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### Recommended Citation

Mark Reutlinger, Prior Inconsistent Statements: Presently Inconsistent Doctrine, 26 *HASTINGS L.J.* 361 (1974).

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# Prior Inconsistent Statements: Presently Inconsistent Doctrine

By MARK REUTLINGER\*

**T**HE common law has come a long way since Sir Walter Raleigh was convicted of treason on the basis of accusations contained in unproduced letters and the hearsay declarations of unproduced witnesses. However, despite the painstaking development and innumerable formulations and reformulations of the hearsay rule over the past several centuries, there are areas of that body of law which are as yet unsettled and the subject of heated controversy. One such area is that of prior inconsistent statements of witnesses, the controversy over which has continued over the years and has surfaced once again with promulgation of the new Federal Rules of Evidence.†

Legal theories, like social and cultural philosophies, often follow marked trends and patterns. A few years ago exclusionary rules were on the ascendancy, especially in the area of criminal law, while today it is increased admissibility which is in vogue. Both had their advocates throughout common law history,<sup>1</sup> and will probably always find support. It is a reflection of this current trend that the traditional rules governing substantive use of prior inconsistent statements, once unquestioningly accepted, have since been roundly criticized by authorities from Wigmore to the Supreme Court. The purpose of this ar-

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† As of the time that this article went to press, the proposed rules were still pending in the Senate Committee on the Judiciary, having been introduced in the Senate on February 7, 1974 after passing in the House of Representatives the previous day by a 377-13 vote.

1. Compare *People v. Mayen*, 188 Cal. 237, 205 P. 435 (1922), with *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955). Compare T. STARKIE, *LAW OF EVIDENCE* 19-20 (10th ed. 1876), with 3A J. WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1018 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE; citations to 5 & 6 WIGMORE refer to 3d ed. 1940].

ticle is to attempt to redress the balance just slightly, by setting out some of the counterarguments which lie behind the traditional substantive exclusion of prior inconsistent statements. An attempt will be made to emphasize practical, rather than merely theoretical, considerations.

### “Orthodox” versus “Unorthodox” Rules

Prior inconsistent statements are easy to understand in concept, once one clearly comprehends the hearsay rule itself. The hearsay rule excludes evidence consisting of out-of-court statements (that is, statements made other than by a witness while testifying at the present hearing) when offered to prove the truth of the matter stated therein.<sup>2</sup>

The rationale for the hearsay rule is threefold: (1) the statement is not made under oath; (2) the declarant is not subject to cross-examination by the party against whom the statement is being offered; and (3) the statement is not made under circumstances enabling the trier of fact to observe the demeanor of the witness when the statement was made.<sup>3</sup> It is apparent that a prior statement made by a witness, although he is presently testifying on the stand, suffers from all three of these deficiencies, if (as is usual) such a statement was made at a time when the witness was not under oath, was not subject to cross-examination by the opposing party, and could not have been observed by the trier of fact.<sup>4</sup> For these reasons, even prior out-of-court statements by present witnesses have traditionally been excluded when offered to prove the truth of the matters stated therein. They are, however (and under the “orthodox” rule always have been), admissible if they are inconsistent with, and offered only to *impeach*, present testimony by the wit-

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2. For purposes of this article, it is unnecessary to delve into the controversy over what constitutes a “statement.” See, e.g., CAL. EVID. CODE § 1200, Comment—Senate Comm. on Judiciary (West 1966); C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 250 (2d ed. 1972) [hereinafter cited as McCORMICK].

3. See, e.g., *People v. Johnson*, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), cert. denied, 393 U.S. 1051 (1969); *People v. Bob*, 29 Cal. 2d 321, 325, 175 P.2d 12, 15 (1946); McCORMICK, *supra* note 2, § 245; 5 WIGMORE, *supra* note 1, § 1362.

This rationale explains why a statement is hearsay only if it is offered to prove the truth of the matter stated. If it is offered only as evidence that the statement was made, the trier of fact need determine only whether the witness *on the stand* is truthfully and accurately reporting the out-of-court statement, and the witness’s testimony is made under oath, subject to cross-examination, before the present trier of fact.

4. As will be discussed below, even when some of these conditions appear to be fulfilled, there are basic flaws in the use of prior inconsistent statements which cannot be overcome so long as the statement was made outside of the hearing and observation of the present trier of fact. See notes 41-58 & accompanying text *infra*.

ness.<sup>5</sup> Although there are no means of testing the truth value of the prior statement, once it is proven simply that the prior inconsistent statement was *made*, this alone reflects on the credibility of the conflicting testimony from the witness stand. Thus if the witness says today that the traffic light was red when the defendant crossed the intersection, but said yesterday that the light was green, the jury need not accept the "green light" version as true in order to view the contradiction as grounds to doubt the present "red light" version, and perhaps to discount the witness's veracity or reliability entirely.

All of the above may sound somewhat esoteric and ritualistic, and many distinguished authorities in the field of evidence have come to doubt the efficacy of the distinction between admitting the prior inconsistent statement for its impeachment value only, and admitting it for its truth value as well.<sup>6</sup> If statement *A* is the opposite of statement *B*, it is asserted, does it really matter whether we believe *A* or disbelieve *B*?<sup>7</sup> Are we merely putting jurors through mental gymnastics, asking them to disbelieve one statement while attempting not to accept as true its converse? The answers are not nearly as clear as the questions.

Of the three reasons for excluding prior statements under the hearsay rule, probably the weakest in a modern context is that of the presence or absence of an oath. Whatever importance was historically (or is presently) attached to the oath as a means of eliciting the truth, either because of its moral persuasiveness or because of the possibil-

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5. See, e.g., *People v. Ballard*, 218 Cal. App. 2d 295, 309, 32 Cal. Rptr. 233, 242 (1963) (pre-Code decision). Wigmore first referred to this "impeachment only" rule as the "orthodox" rule, and so it has become known. Interestingly, the first edition of Wigmore's treatise approved the orthodox rule, but subsequent editions have disapproved it and have formed the basis of most of the attacks on that rule. 3A WIGMORE, *supra* note 1, § 1018.

Since today there are relatively few advocates of the traditional restriction on prior inconsistent statements, it is perhaps a misnomer to refer to this as the "orthodox" rule—a misnomer this article will perpetuate in the interest of consistency with accepted terminology.

6. E.g., McCORMICK, *supra* note 2, § 251; 3A WIGMORE, *supra* note 1, § 1018; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192-96 (1948) [hereinafter cited as Morgan]. See also *California v. Green*, 399 U.S. 149 (1970); CAL. EVID. CODE § 1235 (West 1966); N.J. RULES OF EVID., Rule 63(1) (1974).

7. See, e.g., *United States ex rel. Ng Kee Wong v. Corsi*, 65 F.2d 564, 565 (2d Cir. 1933); Morgan, *supra* note 6, at 193. This assumes that the two statements are indeed opposite as well as inconsistent, and that if *A* is false then *B* must be true. Of course, this need not necessarily be so—*A* and *B* may *both* be false. "The light was green" is inconsistent with "the light was red," but both are untrue if the light was in fact yellow.

ity of conviction for perjury, over time the oath has taken on less importance.<sup>8</sup> Some would also dismiss demeanor as a desirable but unnecessary benefit in reaching the truth,<sup>9</sup> a position which will be discussed further below.<sup>10</sup> There is no doubt, however, that the principal thrust of the hearsay rule, and the factor which clearly separates hearsay from other forms of evidence, is the opportunity to cross-examine the declarant, to put his assertions to the test of "the greatest legal engine ever invented for the discovery of truth."<sup>11</sup> While virtually no one within the legal community disputes the value and necessity of cross-examination in reaching the truth of a witness's testimony, it is precisely on this point—the opportunity to cross-examine—that the critics and commentators are divided with respect to prior inconsistent statements. The controversy is not so much over the necessity for an opportunity to cross-examine, as it is over the practical effectiveness of what cross-examination there is. In short, what is the worth of cross-examination which is not (a) *contemporaneous* with the statement whose truth value is in question, and/or (b) conducted before the *same trier of fact* who must determine that truth value? Here the battle is joined.

One must distinguish for purposes of subsequent discussion the various circumstances under which a prior statement might have been made by the witness. It might have been made under totally nonjudicial circumstances, as at the scene of the crime, transaction, or incident in issue. It might, on the other hand, have been made in a judicial setting: at a preliminary hearing, at a grand jury proceeding, or from the witness stand at a previous trial in which the present parties were or were not involved. The context of the statement is crucial, because both the opportunity for and the practical efficacy of cross-examination vary greatly depending upon the surrounding circumstances. For this reason, some authorities have taken a middle ground between the "orthodox" and the "unorthodox" formulations of the rule, permitting substantive use of prior inconsistent statements made in some circumstances but rejecting those made in others. As will be seen, the proposed Federal Rules adopt this latter approach.

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8. McCORMICK, *supra* note 2, § 251, at 601; 6 WIGMORE, *supra* note 1, §§ 1827, 1831.

9. 5 WIGMORE, *supra* note 1, § 1396.

10. See notes 39-40, 47-53 & accompanying text *infra*.

11. 5 WIGMORE, *supra* note 1, § 1367, at 29. See *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 382-83 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) ("The best method yet devised for a determination of the truth of a fact . . ."); R. SCHWEITZER, *CYCLOPEDIA OF TRIAL PRACTICE* § 231, at 606 (2d ed. 1970) ("The highest and the most indispensable [test] known to the law for the discovery of truth.").

The primary argument against the orthodox rule is expressed by Wigmore: because the witness who made the statement is, by definition, available at the present hearing for cross-examination with respect to both his present *and former* statements, "the whole purpose of the hearsay rule has been already satisfied."<sup>12</sup> The premise of this argument is found in a preceding sentence in Wigmore's treatise. After explaining that the only ground for rejecting the truth value of a prior inconsistent statement would be the hearsay rule prohibition, the treatise continues: "[b]ut the theory of the hearsay rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination . . . ."<sup>13</sup>

Dean Wigmore notwithstanding, the hearsay rule does not distinguish between the presence or absence of the declarant in court.<sup>14</sup> In fact, exclusions under the rule are replete with instances of statements made by persons readily available to testify at the present hearing. For example, a letter or other document containing factual assertions sought to be proved at trial cannot be admitted for the truth of the matters stated therein unless a specific exception to the hearsay rule (such as that for entries in business records)<sup>15</sup> has been satisfied. It is wholly immaterial whether the person who made the entry is present in the courtroom or willing to testify, except with respect to laying a foundation for the admission of the document under a hearsay exception.<sup>16</sup>

Moreover, many exceptions to the hearsay rule contain a fundamental prerequisite that the declarant be unable to testify at the hearing.<sup>17</sup> This requirement is included because these exceptions are

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12. McCORMICK, *supra* note 2, § 251, at 602, quoting 3A WIGMORE, *supra* note 1, § 1018, at 996; see *California v. Green*, 399 U.S. 149, 159-60 (1970); CAL. EVID. CODE § 1235, Comment—Law Revision Comm'n (West 1966); Morgan, *supra* note 6.

13. 3A WIGMORE, *supra* note 1, § 1018, at 996.

14. *See, e.g.*, CAL. EVID. CODE § 1200 (West 1966); McCORMICK, *supra* note 2, § 246, at 584.

15. *See, e.g.*, CAL. EVID. CODE § 1271 (West 1966).

16. *See generally id.* § 1271; UNIFORM RULES OF EVIDENCE rule 63(13); McCORMICK, *supra* note 2, §§ 304-14. Thus, if the author of the document is present in court but his testimony fails to satisfy the requirements of one of the exceptions to the hearsay rule (for example, he cannot testify as to when or how a particular entry was made) the writing will remain inadmissible hearsay. *See also* CAL. EVID. CODE § 1203(d) (West 1966) (hearsay declarant may be examined concerning admissible hearsay evidence, but declarant's unavailability does not affect admissibility if not otherwise required).

17. An example is the exception for former testimony. *See, e.g.*, CAL. EVID. CODE §§ 1291-92 (West 1966). *See also id.* §§ 1230, 1251, 1310-11, 1323. *See generally* McCORMICK, *supra* note 2, § 253; 5 WIGMORE, *supra* note 1, §§ 1421, 1431, 1456, 1481, 1506, 1521, 1565.

based on the dual rationale of necessity and some circumstantial guarantee of trustworthiness,<sup>18</sup> and the former requirement is generally satisfied by the declarant's unavailability. Thus present availability of a witness to testify does not "satisfy the whole purpose of the hearsay rule"; if anything, it generally reinforces the rationale for excluding any but his present, in-court testimony. If a witness is on the stand and testifying, use of his prior statements cannot be considered necessary (although for the examiner they may understandably be desirable). Just how trustworthy prior inconsistent statements are will be considered in the remainder of this article.

While it is of course true that an available witness can be cross-examined at the present hearing with respect to a prior statement, any such questioning would not be contemporaneous with the making of that prior remark. By the very fact of excluding generally *all* out-of-court statements (whether consistent or inconsistent, and whether the declarant is available or unavailable), the hearsay rule implies the insufficiency of cross-examination at another time, and before another trier of fact. Most critics of the orthodox rule make their assertions in the context of prior *inconsistent* statements only (or prior consistent statements used for rehabilitation following an assertion of recent fabrication),<sup>19</sup> rather than with respect to all prior statements. And yet,

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The requirement of unavailability has been abandoned with respect to certain of the hearsay exceptions through the years; however, even the proposed Federal Rules retain it for several exceptions. PROPOSED FED. R. EVID. rule 804(b), H.R. 5463, 93d Cong., 1st Sess. § 804(b) (1973). *But cf.* Martin, *The Former-Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547, 596 (1972) ("To retain the unavailability requirement . . . is to perpetuate an anachronism . . .").

18. 5 WIGMORE, *supra* note 1, §§ 1420-22. Wigmore credits Starkie with first stating this philosophy of the hearsay exceptions in his 1824 treatise. Compare this philosophy with the Federal Rules of Evidence as originally proposed by the Supreme Court's Advisory Committee, which attempted to open the door to judicial creativity in the area of hearsay exceptions, based generally on the "necessity-trustworthiness" principle. PROPOSED FED. R. EVID. rule 8-03 to -04, 46 F.R.D. 327-28 (1969). *See also* CAL. EVID. CODE § 1200(b) (West 1966): "Except as provided by law, hearsay evidence is inadmissible." The comments to this section of the California law indicate that exceptions "may be found either in other statutes or decisional law," and cite *People v. Spriggs*, 60 Cal. 2d 868, 874, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845 (1964), a case in which Justice Traynor utilized the trustworthiness rationale to create the "declaration against penal interest" exception now codified in CAL. EVID. CODE § 1230 (West 1966).

19. Prior *consistent* statements generally present the same problems in theory as prior inconsistent statements, but to the extent that they are identical to in-court testimony, there should be no practical difficulty in allowing substantive use. Clearly, the trier of fact is entitled to accept as true the present testimony, rendering any inquiry as to whether it also made substantive use of the prior consistent statement of academic interest only. *See People v. Washington*, 71 Cal. 2d 1061, 1077-78, 458 P.2d 479, 488, 80 Cal. Rptr. 567, 576 (1969). For a recent application of the California statute

if cross-examination *now* for utterances made *then* is sufficient to overcome objections with respect to inconsistent statements, why is it not equally sufficient with respect to *all* statements made out of court by a declarant available for present cross-examination?<sup>20</sup> In any event, the controversy is generally confined to prior inconsistent statements, and it is this category which will be examined herein with respect to the efficacy of cross-examination which is not *both* contemporaneous with the declaration and before the present trier of fact.

Another argument against the orthodox rule is a very practical one: no manner of limiting instruction can assure that a jury will comprehend or follow an admonition to use a prior statement for one purpose but not for another.<sup>21</sup> This contention has greatest impact when put in the context of a prior statement which is the logical converse of present testimony—that is, if one is false the other must, a fortiori, be true. How can a jury be expected to disbelieve the second without accepting as true the first? As pointed out earlier,<sup>22</sup> however, this is only one extreme example of possible inconsistency; more often statements may be inconsistent, and thus cannot both be true, yet logically may both be false.

One answer to this argument is that where a judge is the sole trier of fact he is presumably capable of understanding and applying the distinction. Furthermore, in any case in which the prior statement constitutes the only substantial evidence put forth by the party with the burden of proof, a directed verdict (or reversal on appeal) effectively takes the matter out of the jury's hands. But there is no denying that it is an inherent failing of the jury system that limiting instructions, like admonitions to disregard improper testimony, are not an absolute safeguard against the intrusion of human frailties and limitations into a

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allowing use of prior consistent statements for all purposes, see *People v. Cannady*, 8 Cal. 3d 379, 385-88, 503 P.2d 585, 589-91, 105 Cal. Rptr. 129, 133-35 (1972).

Another "special" category of prior statements is that of prior identification, involving various considerations beyond the scope of this article. See CAL. EVID. CODE § 1238 (West 1966).

20. See *State v. Saporen*, 205 Minn. 358, 361-62, 285 N.W. 898, 901 (1939). McCormick's treatise, in its present (Cleary) edition, at least recognizes this inconsistency, and attempts to reconcile it by explaining that there may be less likelihood of abuse in the case of inconsistent statements. MCCORMICK, *supra* note 2, § 251, at 603-04. Professor McCormick himself, in his earlier works, did not appear to draw this distinction. See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 39, at 82 (1st ed. 1954); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573, 588 (1947) [hereinafter cited as *The Turncoat Witness*].

21. *The Turncoat Witness*, *supra* note 20, at 580-81; see CAL. EVID. CODE § 1236, Comment—Law Revision Comm'n (West 1966).

22. See note 7 *supra*.



verdict. Nevertheless, the fact that we cannot "unring the bell" after an improper statement by counsel or a witness is not a sufficient reason to eliminate motions to strike and admonitions to the jury, and it is likewise questionable whether the difficulty in attempting to apply evidence against some defendants but not against others, or to consider a prior statement for impeachment but not for substantive purposes, should result in such evidence either being admitted for all purposes or being excluded entirely.<sup>23</sup> The jury frailty rationale is simply too broad.

A subsidiary contention often put forward in opposition to the orthodox rule is that the prior statement, because of its greater relative proximity in time to the event in question, is inherently more reliable than the testimony on the stand: not only was the witness's recollection more accurate at a time closer to the event in question, but there had been less opportunity at that time for improper influence to have encouraged the witness to falsify his story.<sup>24</sup>

There are some obvious weaknesses in this position. To begin with, the prior statement might well have been made months or years after the event in question, yet only a few days prior to the in-court testimony. Even assuming significantly greater proximity of the prior statement to the event, is that statement indeed more reliable? No doubt most memories fade over time (although we have all "forgotten" events only to remember them clearly at a later date). Nonetheless, with respect to the possibility that the witness was corrupted after the first statement was made, it is equally likely that a witness who lied originally, for whatever reason, has since been convinced to tell the truth. For example, an attack of conscience or a guarantee of protection or immunity from prosecution could be motivating factors. Perhaps more likely, the witness may be influenced by the awesome difference between an informal statement of no immediate consequence to anyone (and carrying no threat of conviction for perjury or other sanction) and formal testimony in court under penalty of perjury, with the

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23. See, e.g., CAL. EVID. CODE § 355 (West 1966): "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

Of course, where the possibility of the jury being unable to follow a limiting instruction threatens a constitutional right of the accused, this contingency must be eliminated by severance or other means which preserve the limitation, rather than forego it. See, e.g., *Bruton v. United States*, 391 U.S. 123 (1968); *People v. Aranda*, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

24. See, e.g., *People v. Gould*, 54 Cal. 2d 621, 626, 354 P.2d 865, 867, 7 Cal. Rptr. 273, 275 (1960); *The Turncoat Witness*, *supra* note 20, at 577-78.

life or liberty of a party now in the balance.<sup>25</sup>

Moreover, even if we accept the premise that earlier statements are more reliable than later ones, this is nothing more than an abstract generalization, not a basis for decision. Merely to say that, in general, one class of statement tends to be more reliable than another is really to say little or nothing about the actual reliability of any particular two statements before the court. Relative proximity to the event, in and of itself, provides no intrinsic guarantee whatsoever of truthfulness (as does, for example, the fact that a statement is against one's interest).

Further, the question of fading memory, surely the element most likely to render an earlier statement more reliable, reduces only the possibility of honest mistake based on poor recollection, and not at all that of deliberate falsehood or mistake based on other factors, such as faulty perception. For those defects, the only cure is effective cross-examination.<sup>26</sup> Thus it seems that we must return to adequacy of cross-examination as the best determinant of whether prior statements should or should not be given substantive effect.

As noted earlier, prior inconsistent statements can occur in many contexts, some of which offer the opportunity for cross-examination at the time of the declaration (as at a former trial or preliminary hearing). This latter circumstance is a somewhat special case and will be discussed separately, as it raises questions that are different from those created by the prior statement made either outside of the judicial context or under circumstances clearly offering no opportunity for cross-examination.

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25. Cf. *California v. Green*, 399 U.S. 149, 199 (1970) (Brennan, J., dissenting); *People v. Johnson*, 68 Cal. 2d 646, 654, 441 P.2d 111, 117, 68 Cal. Rptr. 599, 605 (1968).

26. For all of these reasons, the only type of statement which the hearsay rule generally recognizes as more reliable than present testimony, based primarily on proximity to the event, is a spontaneous utterance, one made so close to an "exciting" event (or physical or mental feeling) to preclude, at least in theory, an opportunity for reflection or conscious prevarication. See, e.g., *Showalter v. Western Pac. R.R.*, 16 Cal. 2d 460, 465-70, 106 P.2d 895, 898-900 (1940); CAL. EVID. CODE §§ 1240, 1250 (West 1966); 6 WIGMORE, *supra* note 1, § 1747. See also *Pope v. United States*, 296 F. Supp. 17, 19-20 (S.D. Cal. 1968). Even spontaneity, however, is a questionable guarantee of truthfulness. See, e.g., Stewart, *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 27-29. Faulty perception, for example, will occur regardless of how "spontaneous" the utterance based on that perception. The proposed Federal Rules' extension of this category to include all spontaneous observations is even more debatable. See PROPOSED FED. R. EVID. rule 803(1), H.R. 5463, 93d Cong., 1st Sess. § 803(1) (1973).

Of course, if the prior statement falls within this or any other hearsay exception not requiring unavailability, the problems discussed in this article become moot.

### Prior Statement, Present Cross-Examination

Many explanations have been advanced to explain why cross-examination, to be effective, cannot take place months or years following the challenged statement. First, cross-examination, by its very nature, depends for its success in exposing falsehood upon immediacy; in the words of the leading case expounding the orthodox rule, "[i]ts strokes fall while the iron is hot."<sup>27</sup> Generally this means that a witness must not be given time to crystallize and rationalize a false story. However, by definition a prior inconsistent statement implies that the witness has already recanted *before* taking the stand,<sup>28</sup> making cross-examination unnecessary to achieve this result. It has been argued that this should make the cross-examiner's task easier,<sup>29</sup> but just the reverse may in fact be true: his task may be made *too* easy, and thus merely raise an even more difficult obstacle to effective questioning.

This circumstance is illustrated in the case of *Ruhala v. Roby*.<sup>30</sup> *Ruhala* concerned an automobile accident in which a woman was killed and the administrator of her estate sued both *R*, the driver of the car in which the deceased was riding, and *B*, the driver of the truck which collided with her car. A key issue was who was driving the car at the time of the accident. *B* had made an out-of-court statement to the effect that since the woman in the car which he hit was on "his side" at the time of the collision, *R* "had to have been" driving. At trial *B* changed his story and testified that the decedent had been driving the car. The court upheld the trial judge's refusal to permit the use of *B*'s prior inconsistent statement for the truth of the matter stated; that is, to *prove* that the deceased woman was driving.

The court demonstrated that a competent cross-examiner attacking *B*'s statement *at the time it was made* could easily have pointed out the fallacy of his assumption that *R* "had to have been" driving, due to the presence of several other logical explanations for the woman's position at the time, and thereby could have forced *B* to recant his statement *in the presence of the jury*. "Every cross-examiner tries

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27. *State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939). See also *People v. Johnson*, 68 Cal. 2d 646, 654-57, 441 P.2d 111, 117-19, 68 Cal. Rptr. 599, 605-07 (1968).

28. This assumes that the present testimony is not a mere lack of present recollection. There has been much controversy over whether present forgetfulness is inconsistent with prior knowledge. See, e.g., *People v. Sam*, 71 Cal. 2d 194, 208-10, 454 P.2d 700, 708-09, 77 Cal. Rptr. 804, 812-13 (1969); *People v. Petersen*, 23 Cal. App. 3d 883, 891-92, 100 Cal. Rptr. 590, 594-95 (1972).

29. E.g., *The Turncoat Witness*, *supra* note 20, at 576-77.

30. 379 Mich. 102, 150 N.W.2d 146 (1967).

to bring the witness to the point where he changes his story—literally eats his words—in the presence of the jury . . . .”<sup>31</sup>

Cross-examination pre-supposes a witness who affirms a thing being examined by a lawyer who would have him deny it, or a witness who denies a thing being examined by a lawyer who would have him affirm it. Cross-examination is in its essence an adversary proceeding. The extent to which the cross-examiner is able to shake the witness, or induce him to equivocate is the very measure of the cross-examiner’s success.<sup>32</sup>

The cross-examiner at a later trial, on the other hand, faced with a witness who made the statement previously and has already recanted *before* trial, is denied this means of laying to rest forever the previous statement of the witness:

No matter how deadly the thrust of the cross-examiner, the ghost of the prior statement stands. His questions will always sound like attempts to permit the witness to explain *why* he changed his story before coming to court, with the jury being left to infer that he might have been induced to change his story in the intervening months or years, for some unrevealed and sinister reason.<sup>33</sup>

The result of this inability to kill the “ghost” of the prior statement, concluded the court, is that whereas “[i]f 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,”<sup>34</sup> under the unorthodox rule the jury is permitted to ignore the recantation, believe the prior inconsistent statement, and render a verdict solely thereon.

A similar dilemma was faced by the cross-examiner in *People v. Green*.<sup>35</sup> The prosecution witness, who pleaded lack of present recollection, did not retract his prior statements, but simply indicated that they “may have been what he believed at the time, but he now could not remember the events in question.”<sup>36</sup> The prosecution rested its

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31. *Id.* at 124-25, 150 N.W.2d at 156.

32. *Id.*

33. *Id.* at 128, 150 N.W.2d at 158 (emphasis in original).

34. *Id.*

35. 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), *vacated sub nom.*, *California v. Green*, 399 U.S. 149 (1970). *Green* involved the constitutionality of section 1235 of the California Evidence Code, which permits the substantive use of prior inconsistent statements. The California Supreme Court first declared such use unconstitutional, primarily on the basis of the confrontation clause. The United States Supreme Court disagreed with the California court’s analysis (as will be seen, Congress thereafter disagreed with the Supreme Court, at least as a matter of policy). On remand, of course, the California court accepted the Court’s position. *People v. Green*, 3 Cal. 3d 981, 479 P.2d 988, 92 Cal. Rptr. 494, *cert. dismissed*, 404 U.S. 801 (1971).

36. 70 Cal. 2d 654, 663 n.6, 451 P.2d 422, 427 n.6, 75 Cal. Rptr. 782, 787 n.6 (1969).

case on the prior statements, and defense counsel had the choice of either letting them stand unchallenged or attempting to discredit them *ex post facto*. The California court pointed out the inefficacy of an attempt to cross-examine at trial with respect to prior statements hostile to the cross-examiner's case:

Defense counsel was thus put in the awkward position of attempting to discredit a witness who had just testified in defendant's favor [by failing to remember crucial facts required for conviction of the defendant]. If cross-examination of a hostile witness is a delicate process, cross-examination of a friendly witness—as to testimony given at a time when he was hostile—is an unusual exercise in diplomacy and futility.<sup>37</sup>

For that matter, how does one cross-examine a witness with respect to a statement that the witness will not even admit he made? To use the example put by the court in the *Ruhala* case, not only is the cross-examiner deprived of the opportunity to force an immediate admission by the witness that his conclusion (*R* "had to have been driving") was faulty, but he cannot obtain an admission of error at all from a witness who will not even agree that he stated the premise. He cannot elicit an explanation of the inconsistency if the witness will not or cannot concede that it exists.<sup>38</sup>

Little has been said thus far about the third element of the hearsay rationale—demeanor. Some commentators discount the value of demeanor evidence,<sup>39</sup> although it is the basis of the unquestioned axiom that an appellate court will always defer to the trier of fact with respect to the credibility of a witness, because only the trier of fact has had the benefit of direct observation of the witness during his testimony.<sup>40</sup> More will be said directly about demeanor in the context of cross-examination before a former trier of fact. It is difficult, however, to consider questioning after the fact an adequate substitute for physical observation of the declarant as he makes the statement in question,

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37. *Id.* The issue of whether a lack of memory is inconsistent with prior knowledge was not considered in *Green* until the hearing on remand. *People v. Green*, 3 Cal. 3d 981, 988-89, 479 P.2d 988, 1002-03, 92 Cal. Rptr. 494, 498-99 (1971); *cf.* *People v. Sam*, 71 Cal. 2d 194, 208-10, 454 P.2d 700, 708-09, 77 Cal. Rptr. 804, 812-13 (1969).

38. Where the witness does not presently recall even the events with which his former statement was allegedly concerned, even some of the critics of the orthodox rule concede that cross-examination on the prior statement is futile. *E.g.*, Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A.L. REV. 43, 53 (1954); Comment, *Substantive Use of Extrajudicial Statements of Witnesses Under the Proposed Federal Rules of Evidence*, 4 U. RICH. L. REV. 110, 119 (1969).

39. *E.g.*, 5 WIGMORE, *supra* note 1, § 1399 ("a secondary and dispensable element").

40. *Meiner v. Ford Motor Co.*, 17 Cal. App. 3d 127, 140, 94 Cal. Rptr. 702, 710 (1971).

given the nuances of tone and expression which give the statement life and which form the basis of human judgments of credibility.

### Prior Statement, Prior Cross-Examination

The above discussion has been limited to situations in which the prior inconsistent statement was made in either a nonjudicial setting or one which lacked an opportunity for immediate cross-examination. A different problem is presented when the context of the prior statement *did* allow for cross-examination at the time the statement was made, enabling the cross-examiner to "strike while the iron was hot." Typically such a setting is a preliminary hearing or other pretrial proceeding, or a former trial, at which (we will assume) the statement was made under oath, and subject to cross-examination. Have the objections to substantive use at a subsequent trial now been met? It is again necessary to examine the three factors which underlie the hearsay rule.

Seemingly the requirement of an oath is fulfilled: if the threat of damnation for lying and/or imprisonment for perjury is some assurance of truth at the time the statement is made, it does not necessarily diminish with subsequent repetition. Presumably, however, the witness has lied or at least testified inaccurately under oath at least once—either at the present hearing or the prior one, or possibly at both—leaving little significance to his prior oath-taking.

Cross-examination is more difficult to assess. First it is necessary to establish precisely what took place at the prior and subsequent hearings. In criminal proceedings, for example, preliminary hearings do not assess guilt, but only probable cause for further prosecution.<sup>41</sup> Thus the issues at the preliminary stage are different from those at trial. The magistrate before whom a preliminary hearing is held need not be convinced of an accused's guilt beyond a reasonable doubt, but need only, in effect, entertain a reasonable doubt of his innocence.<sup>42</sup> There-

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41. *E.g.*, 18 U.S.C. § 3060 (1970); FED. R. CRIM. P. 5(c); CAL. PEN. CODE § 872 (West 1970); *cf.* Barber v. Page, 390 U.S. 719, 725 (1968).

42. Typical is section 872 of the California Penal Code, requiring a finding of "sufficient cause to believe the defendant [is] guilty." CAL. PEN. CODE § 872 (West 1970). This has been interpreted by the California courts as the equivalent of "probable cause" and nothing more than the same suspicion required to justify an arrest or the issuance of a search warrant. *E.g.*, Williams v. Superior Court, 71 Cal. 2d 1144, 458 P.2d 987, 80 Cal. Rptr. 747 (1969) (arrest); People v. Aday, 226 Cal. App. 2d 520, 38 Cal. Rptr. 199, *cert. denied*, 379 U.S. 931 (1964) (search warrant); *see* People v. Clark, 116 Cal. App. 2d 219, 223, 253 P.2d 510, 513, *cert. denied*, 348 U.S. 902 (1953) (a state of facts which would "lead a man of ordinary . . . prudence to believe, and conscientiously entertain a strong suspicion" of guilt).

fore, a cross-examination which might be sufficient to raise a reasonable doubt of guilt in the minds of the ultimate triers of fact, but would be insufficient to dispel all doubt of innocence from the mind of the magistrate, would be better left for trial than needlessly exposed at a time when it can be of no value. Simply as a matter of tactics, many trial attorneys will attempt to avoid "showing all their cards" during the preliminary hearing, but will allow false testimony to go unchallenged until the trial, when exposure of its falsity can be utilized to greatest advantage.<sup>43</sup>

Furthermore, by law a preliminary hearing must take place very soon after the initial arrest of the accused,<sup>44</sup> before his counsel (or, for that matter, the prosecution) has had an adequate opportunity to assess and investigate the testimony and other evidence available to him. Thus even were full cross-examination at the preliminary hearing considered tactically desirable, counsel on either side would likely be without adequate resources and preparation for its most effective use.

The above considerations were discussed at some length in the California Supreme Court's first *Green* decision, and were reiterated in the dissenting opinion of Mr. Justice Brennan upon the reversal of that decision. Quoting prior California authorities, Justice Brennan pointed out that in California, as in most jurisdictions,

the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouement—an order holding the defendant for trial. Only television lawyers customarily demolish the prosecution in the magistrate's court.<sup>45</sup>

Elaborating on the perfunctory nature of the preliminary hearing, Justice Brennan continued:

In the hurried, somewhat *pro forma* context of the average preliminary hearing, a witness may be more careless in his testimony than in the more measured and searching atmosphere of a trial. Similarly, a man willing to perjure himself when the consequences are simply that the accused will stand trial may be less willing to do so when his lies may condemn the defendant to loss of liberty.<sup>46</sup>

Even assuming that no such impediments to cross-examination exist at the preliminary stage, it must be remembered that the magistrate before whom that questioning occurs will in all likelihood not be

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43. See, e.g., F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 25 (1971); Hollopeter, *Preliminary Examination*, in *CALIFORNIA CRIMINAL LAW PRACTICE* § 6.11, at 241-42 (1964).

44. E.g., CAL. PEN. CODE § 859b (West Supp. 1974) (defendant in custody has right to preliminary examination within 10 days of arraignment).

45. 399 U.S. at 196, quoting *People v. Gibbs*, 255 Cal. App. 2d 739, 743-44, 63 Cal. Rptr. 471, 475 (1967).

46. 399 U.S. at 199.

the trier of fact before whom the prior inconsistent statement is presented at trial. Thus in order for cross-examination at the preliminary stage to have any effect at all, it must be placed in the record available to the subsequent trier of fact. In other words, unless that cross-examination is read into the record or otherwise made known to the trier of fact, its effect on the magistrate and the potential damage it may have done to the direct testimony will be lost.

### Demeanor Evidence and Cross-Examination

These practical problems with cross-examination at a prior proceeding are not the only considerations that militate against the use of prior inconsistent statements for their substantive value. Let us assume that there was a full and far-ranging cross-examination of the declarant at the time he made his prior statement, and that this cross-examination is presented to the subsequent trial jury verbatim. At this point the interplay of cross-examination and demeanor becomes relevant.

As indicated earlier, one of the three factors which render a hearsay statement of limited evidentiary value is that it was made under circumstances which deprive the present trier of fact of an opportunity to observe the declarant as he makes the statement. The same is true of cross-examination: both questions and answers can take on vastly different meaning or weight if reduced to a mere written record. Justice Brennan, again quoting the California opinion in *Green*, points out that a mere reading of the cross-examination loses "the more subtle yet undeniable effect of counsel's rhetorical style, his pauses for emphasis and his variations in tone, as well as his personal rapport with the jurors . . . ." <sup>47</sup> Even were they transferable, a style and emphasis appropriate for an examining magistrate may be far from that employed by a cross-examiner before a jury.

In any event, the role of demeanor during cross-examination goes beyond mere observation of the cross-examiner's style. Without the opportunity to view the witness, the trier of fact is deprived of a dimension which can easily mean the difference between belief and disbelief, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors."<sup>48</sup>

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47. *Id.* "The cross-examiner must remember that he is a performer and the jurors are his audience. No good performer ignores his audience, and all performances are conducted for the purpose of favorably impressing the audience." *Id.* at 198, quoting *People v. Green*, 70 Cal. 2d 654, 662, 451 P.2d 422, 427, 75 Cal. Rptr. 782, 787 (1969).

48. *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 430 (2d Cir. 1951) (L. Hand, J.).



The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which "cold print does not preserve" and which constitute "lost evidence" so far as an upper court is concerned.<sup>49</sup>

The words of a witness under cross-examination will often be the least important part of his response, and of little or no concern to the cross-examiner. A considerable victory can be won by the cross-examiner who elicits—for all to observe—not an admission of falsehood, but a quavering denial, an angry protestation, or a nervous silence.

The most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood; and if he did, his observations would probably be of little use to others.<sup>50</sup>

This was apparently recognized by the Supreme Court's Advisory Committee itself, for it stated in its comment to rule 804(b)(1) (the former testimony exception) that "opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination."<sup>51</sup>

This is not to say that the witness's *present* demeanor or tone are of no value to the trier of fact; however, as is true of present cross-examination, they may expose present falsehood or uncertainty while leaving the jury little basis for assessing whether the prior statement suffered the same or other defects. Nevertheless, Judge Learned Hand at one time maintained that:

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49. *Broadcast Music v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949) (Frank, J.). See also *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946).

The importance to trial lawyers of demeanor evidence is illustrated by the developing field of videotape depositions, which offer the possibility of presenting to the jury the actual examination of a deponent, complete with demeanor preserved on tape, rather than a reported stenographic transcript. As one experienced trial lawyer has stated, "A pause or an inflection can mean the difference between doubt and certainty; a smile the difference between sarcasm and sincerity; a frown the difference between bias and hostility." Miller, *Videotaping the Oral Deposition*, 18 PRAC. LAW. 45, 45-46 (Feb. 1972).

Wigmore, while dismissing demeanor as of secondary value in the context of the hearsay rule, nevertheless in a discussion of electronic recording of testimony during trial extols the virtue of demeanor evidence. 3 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE AT COMMON LAW § 809, at 276-77 (Chadbourn Rev. 1970), quoting *McBride v. State*, 368 P.2d 925, 928-29 (Alas. 1962). See generally Sahn, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A.J. 580 (1961).

50. Stephen, THE INDIAN EVIDENCE ACT, WITH AN INTRODUCTION ON THE PRINCIPLES OF JUDICIAL EVIDENCE 41-43, quoted in Sahn, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A.J. 580, 581 (1961).

51. RULES OF EVIDENCE FOR THE UNITED STATES COURTS & MAGISTRATES, rule 804(b)(1), Advisory Committee's Note, in 34 L. Ed. 2d lxxiii, clxxix (1972) [hereinafter cited as PROPOSED RULES].

[t]he possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.<sup>52</sup>

Although this generalization was considerably limited by Judge Hand in a later case,<sup>53</sup> his earlier words have greatly buoyed the advocates of the unorthodox view, and not without reason. It is true that the jury, in such a circumstance, are in fact "deciding from what they see and hear of that person and in court"; the only question is the practical reliability of judging the credibility of an earlier statement wholly from "what they see and hear" at a later time. Merely to *assume* that this is sufficient begs the question.

The issues discussed here in the context of a criminal trial and a preliminary hearing are not limited to such a narrow (though far from infrequent) set of circumstances. For example, a prior inconsistent statement might have been made by a witness at a former civil trial, where there was, at least nominally, an opportunity to cross-examine. Here the same problems arise, but in a slightly altered form. The setting of the former trial (including the cause of action involved and the purpose of the testimony in question) might well have rendered cross-examination, while theoretically available, tactically or practically unfeasible. The stakes might have been lower, the issues less likely to produce a truthful statement.<sup>54</sup> For example, the first action might have been over a \$100 contract, while the present one may be a matter of life or liberty.<sup>55</sup> If the parties were different, the present plaintiff or defendant must rely on the ability and/or tactical judgment of who-

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52. *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). Compare Judge Hand's later statement, quoted in text accompanying note 48 *supra*.

53. *United States v. Block*, 88 F.2d 618, 620 (2d Cir. 1937).

54. *See, e.g., United States v. Nuccio*, 373 F.2d 168, 173 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967).

55. Compare the evidentiary use of prior judgments, which is limited in effect to prior felony cases, in which the stakes and the standard of proof are both sufficiently high to assure that the matter was fully and fairly litigated. *Cf. PROPOSED FED. R. EVID. rule 803(22)*, H.R. 5463, 93d Cong., 1st Sess. § 803(22) (1974); *CAL. EVID. CODE § 1300* (West 1966). Were this not the case, every minor misdemeanor would necessitate a full defense on every issue, lest the judgment prove ruinous in a subsequent civil action for far higher stakes. Compare also the question of opportunity and incentive to litigate an issue upon which collateral estoppel is invoked. *E.g., Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965).

ever conducted the prior cross-examination.<sup>56</sup> Problems of the transferability of a prior cross-examination to a present trier of fact ( demeanor, etc.) are similarly as prevalent in the context of a prior trial as in that of a prior preliminary hearing.

The California court in *Green*<sup>57</sup> succinctly summed up the orthodox position when it asserted that only contemporaneous cross-examination is truly effective, and contemporaneous means at the time the statement is made and before the trier of fact who must ultimately determine credibility. "In short, cross-examination neither may be *nunc pro tunc* nor may it be *tunc pro nunc*."<sup>58</sup>

### The Federal Rules of Evidence

The above discussion is the background upon which the Supreme Court's Advisory Committee and later the House Judiciary Committee drafted their respective versions of the Federal Rules of Evidence.<sup>59</sup> What emerged was an initial attempt by the Advisory Committee to take an extreme unorthodox approach, and a final compromise which, while far from satisfactory to everybody, at least does not wholly reject the basic premises of either theory.

As originally drafted by the Advisory Committee, rule 801 defined prior inconsistent statements out of the hearsay rule entirely. Rule 801(d)(1) provided that:

A statement is not hearsay if—

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony

. . . .<sup>60</sup>

There was no qualification to the sweeping admission of prior inconsistent statements, so long as there was opportunity for cross-examination at the subsequent hearing. This proposal represented a substantial abandonment of the traditional hearsay concept, while nevertheless rejecting the even more extreme (but perhaps logically consistent)

56. Under the proposed Federal Rules, this is a very real problem. See note 66 & accompanying text *infra*.

57. 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), *vacated sub nom.*, *California v. Green*, 399 U.S. 149 (1970).

58. *Id.* at 661, 451 P.2d at 426, 75 Cal. Rptr. at 786.

59. For a brief account of the checkered history of the proposed Federal Rules of Evidence, see Reutlinger, *Policy, Privacy and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1353-54 (1973), & authorities cited therein.

60. PROPOSED RULES, *supra* note 51, rule 801(d)(1), at cliv.

position of the Uniform Rules of Evidence,<sup>61</sup> which sought to admit *any* out-of-court statement by a present witness. The Advisory Committee accepted the position of the California Law Revision Commission, which drafted the California Evidence Code, regarding the sufficiency of subsequent cross-examination before the present trier of fact, the prior statement's greater credibility because of its proximity in time to the events in question, and the need to protect a party against a "turncoat" witness.<sup>62</sup>

The relevance of a prior statement's greater proximity to an event has already been discussed.<sup>63</sup> As indicated, any lack of effective cross-examination is not significantly alleviated by greater proximity, although where faulty recollection is a possible factor the trier of fact will properly consider the time between testimony and event as relevant to credibility. As for the "turncoat" witness, while the fact that the testimony elicited at trial does not conform to that hoped for or expected by the examiner might be a legitimate basis for a claim of surprise and a request for continuance, it is questionable whether this is sufficient reason to raise the prior untested statement to the same level as in-court testimony.

Initially the Criminal Justice Subcommittee of the House Judiciary Committee, in its sometimes sweeping amendments to the Advisory Committee's proposals, added the requirement that the prior statement be made under oath.<sup>64</sup> After critical comment was received from members of the Bar, pointing out *inter alia* the questionable significance of the oath,<sup>65</sup> a further revision was made and the present compromise emerged. As it left the Judiciary Committee, rule 801(d)(1) provided (and presently provides):

A statement is not hearsay if—

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony and was given under oath subject to cross-examination, and subject

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61. UNIFORM RULES OF EVIDENCE rule 63(1).

62. PROPOSED RULES, *supra* note 51, rule 801(d)(1), Advisory Committee's Note, at clvi-vii. See also CAL. EVID. CODE § 1235, Comment—Law Revision Comm'n (West 1966).

63. See text accompanying notes 24-26 *supra*.

64. The original proposals of the subcommittee were contained in a special supplement to United States Law Week. 42 U.S.L.W. No. 3 (July 17, 1973). Comments from members of the bench and bar were invited, and were later published by the subcommittee. See *Hearings on H.R. 5463 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2, at 170 (1973).

65. See text accompanying note 8 *supra*.

to the penalty of perjury at a trial or hearing or in a deposition

. . . .

Note that the rule, while requiring an opportunity for cross-examination at both the prior and subsequent stages, omits any requirement that the prior cross-examination have been by the party against whom the statement is now offered (or even a similarly interested party), or under circumstances in which the motive and interest to cross-examine were similar. This is not only ill-advised for reasons already stated, but it is somewhat inconsistent with rule 804(b)(1), concerning prior testimony. There the Judiciary Committee rejected the Advisory Committee's recommended admission of testimony which had been subject to cross-examination by any person with motive and interest similar to the present party's. The committee explained:

[I]t is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's *predecessor in interest* in a civil action or proceeding had an opportunity and *similar motive* to examine the witness.<sup>66</sup>

If imposition of responsibility for cross-examination by another party, or by any person without a similar motive and interest, is unfair in the case of prior testimony, it can certainly be argued that it is equally inequitable and unavailing in the case of prior inconsistent statements.

### Conclusion

To some extent, the long debate over the admissibility of prior inconsistent statements is a controversy over the fundamental premises underlying the hearsay rule itself: is it sufficient for admission of a secondhand statement merely that the declarant is available to testify at the time of trial? More narrowly, it is a controversy over whether noncontemporaneous cross-examination is as reliable as contemporaneous cross-examination in eliciting the truth before a trier of fact; and, if not, whether the degree of reliability sacrificed is compensated for by the need to place "all the evidence" before the jury.

The burden of the foregoing analysis is that substantive use of

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66. H.R. REP. No. 650, 93d Cong., 1st Sess. 15 (1973) (emphasis added). That prior cross-examination by anyone but one with similar motive and interest has no transferability to a later proceeding is a matter of common sense, and has generally been recognized by recent formulations of the former testimony exception. See, e.g., CAL. EVID. CODE §§ 1291-92 (West 1966). For a detailed discussion of the criteria which should determine whether "motive and interest" were indeed sufficiently similar, and a criticism of the approach taken by the proposed Federal Rules, see Martin, *The Former Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547, 555-

prior inconsistent statements may involve a far more substantial sacrifice of cross-examination efficacy than most critics of the orthodox rule have been willing to concede. While this does not resolve the problem in that rule's favor, it does draw the lines of battle a bit more clearly: those who would admit such statements should recognize that to a great extent it is not because they are truly as reliable as—or more reliable than—present in-court testimony; rather, it represents a conscious choice to favor, as in other areas of evidentiary law,<sup>67</sup> greater ease of admissibility and fewer hindrances in the form of exclusionary rules. The present Supreme Court surely represents the vanguard of this philosophy in America, and the original draft of the proposed Federal Rules was clearly biased in favor of such freer admissibility.<sup>68</sup> The Congress' version of the Federal Rules is, as most congressional policies tend to be, a compromise, following the trend toward permissive evidentiary rules but not quite so far as many reformers had hoped. Whether Congress has begun the process of reversing the present trend or has only delayed it slightly will perhaps be known when, in the future, other jurisdictions formulate or reformulate their own versions of evidentiary reform.

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65 (1972).

67. *E.g.*, *Gustafson v. Florida*, 414 U.S. 260 (1973) (search and seizure); *Kastigar v. United States*, 406 U.S. 441 (1972) (compelled testimony); *Harris v. New York*, 401 U.S. 222 (1971) (statements of accused).

68. *See, e.g.*, Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353 (1973).

