PRIOR INCONSISTENT STATEMENTS AS AN EXCEPTION TO THE HEARSAY RULE: AN ANALYSIS OF *PEOPLE v. JOHNSON*

In February 1964, Edwin Johnson was indicted by the Yolo County Grand Jury for the crime of incest.[1] The twofold basis of the indictment lay in the testimony of his 15-year-old daughter, Elaine, who stated that he had engaged in an act of sexual intercourse with her on January 11, 1964; and in the testimony of his wife, Eleanor, who claimed that she had observed occasions of sex play between her husband and daughter. At trial in January 1967,[2] however, both witnesses denied that defendant had engaged in any illicit sexual relations with Elaine. To negate these denials, the prosecution, utilizing section 1235 of the California Evidence Code,[3] introduced as substantive evidence the prior statements of Elaine and Mrs. Johnson before the grand jury. Although Elaine Johnson's prior testimony constituted the only evidence of the alleged criminal act, and Mrs. Johnson's prior statement the only supporting evidence, the defendant was found guilty. The California District Court of Appeals affirmed the conviction. On appeal to the Supreme Court of California, *held,* reversed: The admission of a witness' prior inconsistent statements for their substantive value in criminal cases violates the defendant's sixth amendment right of confrontation. *People v. Johnson,* 68 Adv. Cal. 674, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).

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1. CAL. PENAL CODE § 285 (West 1955).

2. Defendant entered a plea of guilty and was sentenced. The United States District Court set aside the conviction on the constitutional ground of inadequate representation by counsel. Defendant was rearraigned on January 24, 1967.

3. CAL. EVID. CODE § 1235 (West 1965).

INCONSISTENT STATEMENT. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

CAL. EVID. CODE § 770 (West 1965).

EVIDENCE OF INCONSISTENT STATEMENT OF WITNESS. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: (a) The witness was examined as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action.

I. Prior Inconsistent Statements and The Hearsay Rule: Adequacy of Cross-Examination, Necessity, and Reliability

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."[4] The reasons underlying the exclusionary rule's requirement that the witness be present in court are as follows: (1) The testimony is made under oath, which encourages truthfulness; (2) the demeanor of the witness can be observed by the jury, which aids in assessing his credibility; and (3) the right to cross-examine opposing witnesses is protected.[5] While the oath and demeanor aspects are important, they are not essential;[6] it is the right of cross-examination that is paramount.[7] The purpose of cross-examination is to extract from the witness any qualifying circumstances left undeveloped by the direct examination and thereby examine the full scope of his perception, memory, and motive for testifying.[8] In this way, the surrounding circumstances of the testimony are presented to the jury in the most complete form for the determination of the truth.

Although admissible for impeachment purposes,[9] prior inconsistent statements have traditionally been excluded as substantive evidence.[10] Legal scholars have argued, however, that the objections to hearsay evidence are inappropriate in this instance and have advocated the admissibility of prior inconsistent statements as an exception to the hearsay rule.[11] Professor

4. CAL. EVID. CODE § 1200 (West 1965); This California statutory definition is an adoption of Professor McCormick's defnition. C. MCCORMICK, LAW OF EVIDENCE, § 230 at 480 (1954) [Hereinafter cited as MCCORMICK].

5. *See generally* MCCORMICK § 224.

6. 5 WIGMORE, EVIDENCE, § 1362 at 7 (3d ed. 1940) [Hereinafter cited as WIGMORE], (where it is stated that the oath is not essential but is merely a normal incident to cross-examination). *But cf.* Bridges v. Wixon, 326 U.S. 135 (1945); In Aquino v. Virgin Islands, 378 F.2d 540 (3d Cir. 1967), the United States Court of Appeals considered the significance of demeanor evidence and concluded that, although highly important, it is not essential.

7. 5 WIGMORE § 1397, at 130.

8. People v. Polack, 165 Cal. App. 2d 226, 331 P.2d 662 (1958); 5 WIGMORE § 1362, at 3.

9. 3 WIGMORE § 1018, at 687. Prior inconsistent statements offered for impeachment are not hearsay.

10. 3 WIGMORE § 1018, at 687 n.3.

11. MCCORMICK § 39; 3 WIGMORE § 1018; Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A.L. REV. 43, 49-55 (1954); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573 (1947); Morgan, *The Law of Evidence 1941-1945*, 59 HARV. L. REV. 481, 545-50 (1946). Professor Morgan argues that the traditional objections to hearsay are so completely satisfied that prior inconsistent

Wigmore suggested that the purpose of the hearsay rule would be satisfied since the declarant will be present in court and the adversary will have ample opportunity through cross-examination to require the witness to explain and clarify any discrepancies in his conflicting statements. Furthermore, his presence permits the adversary and the jury to observe his demeanor.[12]

Persuaded by this argument,[13] the California legislature in 1965 approved a statutory exception admitting prior inconsistent statements as substantive evidence. In the first test of its constitutionality, the California Supreme Court has held that section 1235 infringes upon a criminal defendant's sixth amendment right to cross-examination. The *Johnson* court found that the proponents of the exception had failed to recognize the critical importance of immediate cross-examination.[14]

The concept of immediacy of cross-examination has traditionally referred to the trial procedure of permitting cross-examination to follow the witness' direct testimony before he is excused from the stand. This procedural safeguard serves two distinct purposes: (1) It offers an adversary the opportunity to impeach the credibility of a witness and to pinpoint any inaccuracies or untruths in his statements on direct examination before they become entrenched in the minds of the jury;[15] (2) it avoids the possibility that a delay in cross-examination will allow the witness to reconsider his testimony, will render him susceptible to the influence of interested parties, or will strengthen his adherence to a fallacious or erroneous version of the transaction or event in question.[16] The *Johnson* court alluded to these criteria in

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statements are not hearsay. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 196 (1948); *see* United States v. Murray, 297 F.2d 812, 817 (2d Cir. 1962).

12. 3 WIGMORE § 1018, at 688.

13. 4 CALIFORNIA LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES, *A Study Relating to the Uniform Rules of Evidence*, 401, 425-39 (1963) [Hereinafter cited as CAL. STUDY]; The same hearsay exception has been adopted in other jurisdictions: KANSAS STAT. ANN., 60-460(a) (1964); VIRGIN ISLANDS CODE, Title 5 § 931(1) (1957); N.J. STAT. ANN., RULES OF EVIDENCE, RULE 63(1) adopted by Supreme Court effective Sept. 11, 1967. The only case found construing any of these codes or rules, and finding it applicable is State v. Matlock, 49 N.J. 491, 231 A.2d 369 (1967), which involved a prior identification. The California court has judicially adopted the exception for this limited purpose. People v. Gould, 54 Cal. 2d 621, 345 P.2d 865, 7 Cal. Rptr. 273 (1960).

14. 68 Adv. Cal. 674, 684, 441 P.2d 111, 117, 68 Cal. Rptr. 599, 605.

15. 5 WIGMORE § 1368, at 34.

16. This second purpose of immediacy is not discussed by the authorities. It is a natural

concluding that defendant's cross-examination is inadequate whenever it would not immediately follow the articulation of the out of court declaration. However, if cross-examination promptly follows the introduction of the prior statements at trial, the jury should encounter no greater difficulty in perceiving falsehoods and contradictions in the witness' extrajudicial utterence than in detecting those inhering in his present testimony. Moreover, since section 1235 requires that the hearsay declaration be inconsistent with the witness' statements at trial, the judicial fear that a time lapse will harden his allegiance to an earlier falsehood never materializes. Since his statements at trial reflect a change of opinion or a modification of his recollection of a particular transaction, the possible effect of outside influence casts doubt on the credibility of the witness' present testimony, not on the truthfulness of his prior extrajudicial pronouncements.

A witness' present testimony and his prior inconsistent statements uttered out of court are recitals of different interpretations of the same sensory data. If cross-examination of the witness is adequate when he voices his perceptions in court, there is no reason to believe that cross-examination of another version of the same perceptions will be less adequate merely because the latter version was recorded at an earlier time. Furthermore, if the witness adopts a prior inconsistent statement with which he is confronted in court, his extrajudicial statement becomes admissible as present testimony.[17] It is difficult to discern any difference in the quality of cross-examination in this situation as compared to the case where he admits making the statement but refuses to affirm it as true.[18] The witness is as capable of explaining his affirmation as

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correlative, however, and it is implicit in the argument of the juducial authority relied on by *Johnson*. Thus, Justice Stone argued in 1939:

> False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.

State v. Saporen, 204 Minn. 358, 362, 285 N.W. 898, 901 (1939).

17. McCORMICK § 39, at 74.

18. In Ruhala v. Roby, 379 Mich. 102, 113, 150 N.W.2d 146, 156 (1966), the court found that the adversary nature of cross-examination is diluted if the witness refuses to affirm the prior statement as true. The opponent of the prior statement must become the witness' friend and the cross-examination becomes, in effect, a rehabilitation of the witness. However, there is no apparent reason why the cross-examiner will be less successful in overcoming the prior statement, when, by the nature of the situation, the witness will be willing to help him. While the primary goal of a cross-examiner is to destroy the witness'

his denial. The factual situation in *People v. Johnson* illustrates that the cross-examiner is not necessarily less effective when he attacks the prior inconsistent statements of a witness than when he seeks to discredit present testimony. Both Elaine and Mrs. Johnson testified that defendant had never engaged in sexual misconduct with his daughter whereupon the prosecution introduced their prior inconsistent statements. On cross-examination, they denied the truthfulness of their prior statements to the grand jury. In addition, defendant elicited from the witnesses a thorough explanation of their reasons for having incriminated him before the grand jury. If Elaine and Mrs. Johnson adopted and repeated at trial the substance of their testimony to the grand jury, it is inconceivable that defendant's cross-examination could have been more satisfactory than it actually was. If the ultimate aim of the adversary on cross-examination is to refute and completely discredit damaging testimony, the adequacy of cross-examination should be measured by the defendant's ability and opportunity to bring out all the possible facts and circumstances tending toward that end. In this respect, defendant Johnson was eminently successful.

Since the witness admitted uttering the extrajudicial statements, the *Johnson* holding that defendant's sixth amendment right to cross-examine was violated seems inappropriate.[19] It suggests, however, a judicial distrust of the breadth of section 1235. Whenever a witness denies or does not remember uttering an extrajudicial statement, he will be unable to clarify the inconsistencies with his present testimony. Since his memory and perception cannot be probed by the opponent, there is little chance that cross-examination will be of any value as a testing procedure.[20]

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testimony, hostility seems to be a factor only because the adversary is the one most likely to search out the facts which might subvert the statement.

19. It appears that a more persuasive argument for reversal—not discussed in the *Johnson* opinion, nor presented by defendant Johnson on appeal—is that there was insufficient evidence upon which the jury could reach a verdict of guilty beyond a reasonable doubt. Considering this problem the *Ruhala* court observed:

> If the only evidence of an essential fact in a lawsuit were a statement made from the witness stand which the witness himself completely recanted and repudiated before he left the witness stand, no one would seriously urge that a jury question had been made out.

Id. at 115, 150 N.W.2d at 158; *cf.* People v. Gould, 54 Cal. 2d 621, 345 P.2d 865, 7 Cal. Rptr. 273 (Prior extrajudicial identification admissible as an exception to the hearsay rule, but if unconfirmed at trial it will not sustain a conviction).

20. In Douglas v. Alabama, 380 U.S. 415, 420 (1964), the United States Supreme

In these instances, therefore, it would be justifiable to declare section 1235 unconstitutional. Where the opponent lacks the opportunity for adequate cross-examination of prior inconsistent statements, their admissibility as substantive evidence must depend solely upon the traditional bases of hearsay exceptions—necessity and reliability.[21] If the prosecution's only proof of an essential element of the crime is the witness' inconsistent extrajudicial statement, the question of necessity will not arise since there is insufficient evidence to support a conviction.[22] However, where the prosecution has independent evidence and the introduction of a prior inconsistent statement may reasonably affect the verdict, the element of necessity would seem to be established.

With respect to the reliability of prior inconsistent statements, a comparison between section 1235 and the hearsay exception "past recollections recorded"[23] is instructive. If a witness' memory is insufficient to permit full and accurate testimony at trial, his extrajudicial narration is admissible hearsay if: (1) the witness reduced it to a writing when the facts were fresh in his mind and (2) he testifies that it was an accurate statement of the event when it was composed.[24] This substantial evidentiary foundation is demanded since cross-examination is ineffectual when the witness does not remember the contents of the written statement.[25] However, where the witness denies or does not remember uttering an inconsistent

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Court held that when the prosecution introduces a confession of a witness implicating the criminal defendant and the witness invokes his fifth amendment right against self-incrimination, the defendant has been effectively denied his constitutional right to cross-examine. The *Douglas* court observed that only if the witness had admitted making the confession would the defendant have had an adequate opportunity to cross-examine him. The practical effect of a witness' refusal to answer by pleading a constitutional privilege seems indistinguishable from his denying or failing to remember the communication of a prior inconsistent statement; *see* Falknor, *supra* note 11, at 53.

21. Matthews v. United States, 217 F.2d 409, 417-18 (5th Cir. 1954); McCORMICK § 231, at 487.

22. *See* discussion in note 19, *supra*.

23. *See generally* 3 WIGMORE § 734; The accompanying discussion in the text is based upon the exception for past recollection recorded as codified in CAL. EVID. CODE § 1237 (West 1965).

24. The hearsay declarant's testimony that the statement is true provides sufficient assurance of trustworthiness. CAL. EVID. CODE § 1237, Comment (West 1965).

25. *See* McCORMICK § 9, at 14-18 where the confusion of "refreshing recollection" and "past recollection recorded" is discussed. Where the witness has refreshed his recollection after inspecting the written document, the adversary may effectively cross-examine. In the latter case, however, where the witness testifies that he does not recall the transaction and merely testifies to the accuracy and truthfulness of the writing, there must be other assurances of reliability since cross-examination is ineffectual.

extrajudicial declaration, section 1235 does not provide any comparable safeguards of reliability. It merely requires that the hearsay declaration be inconsistent with the present testimony of the witness and that he be given an opportunity to explain or deny it. Section 1235 does not discriminate between oral and written statements,[26] nor does it protect against the admission of statements recorded by overzealous law enforcement officers intent on obtaining a conviction.[27] The proponents of section 1235 argue that prior inconsistent statements are more likely to be true than present testimony since they were made closer in point of time to the event in question and are less likely to be influenced by the controversy.[28] When the witness admits having uttered the inconsistent extrajudicial statement, the proponents' assurance of reliability together with the defendant's opportunity for effective cross-examination may be a sufficient basis for the admissibility of prior inconsistent statements as an exception to the hearsay rule. However, where cross-examination is impossible because the witness denies or does not remember the out of court statement, this claim of reliability by itself is not convincing.

The *Johnson* court's application of the procedural concept of immediate cross-examination to the factual situation seems inapt. The court ignored the possibility that a criminal defendant may

26. Professor McCormick argued that the proposed hearsay exception for prior inconsistent statements should exclude oral statements not acknowledged by the witness because of the danger of inaccuracy in transmission. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573, 588.

27. It seems that criminal investigations conducted by law enforcement officials are no less vulnerable to the same occupational bias often attributed to insurance adjusters in civil investigations. *See* VA. CODE ANN. § 8-293 *as amended* 1964, c. 350. In actions for personal injury or wrongful death, prior extrajudicial statements, affidavits, or voice recordings with the exception of depositions cannot be used to impeach a witness. The statute is designed to correct the practice of insurance adjusters who obtained statements at the scene of an accident from persons who might not have fully recovered from shock and not in full possession of their faculties. Harris v. Harrington, 180 Va. 210, 220, 22 S.E.2d 13, 17 (1942); *see* DuParc, *The Uniform Rules: A Plaintiff's View*, 40 MINN. L. REV. 301, 338 (1956). (The author's only objection to the hearsay exception for prior inconsistent statements is his distrust of the reliability of statements obtained by insurance claim adjusters who might put ideas in the witness' mind); *cf.* Dow, *KLM v. Tuller: A New Approach to Admissibility of Prior Statements of a Witness*, 41 NEB. L. REV. 598, 607 (1962), where the author warns that judges should be alert to the fact that pressure to secure statements will be increased with a view to making the best possible case before the jury.

28. MCCORMICK, *supra* note 26, at 577; CAL. STUDY at 429; With respect to the effect of the time lapse on the witness' memory, this argument has been accepted by the California court for the limited purpose of allowing proof of a prior extrajudicial identification of criminal defendants. People v. Gould, 54 Cal. 2d 621, 345 P.2d 865, 7 Cal. Rptr. 273.

have an adequate opportunity to cross-examine despite the time interval elapsing between the utterance of an inconsistent extrajudicial declaration and the defendant's confrontation of the witness at trial. While each of the traditional hearsay exceptions possess unique assurances of reliability and trustworthiness, none provide the defendant with the opportunity for effective cross-examination at trial. However, it is this right which is the cornerstone of the sixth amendment. Only when the witness recalls the prior inconsistent statement, is this constitutional consideration satisfied.[29]

II. The Evidentiary Use of Prior Inconsistent Statements for Impeachment: The Future Viability of the Limiting Instruction

The *Johnson* holding limits the prosecution's use of prior inconsistent statements to impeachment; it also restores the applicability of a limiting instruction. Upon the defendant's request the trial court must inform the jury that it may consider the

29. The constitutional basis of the Johnson opinion limits its result to exclusion of prior inconsistent statements as hearsay evidence against a criminal defendant. The exception remains available for use by the defendant and by opponents in civil actions. Whether limitations upon the use of section 1235 in civil cases will follow may depend upon a case by case analysis and the extent of the right to cross-examination. The sixth amendment guarantees the right of cross-examination to criminal defendants. However, the federal constitution does not explicitly grant the same right to civil litigants. The 14th amendment guarantees that property will not be taken without "due process of law." If "[t]he test of cross-examination is the highest and most indispensible known to the law for the discovery of truth[,]" 58 AM. JUR. *Witnesses* § 610, at 339, it is fair to ask whether it is included in the idea of "due process." The California court has said it is: "The law is clear that undue infringement on the right of cross-examination . . . is a deprivation of the constitutional guarantee of due process of law." Pence v. Industrial Acc. Comm'n, 63 Cal. 2d 48, 50-51, 403 P.2d 140, 142, 45 Cal. Rptr. 12, 14 (1964). Other civil cases have invoked the due process concept in requiring cross-examination, or in finding that the party was deprived of the right. Southern Stevedoring Co. v. Voris, 190 F.2d 275, 277 (5th Cir. 1951); Long v. Long, 251 Cal. App. 2d 732, 736, 59 Cal. Rptr. 790, 794 (1967); Polk v. Polk, 228 Cal. App. 2d 763, 772, 39 Cal. Rptr. 824, 832 (1964); Payette v. Sterle, 202 Cal. App. 2d 372, 375, 21 Cal. Rptr. 22, 25 (1962); McCarthy v. Mobile Cranes Inc., 199 Cal. App. 2d 500, 506, 18 Cal. Rptr. 750, 756 (1962). However, none of these cases afforded the appellant any opportunity at trial to cross-examine a witness. Although, the right to cross-examine adverse witnesses is explicit in the sixth amendment and, as shown above, implicit in the fifth and 14th amendments, whether "undue infringement" of that right is the same under both, i.e., whether the right to cross-examine in criminal and civil cases is co-extensive, has not been defined.

Some indication may be seen by comparing Smith v. Illinois, 390 U.S. 129 (1968), a state criminal case, with DuBeau v. Smither & Mayton Co., 203 F.2d 395 (D.C. Cir. 1953), a civil case tried in the federal district court. In *Smith* the defendant was not permitted to ask an informant-witness his true name and address. The Supreme Court said that such information was needed to place the witness in his environment in order to test his credibility.

extrajudicial statement only as evidence of the witness' credibility, and not for the truth of the matter stated.[30]

Judicial distrust of the jury's ability to ignore evidence for one purpose while considering it for another has been expressed for many years.[31] In the 1933 case of *Shepard v. United States*,[32] the defendant was accused of the murder of his wife by poison. The theory of the defense was that she committed suicide. Shortly before her death, she told a witness, "Dr. Shepard has poisoned me." The Supreme Court of the United States held that the decedent's statement was inadmissible as a dying declaration on the ground that death was not imminent. The Government contended that the extrajudicial statement was admissible to rebut evidence of an intent to commit suicide. However, Justice Cardozo, delivering the opinion of the Court, opined that a limiting instruction would not insure that the jury would separate the import of decedent's accusation from the purpose for which the evidence was offered:

> Discrimination so subtle is a feat beyond the compass of

Therefore, "[t]o forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." 390 U.S. at 131. In *DuBeau*, the deposition of a witness was taken prior to trial. The witness gave his name, but on cross-examination he refused to give his address or occupation. The appellate court held, on the same grounds as in *Smith*, that it was error to admit the deposition in evidence. The *DuBeau* court said, "Measuring the credibility of a witness in a civil trial is equally as important as in a criminal trial." 203 F.2d at 396. These cases are limited to the issue of the credibility of the witness. "Immediacy" is not analogous. There is, therefore, no analytic tool at hand to suggest that the principle of the *Johnson* case should be applicable in civil cases. It seems, however, that the infringement of the right to cross-examination in *DuBeau* and *Smith* is not as severe as in the case of the admission of an alleged out of court statement of a witness who claims no memory, or denies its making. In those cases, at least, the right of cross-examination as included in the constitutional guarantee of due process of law should be one ground of attack against its admission as hearsay.

30. CAL. EVID. CODE § 355 (West 1965); *e.g.*, CALIFORNIA JURY INSTRUCTIONS, No. 54-A (1958).

31. *See* MCCORMICK § 39, at 77 nn.14-17; In some cases judges may be no more able to avoid prejudice than juries. In the recent California case of People v. Charles, 66 Cal. 2d 330, 425 P.2d 545, 57 Cal. Rptr. 745 (1966), the California Supreme Court indicated that in non-jury trials where the voluntariness of a defendant's confession is in issue, or where portions of a codefendant's confession implicates another defendant in a joint trial, the determination of voluntariness or whether deletions can be effected must be made by another judge in pre-trial hearings and not by the judge presiding at trial. The court observed:

> We have long recognized that judges are *better* able than juries to limit their consideration of evidence to the purpose for which it is admissible. . . . Some types of evidence are so difficult to disregard completely . . . or to consider for one purpose but ignore for another . . . [that] [t]he hearing of evidence of this kind, by judges as well as juries should be restricted to the essential minimum.

Id. at 338 n.12, 425 P.2d at 550-51 n.12, 57 Cal. Rptr. at 750-51 n.12.

> ordinary minds. . . . It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.[32]

During the October 1967 Term, the United States Supreme Court reconsidered the viability of the limiting instruction in another context and found it wanting. In *Bruton v. United States*[34] the petitioner and a co-defendant were convicted in a joint trial. The extrajudicial confession of the co-defendant—implicating the petitioner—was admitted with a cautionary instruction to the jury to disregard the confession as evidence against the non-confessing defendant. The Supreme Court reversed, concurring with the reasoning of Chief Justice Traynor in *People v. Aranda*:[35]

> A jury cannot segregate evidence into 'separate intellectual boxes'. . . . It cannot determine that a confession is true insofar as it admits that A committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B committed those same criminal acts with A.[36]

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32. 290 U.S. 96 (1933).

33. *Id.* at 104. People v. Alcalde, 24 Cal. 2d 177, 190, 148 P.2d 627, 633 (1944), the statement of the murder victim that she intended to go out with "Frank" was admitted to prove that she probably left her apartment on the night of the crime. The conviction of the defendant, Frank Alcalde, was affirmed. In dissent, Justice Traynor quoted the *Shepard* court, urging that a limiting instruction would not cure the prejudice.

34. 391 U.S. 123 (1968).

35. 63 Cal. 2d 518, 529, 407 P.2d 265, 272, 47 Cal. Rptr. 353, 360 (1965).

36. 391 U.S. at 131. The conclusion reached in these cases was seen by both courts as the logical extention of Jackson v. Denno, 378 U.S. 368 (1964). In that case the United States Supreme Court held that it was error to submit the question of the voluntariness of defendant's confession to the trial jury since the court doubted the jury's ability to separate voluntariness from truth.

In Delli Paoli v. United States, 352 U.S. 232, 242 (1957), overruled by *Bruton*, the petitioner was one of five defendants in a joint trial. A codefendant's confession, made after the termination of the conspiracy and therefore inadmissible against the petitioner, was admitted against the codefendant. The trial court cautioned the jury several times to consider it only against the confessing defendant. In affirming the petitioner's conviction, the court stated:

> Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense.

In United States v. Maloney, 262 F.2d 535 (2d Cir. 1959), the United States Court of Appeals felt compelled to recognize the effectiveness of limiting instructions in view of the Supreme Court's ruling in *Delli Paoli*. In *Maloney* questions were asked of two witnesses which they refused to answer, relying on the fifth amendment. The jury might have assumed certain facts not in evidence because the questions were asked, and infer that they were true from the witnesses' refusal to answer. The "evidence," put before the jury in this way, gives vital support to other evidence against the defendant. The *Maloney* court found that the failure of the trial judge to give a cautionary instruction to the jury was error, even though the defendant did not request it. Although the court required the instruction it questioned its

Thus, the inability of the jury to make the required distinction was tantamount to the admission of the co-defendant's confession against the petitioner. Since the co-defendant did not testify at trial, the petitioner was denied his sixth amendment right to cross-examination.

In view of the judicial skepticism regarding the jury's capacity to ignore evidence for one purpose while utilizing it for another,[37] future courts must determine whether prior inconsistent statements will be admissible even for impeachment. It is debatable whether a jury is capable of comprehending the evidentiary distinction between hearsay and impeachment.[38] Aside from the problem of understanding, it is questionable whether the limiting instruction, in this instance, is effective. After a witness testifies to a particular fact, the opposing party may introduce a prior statement contradicting the present testimony. If the jury doubts the witness' credibility and concludes that his present testimony is either false or inaccurate, it may be a natural human inclination to conclude that

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value: "[I]t is doubtful whether such admonitions are not as likely to prejudice the interest of the accused as help them." It imposes on the jury mental gymnastics which it is "absurd to expect of them." However, the court said, if the "accredited ritual is ever to be taken seriously" it should have been observed here. *Id.* at 538.

In Small v. Robbins, 258 F. Supp. 621 (D. Me. 1966), the confession of a witness, implicating the petitioner, was presented in the form of leading questions, which the witness refused to answer. Those questions, if believed by the jury to be the true facts, substantially prejudiced the petitioner. The trial court gave a clear, easily understandable instruction (the instruction is set out in State v. Small, __ Me. __, 219 A.2d 263, 268, 272 (1966). On petition for habeas corpus the federal court referred to the doubt of the effectiveness of limiting instructions expressed by the *Maloney* court and found the instruction incapable of curing the error. Relying on Douglas v. Alabama, 380 U.S. 415 (1964), the district court reversed, finding that the petitioner was denied his right to cross-examine the witness against him.

Even though the evidence in *Maloney* had less potential for prejudice than that in *Small*, the holding is questionable in view of the overruling of *Delli Paoli*.

37. *But cf.* Spencer v. Texas, 385 U.S. 554 (1967), where evidence of the prior convictions of the petitioner were to be considered by the jury in determining the sentence—if he was found guilty. The jury was directed to disregard the convictions for any other purpose. The United States Supreme Court affirmed the convictions saying,

> It would be extravagant in the extreme to take Jackson [v. Denno, 378 U.S. 368] as evincing a general distrust on the part of this court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instruction by the judge in a criminal cases, or as standing for the proposition that limiting instructions can never purge the erroneous introduction of evidence or limit evidence to its rightful purpose.

Id. at 565. The disputed evidence in *Spencer* is distinguishable from that in *Bruton*, *Aranda*, and cases discussed in note 42, *supra*, in that it did not further the prosecution's case in an affirmative way.

38. McCORMICK § 39, at 77 nn.15-16.

the extrajudicial statement is a true representation of the disputed fact.[39] To be truly effective, the cautionary instruction must prevent the jury from making this second determination. In analyzing the mental processes of the trier of fact, Professor McCormick, however, suggested that a determination of the truth of the out of court statement is a prerequisite to a decision regarding the veracity of the witness' assertion at trial.[40] If this assessment is valid and if the jury concludes that the extrajudicial statement is true, then the effectiveness of the limiting instruction depends on the jury's ability to erase a mental judgment it has already made. While the jury may dutifully avoid mentioning the extrajudicial statement during deliberations, it might, nevertheless, be influenced in its evaluation of other evidence which the prior inconsistent statement tends to corroborate, or, conversely, the jury might consider the substantive evidentiary value of the impeaching statement when it is supported by other evidence. In view of the *Bruton* opinion and the conclusion of a study which demonstrated that the limiting instruction serves only to entrench inadmissible evidence in the minds of the jury,[41] the efficacy of the limiting instruction accompanying the introduction of prior inconsistent statements is suspect. If the limiting instruction is adjudged ineffective, the admission of the impeaching statement would amount to the introduction of otherwise inadmissible hearsay. Thus, according to the *Johnson* holding, the criminal defendant would be deprived of his sixth amendment right to immediate cross-examination.[42]

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39. *Id.*, at § 39 n.14; Professor Wigmore observed:

> The opinions are full of directions to trial Courts to tell the jurors to use their mental force to ignore in such self-contradicting assertions that testimonial value which their natural reason persists in seeing there.

3 WIGMORE § 1018, at 690.

40. MCCORMICK § 39, at 77-78.

41. Broeder, *The Chicago Jury Project*, 38 NEB. L. REV. 744, 753-54 (1959). The results of the deliberations of thirty juries, in controlled experimental civil damages cases, are compared as to the mention of insurance: Overall average verdict, $33,000; mention of insurance but no objection, average verdict, $37,000; mention of insurance with objection and cautionary instruction, average verdict, $46,000. In this last instance, unlike the others, the jury did not discuss insurance during deliberations.

42. In a footnote to *Aranda*, Chief Justice Traynor interpreted Pointer v. Texas, 380 U.S. 400 (1964)—which first applied the sixth amendment confrontation clause to the states—in these terms:

> It is not clear what other procedural practices *Pointer* precludes. It at least casts further doubt, however, on any encroachment on the right of confrontation by an instruction to disregard inadmissible hearsay evidence.

63 Cal. 2d at 530 n.8, 407 P.2d at 272 n.8, 47 Cal. Rptr. at 360 n.8.

The dilemma posed by prior inconsistent statements is distinguishable in two important respects from the problem that confronted the *Bruton* and *Aranda* courts. The danger of substantial prejudice to a defendant by the admission of a co-defendant's extrajudicial confession implicating him is always present. In contrast, prior inconsistent statements may vary from mere negation of a witness' present testimony to a revelation materially advancing the prosecution's case. Moreover, in *Aranda* and *Bruton* "viable alternatives"[43] did exist: Co-defendants could have been tried separately or the incriminating portions of the co-defendant's confession deleted.[44] There does not appear to be any "viable alternative" by which the cross-examiner may demonstrate the witness' inconsistency without revealing the content of the prior extrajudicial statement—the choice is between admission and exclusion.

Assuming a judicial reluctance to preclude the use of a traditionally effective tool of the cross-examiner, it is unlikely that the courts will, as a matter of law, hold extrajudicial statements inadmissible for impeachment. Nevertheless, the deprivation of defendant's right to immediate cross-examination cannot be ignored. Thus, when a prior inconsistent statement is offered for the limited purpose of impeachment, the trial court of the future may be required to determine in its discretion the question of admissibility or exclusion in each case by weighing two considerations: (1) the likelihood that a limiting instruction will be effective, and (2) if ineffective, the possible prejudice to the defendant.[45] When the impeaching statement merely negates the testimony of the witness, the instruction may in fact be heeded by the jury, and if it is not, any prejudice would appear to be slight. On the other hand, whenever the impeaching evidence would affirmatively advance the prosecution's argument on a material issue, the probable effectiveness of the limiting instruction is lessened, and the trial judge may be compelled to exclude the

43. 391 U.S. at 134, "Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice."

44. 63 Cal. 2d at 530-31, 407 P.2d at 272-73, 47 Cal. Rptr. at 360-61.

45. This is substantially the same as the "critical weight" test set out in Namet v. United States, 373 U.S. 179 (1963). In that case a witness refused to answer some questions claiming his privilege against self-incrimination. The test approved by the Court is:

> [Whether] inferences taken from a witness' refusal to answer [added] critical weight to the prosecution's case in a form not subject to cross-examination.

Id. at 187.

statement unless there is no reasonable possibility that the infringement upon the defendant's sixth amendment right to cross-examination would contribute to a conviction.[46] This is the potential legal quagmire arising from *Johnson's* requirement of immediate cross-examination and the possible application of the *Bruton-Aranda* rationale to prior extrajudicial statements admitted for impeachment.

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46. If the limiting instruction is not heeded the error is of federal constitutional dimensions. The prosecution must show lack of prejudice beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967).