsc{Nev. Rev. Stat.} § 51.035(1)(B) (1986).
  \item \textsuperscript{61} \textsc{Ore. R. Evid.} 801(4)(a)(B).
\end{itemize}
state courts, including those in Arizona, California, Maine, Michigan, Nevada, South Dakota, and Washington have held that the prior statement must have predated the motive to fabricate in order to be admitted into evidence on rebuttal.

Before the promulgation of the Alaska Rules of Evidence in 1979, courts in Alaska followed the traditional common law regarding the admission of prior consistent statements insofar as it admitted as substantive evidence prior statements that predated the motive to fabricate. The Alaska Supreme Court, in Buchanan v. State, stated the law in Alaska: "It is firmly established that if the credibility of a witness has been attacked on the basis that influence of others has altered her story, supporting evidence in the nature of prior consistent statements may then be introduced." Buchanan did not indicate, however, whether the motive to fabricate must have postdated the prior statement. Further, it remained unclear whether evidence of the prior statement would be admitted as "rehabilitative evidence" alone, and not as substantive evidence, if a motive to fabricate had existed before the making of the prior statement.

The commentators to the Alaska Rules of Evidence did not make clear whether the rules that they were endeavoring to enact were to be included within the traditional common law interpretation of the admission of prior consistent statements. The Alaska Rules of Evidence were effectuated in 1979. Alaska Rules of Evidence section

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64. See State v. Swain, 493 A.2d 1056, 1058-59 (Me. 1985).
70. 554 P.2d 1153.
71. Id. at 1157 (citing FED. R. EVID. 801(d)(1)(B)). In Buchanan the defendant appealed a conviction for commission of lewd and lascivious acts on a child. The court affirmed his conviction. Id. at 1167.
72. See discussion of "rehabilitative evidence," infra section II.
73. In Buchanan, the court cited Federal Rule of Evidence 801(d)(1)(B) seemingly as general support for the underlying requirements of reliability in prior consistent statements. 554 P.2d at 1157 n.9. Federal Rule 801(d)(1)(B) only allows into evidence a prior statement used substantively. There is no clear indication whether the court in Buchanan intended its citation of the Federal Rule to restrict Alaska solely to the strict interpretation of the text of 801(d)(1)(B), and thereby to exclude the possibility of a prior statement antedating a motive to fabricate coming in as "rehabilitative evidence" alone, rather than as substantive evidence.
74. ALASKA R. EVID. 801(d)(1)(B) commentary.
75. Alaska Supreme Court Order 364 (August 1, 1979).
801(d)(1)(B) adopted the language of its federal counterpart verbatim, and the commentary following the Alaska rule mirrors the commentary found in the federal rules. The Alaska Rules of Evidence commentary for section 801(d)(1)(B), as well as the Federal Rules commentary, states that "prior consistent statements have been admissible to rebut charges of recent fabrication or improper influence or motives, but not as substantive evidence." This statement, however, does not clarify whether the Alaska rules themselves were designed to fall within this rubric. In short, the Alaska rules commentary provides no more guidance than does the federal commentary as to whether the in-court testimony by a third party must postdate the prior statement in order for that prior statement to be admitted as evidence of any sort.

IV. THE NITZ DECISION

In Nitz v. State, the Alaska Court of Appeals held that evidence of a witness' prior statements consistent with his testimony may sometimes be relevant and admissible under Alaska Rule of Evidence 801(d)(1)(B) even if the statements were made after the witness' alleged motive to fabricate arose. The court's holding is very controversial. Furthermore, the decision rendered by the court in Nitz masks an attempt to grapple with the developing problem of the sexual assault of children through the use of supposedly uniform rules of evidence.

The court in Nitz revealed its underlying concerns in the very first sentence of its opinion: "In this case, we must determine the extent to which evidence of prior consistent statements may be admitted to bolster the testimony of the victim in a case involving the sexual abuse of a child." This statement reveals much about the overriding policy concerns preoccupying the judges when they considered the matter on appeal. A close reading of the opinion indicates that the court rejected the traditional approach to prior consistent statements at least partly because the offenses charged in the case involved sexual crimes against children, and not because of evidentiary reasoning considered apart from the factual background of the case.

A possible explanation for the Nitz court's decision to reinterpret the standard required for admission of prior statements is found in the frustratingly complex procedural history of the Nitz case itself. On
October 8, 1982, Richard Nitz was arrested for sexually molesting his stepdaughter, T.K.\textsuperscript{81} Nitz was charged by indictment on October 12, 1982, with six counts of lewd and lascivious acts toward children,\textsuperscript{82} four counts of sexual assault in the first degree,\textsuperscript{83} and two counts of sexual abuse of a minor.\textsuperscript{84} On December 23, 1982, Nitz moved to dismiss the indictment, contending that the prosecution had failed to present exculpatory evidence to the grand jury.\textsuperscript{85} The motion to dismiss was granted on January 18, 1983, but two days later Nitz was reindicted.\textsuperscript{86} The second indictment was also subsequently dismissed, because the state had improperly presented hearsay evidence to the grand jury.\textsuperscript{87} After considering and rejecting the option of seeking appellate review of the second dismissal, the state indicted Nitz for the third time. The third indictment was also dismissed on the ground that Nitz had not been properly indicted within the 120 day speedy trial requirement.\textsuperscript{88} On appeal, the Alaska Court of Appeals concluded that Nitz's third indictment should not have been dismissed and reversed the superior court's order of dismissal.\textsuperscript{89} The case was remanded to the superior court on June 26, 1984.\textsuperscript{90} The almost two years that passed between Nitz's first indictment and his trial may have provided an impetus for the court of appeals to decide the case as it did.

Eventually, Nitz was convicted by a jury of four counts of lewd and lascivious acts toward children,\textsuperscript{91} three counts of sexual assault in the first degree,\textsuperscript{92} and two counts of sexual abuse of a minor.\textsuperscript{93} He was sentenced to a total of twenty-two years of imprisonment.\textsuperscript{94} Nitz had been charged with committing a series of sexual assaults upon his stepdaughter, T.K., including fondling her breasts and vagina, and engaging in acts of fellatio and cunnilingus with her. The assaults allegedly began when she was seven years old and ended when she was eleven years old.\textsuperscript{95} These incidents first came to light when a neighbor, Paula

\textsuperscript{82} ALASKA STAT. § 11.15.134 (repealed 1978).
\textsuperscript{83} ALASKA STAT. § 11.41.410(a)(4) (repealed 1983).
\textsuperscript{84} ALASKA STAT. § 11.41.440(a)(2) (repealed 1983).
\textsuperscript{85} Nitz, 684 P.2d at 136.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id; see ALASKA R. CRIM. P. 45.
\textsuperscript{90} Id.
\textsuperscript{91} ALASKA STAT. § 11.15.134 (repealed 1978).
\textsuperscript{92} Id. § 11.41.410(a)(4) (repealed 1983).
\textsuperscript{93} Id. § 11.41.440(a)(2) (repealed 1983).
\textsuperscript{94} Brief for Appellant supra note 89, at 9.
\textsuperscript{95} Nitz, 720 P.2d at 58.
Hall, noticed the irregular behavior of T.K.. Hall reported her suspicions to Dorothy Nitz, T.K.'s mother. When Dorothy Nitz finally approached her daughter and asked whether "daddy [had] been bothering [her]," T.K. allegedly replied in the affirmative.96

Over the next several months numerous people questioned T.K. about her father's behavior toward her, including an Anchorage police officer, an employee of the Alaska Division of Family and Youth Services, and a psychiatrist. She was removed from her home two days after Nitz was arrested. According to the trial court's findings of fact, T.K. provided during the two days after her removal from the home only a "sketchy" description of what had happened to her.97 It took four months of meetings with police representatives and with her child psychiatrist before T.K. provided more complete descriptions of Nitz's alleged behavior toward her.98

As part of its analysis of the potential admissibility of prior consistent statements, the Nitz court attempted to draw a distinction between "rehabilitative" evidence and "substantive" evidence. In the court's view, so-called rehabilitative evidence, or evidence offered "solely to rehabilitate a witness,"99 differs in quality from so-called substantive evidence, which is admitted "as evidence of the matters asserted in . . . [certain] . . . statements."100 The distinction drawn by Nitz is its determination that Alaska Rule of Evidence 801(d)(1)(B) permits the use of rehabilitative evidence at the discretion of the court, even where a motive to falsely testify has previously arisen in testimony. This distinction between the two "types" of evidence misconstrues the actual differences between these evidentiary terms, and consequently undervalues the misuse of such evidence.

Substantive evidence is evidence of matters directly asserted in the proffered statements. By way of example, assume that witness Jones testifies that he heard defendant Smith state that he intended to rob the local supermarket. This statement is substantive when it is interpreted by the jury to tend to prove that Smith actually intended to rob the supermarket. Such evidence, interpreted substantively, would be damning to Smith in a case in which he was charged with robbing the supermarket. Non-substantive evidence, however, would allow a jury to interpret this scenario to mean only that Jones believed that he heard Smith make the statement of intent to rob the store. The distinction between these two terms is qualitative in import. The value

96. Id.
97. Id. at 59.
98. Id.
99. Id. at 66 (citing United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985)).
100. Id.
attached to Jones' testimony assumes markedly different dimensions depending on which quality of evidence is attached to that testimony.

The term "rehabilitative evidence" is not precisely defined in any evidentiary treatise. The logical conclusion, however, is that the term "rehabilitative" does not refer to the quality of the evidence, but to the point in time at which it comes into evidence. When Nitz states that rehabilitative evidence is offered "for the limited purpose of rehabilitating the testimony of the impeached witness,"\textsuperscript{101} the court of appeals implicitly recognizes the temporal significance of such evidence. The need to rehabilitate a witness logically arises only after that witness' veracity is brought into question through adverse evidence. Theoretically, rehabilitative evidence could fall within either the substantive or non-substantive category; there simply is nothing about the appendage "rehabilitative" to the word "evidence" which indicates the import that is to be given to that evidence.

Brought to a less theoretical level, the Nitz distinction between substantive evidence and rehabilitative evidence ignores the fact that juries are unable to detect the difference between the terms "rehabilitative" and "substantive." One of the Nitz requirements is that the judge must instruct the jury that any prior consistent statement which was originally made after a motive to fabricate arose, is entered into evidence for the "limited purpose of determining the credibility of the declarant's trial testimony . . . [and not] . . . directly as proof that the matters asserted in it are true."\textsuperscript{102} Superficially, this warning provides an adequate explanation to assure that the jury does not overrate the qualitative import of such testimony. However, two problems exist in the application of the Nitz limiting instruction.

First, it is not at all clear that a jury is capable of understanding the distinction between rehabilitative evidence and substantive evidence. This problem raises the question of whether limiting instructions generally are a valuable tool for directing a jury to consider evidence only for a particular purpose. The general argument made favoring the use of limiting instructions is based on little more than an instinctive faith—by judges and others—that such instructions are understandable to the jury. In contrast, the argument against the use of limiting instructions is based upon years of empirical research, the sum of which indicates that limiting instructions actually serve to sensitize the jury to the evidence which it is being asked not to consider.\textsuperscript{103} Thus, the instruction required by Nitz, informing the jury

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\item \textit{Id.}
\item \textit{Id.} at 68.
\item The University of Chicago Jury Project used experimental juries, intensive jury interviews, and statistical data to test various hypotheses in an attempt to uncover the mysteries of the jury process. In its study of jurors' ability to follow limiting
\end{enumerate}
\end{footnotesize}
that the prior consistent statements which it hears are admissible only to “rehabilitate” the veracity of the victim, most probably will serve to highlight for the jury the potential for considering such evidence as proof that the victim’s recollection is itself the truth.

Additionally, even if it is assumed that jurors are capable of understanding the purported distinction between substantive and rehabilitative evidence, there is no indication that the jury will choose to rely upon such evidence only for the instructed purpose. Given the potential prejudice that can arise from such a scenario, the Nitz limiting instruction requirement, though facially adequate, is in fact wholly unreliable for ensuring that the jury properly weights such evidence.

The unjustified reliance on a limiting instruction to aid a jury in distinguishing between substantive and rehabilitative evidence seemingly has been furthered by the court of appeals recently in Nusunginya v. State. In Nusunginya, the court of appeals affirmed the conviction of the defendant, Thomas Nusunginya, who was charged with sexually assaulting his daughter, C.N. Nusunginya was charged with raping C.N., who reported the rape to her ten-year-old cousin two or three days later, and to her aunt four or five days after the incident occurred.

The court of appeals found that C.N.’s cousin had properly been allowed to testify about the report of rape that C.N. made to her, as a Greenway prompt complaint. Additionally, the court found that both C.N.’s cousin’s testimony and her aunt’s testimony about her report of rape were admissible under Alaska Rule of Evidence 801(d)(1)(B) as prior consistent statements. The first three Nitz criteria for admission of the statements were met in Nusunginya. The fourth requirement, however, that the trial court instruct the jury that

instructions, the Chicago researchers found that only one of 18 persons interviewed remembered the judge’s instruction well enough to follow it. See Hoffman & Bradley, Jurors on Trial, 17 Mo. L. Rev. 235 (1952). The authors of the study concluded that their study demonstrated “the wisdom of trial lawyers who fight hard to get a particular piece of evidence before the jury, even though they know the judge is going to strike it out.” See Note, Limiting Instruction—Its Effectiveness and Effect, 51 Minn. L. Rev. 264, 266 (1966). This evidence complements the experience of many learned jurists and scholars who have entertained no doubt that limiting instructions are useless, and act as a “judicial placebo.” See, e.g., United States v. Grunewald, 233 F.2d 574 (2d. Cir. 1956) (in which the definition of placebo as a “medicinal lie” was compared to its legal equivalent, “a judicial lie”).

105. Nusunginya was convicted pursuant to ALASKA STAT. § 11.41.434(a)(2)(B) (1983).
107. Id.
108. Id. at 174.
109. Id.
the prior consistent statements could only be considered for the limited purpose of evaluating the witness' credibility, was not met. The court of appeals recognized this omission and nonetheless found the absence of a limiting instruction to be "harmless under the circumstance of . . . [the] . . . case."110 The court of appeals' determination that the fourth Nitz criterion of a limiting instruction was not necessary to admit prior consistent statements reveals that court's retrenchment from an already questionable standard of protection for defendants. Furthermore, it seems to indicate that the court's actions were shaped to fit the facts of the case in a result-oriented fashion.

The court correctly recognized that since Nitz had not been decided after Nusunginya went to trial, the Nitz requirement of a limiting instruction was unnecessary.111 Notably, however, the court of appeals provided two other lines of analysis for justifying its decision. First, it focused on the fact that Nusunginya's attorney requested a limiting instruction after his objection to the admission of the two prior consistent statements was overruled.112 While this analysis arguably is dicta, the court's observation implies that the requirement of a limiting instruction is in fact not a requirement at all, but rather is a privilege that will only reluctantly be granted upon request. Taken a step further, the court of appeals' mention of the defense's failure to request a limiting instruction implies that none of the Nitz requirements are strictly necessary.

This interpretation is supported by the court of appeals' second dicta argument in Nusunginya, that the limiting instruction was unnecessary because the facts of the case, taken in concert, did not require the fulfillment of all the Nitz requirements. The court of appeals in Nusunginya delved into a comparison of the facts in Nitz and Nusunginya, and concluded that "[t]he circumstances of . . . [Nusunginya] . . . do not give rise to the same concerns that led to reversal in . . . [Nitz]."113 The court stated that in Nitz the fear was that "the jury might well be apt to lose sight of the need to base its verdict on the credibility of the victim's testimony."114 The very same potential for confusing the jury about the value and importance of the prior consistent statements existed in Nusunginya, however, and this danger was furthered by the lack of a limiting instruction. As a result, the requirement in Nitz of a limiting instruction seemingly has been transformed into one of four criteria which the court can weigh in concert and in any manner of its choosing when considering the admission of prior

110. Id.
111. Id. at 175.
112. Id.
113. Id.
114. Id.
consistent statements.\textsuperscript{115} Any test that involves a series of "criteria" which are to be considered as a whole is far easier to meet than the stricter test where each step in a four-part requirement must be independently met. Thus, the court of appeals in \textit{Nusunginya} seems to have abandoned the purported concern that hearsay evidence be used only sparingly against defendants. In short, the court of appeals has engaged in a result-oriented retrenchment from safeguards it had established only one year earlier, thereby valuing the conviction of a "bad guy" over judicial precedent.

In \textit{Nitz} the court of appeals considered the application of the prompt complaint doctrine as an alternative theoretical basis for admission of T.K.'s report to her neighbor, Paula Hall, that she had been sexually abused by her father. The analysis of the court's use of the prompt complaint further reveals the result-oriented nature of its concerns. Furthermore, the foregoing analysis brings into question whether the Alaska courts have the authority to establish a prompt complaint doctrine, since one does not exist in the Alaska Rules of Evidence. Before considering the \textit{Nitz} court's treatment of prompt complaints, however, it is appropriate to review the common law history of that doctrine.

V. THE PROMPT COMPLAINT DOCTRINE

At common law, testimony that the victim promptly complained of being sexually abused against her will was admissible as evidence. A statement of prompt complaint, often called fresh complaint, was most frequently admitted in rape prosecutions.\textsuperscript{116} This theory allowed rape complaints to be admitted as evidence to corroborate the victim's testimony in order to negate an inference of silence inconsistent with the victim's story.\textsuperscript{117} The doctrine's underlying rationale was that if the victim remained silent, it might be assumed that the rape never happened. With prompt complaint testimony, the jury might infer

\textsuperscript{115} \textit{Nitz} v. State states that "the court . . . \textit{must} instruct the jury that the statement . . . should be considered for the limited purpose of determining the credibility of the declarant's trial testimony . . . ." 720 P.2d 55, 68 (Alaska Ct. App. 1986) (emphasis added).


that the victim’s silence was the result of fear or shame through the
evidence of the prompt complaint.118 Early English common law re-
quired a showing that the victim raised the “hue and cry,” which was
a general alarming of the neighborhood, in all cases of violent crimes,
including sexual offenses.119 Such complaints were considered part of
the necessary corroboration of the case. Since the hue and cry concept
came into existence before the rules against hearsay, testimony that an
alleged victim of sexual abuse made a prompt complaint, and testi-
mony by a third party identifying the assailant were unobjectionable.
Additionally, any person who heard the complaint could testify not
only to the fact of the complaint, but also to what the victim said.120

Through the centuries, courts gradually removed the burden of
showing hue and cry for crimes of violence. The victim’s initial com-
plaint, and details of the offense, however, continued to be admitted
into evidence. As the rule against hearsay developed, English courts
began to hold that the details of the complaint were inadmissible be-
because the witness was not under oath nor subject to the pressures of
cross-examination when the complaint was first made.121 By the time
the common law rules of evidence were being applied in the American
colonies, the details of the complaint, including the name of the assail-
ant, were considered inadmissible hearsay. Only the fact of the com-
plaint was automatically admissible, and the details of the complaint
were admitted only upon satisfaction of the excited utterance
requirements.122

Although the doctrine of hue and cry disappeared long ago as an
element of the prosecution’s case, its rationale continues to support the
admissibility of some prompt complaints.123 Courts employ three dif-
ferent theories to support admission of the complaint. One theory rea-
sons that the complaint should be admissible because the inference of
recent fabrication of the charge will solidify if there is no testimony of
a prompt complaint.124 A second theory admits the complaint as a
prior consistent statement which will corroborate the testimony of the
prosecuting witness, so long as the witness’ testimony has been prop-
erly impeached on cross-examination.125 The third theory admits the

118. See 4 J. Wigmore, supra note 3, § 1135.
119. See Graham, The Prompt Complaint Doctrine, supra note 12, at 491; see gen-
erally 4 J. Wigmore, supra note 3, §§ 1134-1135, 1760-1761.
120. Graham, The Prompt Complaint Doctrine, supra note 12, at 491.
121. Id. at 491-92.
122. Id. at 492.
123. Id. In the State of Washington the prompt complaint doctrine is still called
124. Graham, The Prompt Complaint Doctrine, supra note 12, at 489-90; see also 4 J.
Wigmore, supra note 3, § 1135.
statement of complaint if it meets the requirements of the hearsay exception for an excited utterance. Each of these theories is distinct. Consequently, different requirements and limitations apply to the evidence of prompt complaint, depending on which of the three theories supports admission of the evidence. Nevertheless, courts often confuse the theories, or conflate their requirements into single interpretations, resulting in confusing and contrary rulings.

The Federal Rules of Evidence have no provision for the admission of testimony that the victim made a prompt complaint of sexual abuse. Since sexual abuse issues rarely arise in federal court, this omission is not surprising. In many states, however, prosecutors have urged the adoption of a prompt complaint doctrine under one of the three theories delineated above. Thus, courts in states that have adopted evidentiary rules based upon the Federal Rules of Evidence have been required to determine the admissibility of statements of prompt complaint when the applicable rules are silent on the subject. Since the Federal Rules of Evidence do not provide a specific hearsay exception for third party recitation of prompt complaint, however, the trial courts in jurisdictions adopting evidence codes modeled on the Federal Rules lack specific authority to admit such statements as substantive evidence.

In Greenway v. State, the Alaska Supreme Court considered the existence of the prompt complaint doctrine in light of the Alaska Rules of Evidence. Harold Greenway was convicted of raping his thirteen-year-old stepdaughter. The rape occurred in July, 1978, near Greenway's summer fishing camp on the banks of the Yukon River. According to the complainant, Greenway threatened to kill her if she told anyone about the rape, and so she told no one other than her

126. Id.; 4 J. Wigmore, supra note 3, §§ 1134, 1139. See also supra note 98.
127. Graham, The Prompt Complaint Doctrine, supra note 12, at 490; see, e.g., People v. Taylor, 66 Mich. App. 456, 461, 239 N.W. 2d 627, 630 (1976). The court discussed all three theories, and then upheld the admission of hearsay testimony made three weeks after the indictment and "corroborating the details of the alleged statutory rape" under the theory of res gestae. Id. Under none of its three theoretical bases does the prompt complaint doctrine call for corroboration of details. Id. See also Fitzgerald v. United States, 412 A.2d 1, 9-10 (D.C. Cir. 1980) (confusing the prompt complaint doctrine with the requirement of corroboration, and viewing the complaint as the means to rehabilitate the complaining witness' testimony).
129. Id.
130. Id. at 509.
mother. In September she reported the rape to her school counselor.

At trial the state, over Greenway's objection, presented testimony by the complainant's school counselor concerning her complaints of rape. Greenway contended on appeal that the trial court's failure to exclude this testimony as inadmissible hearsay constituted reversible error. The state contended that the statements in question were admissible under the special hearsay exception concerning complaints of the victim, which was recognized in Torres v. State. Torres, decided before the promulgation of the Alaska Rules of Evidence, held that "statements concerning the crime of rape or sexual assault, shortly after the commission of the act are admissible as a recognized exception to the hearsay rule." The Greenway court found that the "shortly after" time constraint required in Torres extended to the two month period between the commission of the act and the first complaint, citing authority that allowed even a nine month period between the act and the "prompt" complaint.

The Alaska Supreme Court affirmed the substantive admissibility of the prompt complaint as a common law hearsay exception, recognizing that the Alaska Rules of Evidence were not yet in effect at the time of Greenway's trial. The court noted that Rule 803 of the Alaska Rules of Evidence has no such hearsay exception for a prompt complaint. It stated that "[t]his omission, however, was more in the nature of an oversight on our part and not a repudiation of Torres; we shall refer the question of whether the rules should be amended to include the exceptions noted in Torres to our standing committee on the Evidence Rules."

132. There was conflicting testimony presented as to whether the victim actually told her mother of the rape. The victim testified that she told her mother of the rape three days after it happened, but her mother interpreted the incident differently, and denied that she knew of the rape until after her daughter's school counselor discussed it with her in September. See Greenway, 626 P.2d at 1060 n.1.
133. Id. at 1060.
134. Id.
135. Id. at 1060-61.
136. Id.
137. 519 P.2d 788 (Alaska 1974).
138. Id. at 793 n.9 (quoting 2 F. Wharton, Criminal Evidence § 313 (C. Torcia 13th ed. 1972)).
139. Greenway, 626 P.2d at 1061 (citing Hunt v. State, 44 Ala. App. 479, 213 So. 2d 664, cert. denied, 282 Ala. 727, 213 So. 2d 666 (Ala. 1968)).
140. Id. at 1061 n.3.
141. Id.
142. Id.
VI. PROMPT COMPLAINT DOCTRINE UNDER NITZ AND ITS PROGENY

In Nitz v. State, the court of appeals was faced with determining whether the prompt complaint doctrine established in Greenway continued in effect after the rules of evidence were enacted. The defendant argued that no such doctrine had been established in Greenway, since the question was referred by the Greenway court to the standing committee on the rules of evidence and no such amendment had subsequently been made to the Alaska rules. The Nitz court was unconvinced by this reasoning, however, and instead chose to interpret Greenway to indicate the Alaska Supreme Court's creation of a rule of evidence. This decision marked a display of authority which arguably neither the Alaska Supreme Court nor the court of appeals technically possesses. The Nitz court "buttressed" its argument by citing Contreras v. State, which was read to support the survival of Greenway as a "pre-existing rule" to the adoption of the rules of evidence. Contreras recognized, however, that the Greenway court had referred to the standing committee on the evidentiary rules to determine whether the prompt complaint doctrine survived the enactment of the Alaska Rules of Evidence. The logic of leaving the establishment of rules of evidence to the legislature is based not only on technical separation of powers considerations, but on practical concerns about ensuring that there be one final arbiter in creating a new rule. The Nitz court read previous common law with a highly prejudiced eye towards achieving a specific result: the establishment of a prompt complaint doctrine.

The problem with Nitz's prejudiced interpretation of Greenway is heightened considerably by the fact that the opinion did not adequately delineate the scope of the prompt complaint doctrine. The problematical nature of determining what statements fit within the rubric of prompt complaint is best revealed in the court's confusing analysis of the hearsay statements T.K. made to others that the court found admissible under Greenway. In his appellate brief Nitz argued that the hearsay testimony provided by the five individuals who allegedly were told about the assault was not at all "fresh" or "prompt."

The testimony admitted in Nitz's trial provided the details of T.K.'s

143. Brief for Appellant, supra note 89, at 18.
146. Nitz, 720 P.2d at 62 (citing Contreras, 718 P.2d at 136).
147. Contreras, 718 P.2d at 136 n.21. Contreras determined, inter alia, that the test for the admission of expert testimony obtained through a scientific technique which was established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), commonly known as the "Frye test," survived the enactment of the Alaska Rules of Evidence. Contreras, 718 P.2d at 134.
reports, the name of the assailant, and detailed renditions of the place and type of sexual assault. Paula Hall’s testimony provides a compelling example of the degree of detail that the court allowed in her rendition of the prompt complaint: “She said he would make her put his noodle in her mouth, all of their clothes came off as soon as mommy left, and what else did she say. She did say that he had tried to put his noodle in her and it hurt so bad that she bit him and he slapped her in the face.”

The Nitz court found that this statement, among others conveyed by Paula Hall at trial, was admissible under the prompt complaint doctrine. The confusing language of the Nitz opinion makes it difficult to understand whether the court actually considered the admission of details such as the ones stated by Paula Hall to be permissible. At one point, the Nitz court states:

> because the doctrine is founded on the assumption that evidence of the victim’s first complaint is necessary to counteract the inference of silence that might otherwise be drawn, such evidence has traditionally been limited to proof of the fact that a complaint was made. Details of the victim’s first report, including the identity of the assailant, have not generally been considered admissible.

The Nitz court’s holding, however, directly contradicts its reasoning for limiting the scope of prompt complaint doctrine:

> In our view, however, these circumstances . . . (surrounding Hall’s testimony) . . . did not render Paula Hall’s testimony concerning the first complaint inadmissible. We perceive little need for artificial limits on a witness’ account of the circumstances under which the victim’s initial report of sexual assault is made. The jury should generally be permitted to consider these circumstances in assessing the weight to be given to the prior statement.

The difficulty in reconciling the two statements made by the Nitz court is not lessened by further scrutiny. The court did not clarify precisely what it meant by the “circumstances” surrounding Paula Hall’s testimony which could permissibly be heard by the jury. Assuming a prompt complaint doctrine is properly created, it is sensible that the permissible circumstances of the encounter between T.K. and Paula Hall should include testimony about the location, date, and time of the conversation—the evidentiary foundations that procedurally allow the testimony be admitted in the first place—and not the details of the testimony. Allowing in only the fact of the complaint itself would not result in “artificial limits,” but would represent an effort to ensure

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149. Id.
150. Id. at 20 (citing transcript at 247).
151. Nitz, 720 P.2d at 62 (emphasis added).
that only the minimum of hearsay evidence is present to potentially prejudice the jury's qualitative reliance on testimony.

Moreover, the \textit{Nitz} decision provides no guidance on the maximum period of time that may transpire between the alleged assault and the first complaint in order for such hearsay testimony to be admissible under the prompt complaint theory. The court in \textit{Nitz} concluded that the period of time need only be "adequately explained,"\textsuperscript{152} without providing any guidance on how to determine the value of such explanations, or of how such explanatory facts are to come to be admitted into evidence.

Finally, \textit{Nitz} questions the value of concealing the identity of the assailant during the prompt complaint testimony. "Identity will seldom be an issue in . . . [child sexual assault cases], . . . and even the least astute of jurors will readily be capable of surmising that the victim's complaint was directed at the parent who has been charged with the offense."\textsuperscript{153} The assumption made by the court, that the identity of the assailant can be revealed since it is so obvious anyway, is unsupported by even a shred of empirical evidence. This sort of reasoning further reveals the court's myopic, though well-intended focus solely on the facts at hand, since only the stepfather was charged in \textit{Nitz}. Presumably, in other cases more than one person could be charged with sexual assault, and identity might be a central issue in the case.

The court of appeals has considered the application of the prompt complaint doctrine twice since the \textit{Nitz} opinion, first in \textit{Vandiver v. State},\textsuperscript{154} and then in \textit{Nusunginya v. State}.\textsuperscript{155} In \textit{Vandiver}, the defendant appealed his conviction for sexually abusing and assaulting his fourteen-year-old daughter, J.C.\textsuperscript{156} J.C. had made a complaint to a social worker, Ford, shortly after one of the occasions of sexual abuse. At trial, Vandiver asserted that J.C. acted out of revenge for being "grounded" by him, and J.C.'s mother corroborated the assertion that J.C. had earlier fabricated allegations to "get her way."\textsuperscript{157}

The court of appeals reversed Vandiver's convictions, basing its reversal on the impropriety of admitting evidence of J.C.'s statements to Ford as a prompt complaint,\textsuperscript{158} and because Vandiver's prior conviction was impermissibly mentioned at trial.\textsuperscript{159} The court expressed its disapproval for the application of the prompt complaint doctrine in cases where consent is not an issue, which includes child sexual assault

\textsuperscript{152} \textit{Nitz}, 720 P.2d at 63.
\textsuperscript{153} \textit{Id}.
\textsuperscript{156} \textit{Vandiver}, 726 P.2d at 96.
\textsuperscript{157} \textit{Id}.
\textsuperscript{158} \textit{Id}.
\textsuperscript{159} \textit{Id}.
cases. The Vandiver court stated: "Where, as here, consent is not in issue and the defendant's theory of defense implicitly concedes that no inferences may be drawn from post-incident silence . . . the trial court erred in admitting J.C.'s statement to Ford as a prompt complaint." 

Thus, Vandiver appeared to have limited the use of the prompt complaint doctrine to cases in which consent is an essential element in the proof of the crime. Since consent is not normally an essential element of proof in establishing a child sexual assault case, a logical extension of Vandiver's limitation of the use of prompt complaints makes the doctrine inapplicable to all child sexual assault cases.

In Nusunginya v. State, decided only one month after Vandiver, the court of appeals inexplicably added a further layer of confusion to the prompt complaint doctrine. In Nusunginya, the trial court had permitted the victim's neighbor, Donna Long, to testify about acts that the victim told Long had been perpetrated against her by the defendant. Long was permitted to go beyond the fact that the complaint was made, and was allowed to describe some of the details of the victim's statement. The court of appeals upheld the convictions, finding that "Long's testimony helped provide a context in which the complaint could be viewed." The court's use of the term "context" is difficult to understand, as the facts of the victim's complaint to Long are details, and are not a contextual framework at all. The "context" of the testimony logically should involve information about when and where the complaint was made, not a description of what details were told. The use of the term "context" apparently was little more than a linguistic ruse for the admission of details declared when a prompt complaint was made.

Additionally, Nusunginya confusingly focused on the Vandiver warning against the admission of prompt complaints when they would not serve to counter an implication of consent. The court of appeals attempted to distinguish Nusunginya from Vandiver, stating that unlike Nusunginya, "in Vandiver the accused relied on a defense that was implicitly inconsistent with the rationale that supports admission of first complaint evidence." Presumably, the Nusunginya court

160. Id. at 201.
161. None of the Alaska criminal statutes defining sexual abuse of a minor includes the requirement of consent in order to obtain a conviction under the statute. See Alaska Stat. § 11.41.434 (1983) (sexual abuse of a minor in the first degree); id. § 11.41.436 (1983) (sexual abuse of a minor in the second degree); id. § 11.41.438 (1983) (sexual abuse of a minor in the third degree); id. § 11.41.440 (1983) (sexual abuse of a minor in the fourth degree).
163. Id. at 173.
164. Id. at 174.
165. Id. at 174 n.1.
meant by this statement that in the present case, the accused did rely on a defense of consent, thereby rendering the prompt complaint doctrine applicable in order to counter the implication of consent. This analysis focuses on whether a consent defense has been raised as the determining factor in a case in which the applicable child sexual assault statutes neither mention consent as an essential element of the offense, nor as a defense. In short, the Nusunginya court identifies the raising of an irrelevant defense as the triggering mechanism for admission of a prompt complaint.

VII. CONCLUSION

It is clear from both the Nitz opinion and from its progeny that the court of appeals is genuinely concerned with providing innovative methods for the admission of hearsay statements of child sexual assault victims. The Nitz court correctly observed that the victims of child abuse, due to their immaturity, inarticulateness, and propensity for becoming confused are less than ideal witnesses. Furthermore, as there are only rare situations where a witness to the sexual assault exists, the issue of guilt or innocence almost invariably comes down to a swearing match between the child victim and the adult defendant. Recent public outcries for action to be taken against a perceived rising tide of child molesters served additionally to pressure the court of appeals to reconsider the evidentiary safeguards for defendants.

Militating against the pressures for relaxation of the evidentiary rules, however, are two concerns. First, there exists a longstanding policy of protecting the accused from unfair prejudice. To quote Nitz:

Where a case hinges on the credibility of a single witness who is an inarticulate child, it can be fundamentally unfair to allow the bulk of a child's testimony to be presented through a parade of articulate, experienced, adult witnesses who impart to the child's statements the mature eloquence of adulthood and a sense of their own credibility, while adding nothing of substance but the force of repetition.

Second, there exists a necessity for respecting the uniform applicability of the evidentiary rules. For the Alaska Rules of Evidence to function effectively, they must be applied evenly. The particular circumstances of a case, even one so urgent in content as a child sexual assault case, should not affect the manner in which the evidentiary rules are applied.

The Nitz decision, however, apparently applies a result-oriented exception to the generally understood notion that prior consistent statements must predate the motive to fabricate. In its zeal to deal

167. Id. at 61.
with the evidentiary problems that arise in child sexual assault cases, the court of appeals has "used" a rule designed for uniform application to meet its specific ends. While the intentions of the court may be worthy, the result is potentially debilitating to the integrity of the rules themselves. Seemingly, the court has not considered how it will react, or how other Alaska courts should respond, if its reinterpretation of the requirements of 801(d)(1)(B) are met by a litigant in, for example, a non-child sexual assault criminal case, or in a civil matter.

Thus, the Alaska Supreme Court should utilize the first opportunity that arises to overturn the *Nitz* interpretation of evidentiary rule 801(d)(1)(B). Such a ruling will serve not only to protect the rights of accused child molesters, but of all defendants to whom the Alaska Rules of Evidence apply. The integrity of the rules must be maintained not merely out of some academic sense of balance, but in order to indicate both to judges and litigants that the codification of such rules actually requires their uniform application.

The *Nitz* application of the prompt complaint doctrine, and the confusing development of that doctrine in *Vandiver* and *Nusunginya*, also arose from the court of appeals' desire to tackle the perceived child sexual assault problem in Alaska. As was argued earlier in this note, the court of appeals relied upon the supreme court's indication in *Greenway* that the judiciary in Alaska was empowered to carve out at will exceptions to the rules of evidence. The strictly legalistic problem arising from such a judicial usurpation of legislative power should be considered by the supreme court and the court of appeals. Moreover, the integrity of the rules of evidence is challenged by the "development" of this prompt complaint doctrine, just as it is by the reinterpretation of the *Nitz* prior consistent statement requirements. These considerations provide reason enough to demand reversal of the prompt complaint doctrine as applied in Alaska.

The problem of admitting a child's prompt complaint of sexual assault into evidence still exists, however. Thus, it is suggested that the Alaska legislature add an exception to the rule against hearsay that would allow the out-of-court statement of prompt complaint by a child victim of sexual abuse under the age of ten to be admitted at trial, so long as the testimony is strictly limited to the existence of the complaint, and the time and place where it was made. The prohibition against going into the details of the complaint should only be dropped when the defendant opens the door to the admission of such information on cross-examination.

Such an amendment to the rules of evidence will have the effect of providing a legitimate, legislatively mandated, and *minimally intrusive* diminution of child sexual assault defendants' right not to be
prejudiced by hearsay evidence. While from a purely academic perspective the creation of such an exception might not be justified, its existence will at least ensure that the doctrine recently applied in Nitz and its progeny is reasonably limited in scope. Moreover, it will send a signal to the Alaska courts that the legislature is aware of the problems attendant upon child sexual assault prosecutions, thereby removing the temptation to skew the rules of evidence, and diminish the value that exists in their ability to establish uniformity in the evidentiary procedures.

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