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Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801 (d) (1) (A), 613, and 607

Michael H. Graham
University of Illinois

EMPLOYING INCONSISTENT STATEMENTS FOR IMPEACHMENT AND AS SUBSTANTIVE EVIDENCE: A CRITICAL REVIEW AND PROPOSED AMENDMENTS OF FEDERAL RULES OF EVIDENCE 801(d)(1)(A), 613, and 607

*Michael H. Graham**

I. INTRODUCTION

The proposed Federal Rules of Evidence,[1] which were drafted by the Advisory Committee and approved by the Supreme Court,[2] dealt in a comprehensive manner with a party's impeachment of his own or his opponent's witness by means of prior inconsistent statements. Proposed rule 801(d)(1)(A),[3] advocating a significant departure from the common law, provided that all prior statements inconsistent with the testimony given by a witness during trial were not hearsay. In proposed rule 607[4] the Advisory Committee and the Supreme Court rejected the traditional reasons offered in support of the voucher rule's restrictions on a party's impeachment of his own witness, providing instead that "the credibility of any witness may be attacked by any party, including the party calling him." Thus, the proposed rules eliminated the question whether prior inconsistent statements accompanied by a limiting instruction are admissible only for purposes of impeachment; henceforth, courts were to admit all such statements as substantive evidence. Complementing proposed rules 801(d)(1)(A) and 607, proposed rule 613[5] significantly eased the traditional foundation requirements imposed by the common law as prerequisites to the introduction of extrinsic evidence of a prior inconsistent statement.

The Advisory Committee's comprehensive scheme, however,

* Professor of Law, University of Illinois. B.S.E. 1964, University of Pennsylvania; J.D. 1967, Columbia University.—Ed.

1. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972).

2. 56 F.R.D. at 184.

3. 56 F.R.D. at 293.

4. 56 F.R.D. at 266.

5. 56 F.R.D. at 278.

failed to withstand congressional scrutiny. Although proposed rules 607 and 613 were adopted without substantive change, Congress, motivated by concerns over the reliability of prior inconsistent statements, amended proposed rule 801(d)(1)(A) to provide that only prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" were admissible as substantive evidence.[6] Thus, under rule 801(d)(1)(A) of the Federal Rules of Evidence as enacted, a party may introduce a prior inconsistent statement as substantive evidence only if it was originally made in testimonial form. That denial of substantive admissibility for most prior inconsistent statements raises two serious concerns. First, rule 801(d)(1)(A) as enacted denies substantive admissibility to some prior inconsistent statements for which there are strong guarantees of reliability. Second, the wisdom of rules 607 and 613 appears questionable in light of Congress' concern about the reliability of those prior inconsistent statements no longer substantively admissible pursuant to rule 801(d)(1)(A).

Under prior federal practice the voucher rule restricting impeachment of a party's own witness and the foundation requirement for the introduction of extrinsic evidence of a witness' prior inconsistent statement operated to curtail potential jury misuse of prior inconsistent statements admitted solely for purposes of impeachment.[7] Although the Advisory Committee's proposed rules 607 and 613 altered both these aspects of prior federal practice, no consequent abuse of prior inconsistent statements was threatened because all such statements were to be admissible as substantive evidence. Now, however, with Congress' amendment to proposed rule 801(d)(1)(A), the possibility of abuse arises because the limitations Congress engrafted upon proposed rule 801(d)(1)(A) were not accompanied by corresponding amendments to proposed rules 607 and 613.

A further issue raised by the enactment of rule 801(d)(1)(A) is whether Congress was not unduly cautious in placing restrictions on the rule as initially proposed by the Advisory Committee. Although Congress' concern over the general trustworthiness of prior inconsistent statements is clearly justifiable, there remains the question whether, in the interest of guaranteeing the reliability of prior inconsistent statements, it is necessary to limit substantive admissibility only to those statements made in a formal setting.

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6. FED. R. EVID. 801(d)(1)(A).

7. *See* text at notes 129 & 134 *supra.*

The Federal Rules of Evidence have already been employed as a model for the new Uniform Rules of Evidence[8] and for several state codifications,[9] and yet apparently none of the drafters of these schemes gave serious consideration either to expanding admissibility under 801(d)(1)(A) selectively or to controlling potential abuse regarding the use of prior inconsistent statements not substantively admissible. This Article, after exploring the history, development, and rationale of rules 801(d)(1)(A), 613, and 607, proposes that rules 613 and 607 be amended to bring their provisions into conformity with rule 801(d)(1)(A). In the same vein, the Article also suggests that rule 801(d)(1)(A) unduly restricts the types of prior inconsistent statements substantively admissible thereunder. Accordingly, it proposes an amendment to rule 801(d)(1)(A) that expands the substantive admissibility of prior inconsistent statements while seeking to preserve the guarantees of reliability that Congress has seen fit to impose.

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8. Uniform Rules of Evidence, *in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 912 (1974).

9. Several states have adopted evidence rules modeled after the Federal Rules of Evidence discussed in this Article. Rule 801(d)(1)(A) is the basis for evidence rules in eight states: Arkansas [ARK. STAT. ANN. § 28-1001 (Noncum. Supp. 1976), *codifying* ARK. UNIF. R. EVID. 801 (state adopted all Uniform Rules)]; Maine [ME. R. EVID. 801]; Minnesota [MINN. R. EVID. 801 (state added qualification to 801(d)(1)(C) and added new provision, 801(d)(1)(D), to define a "present sense impression" as not hearsay)]; Nebraska [NEB. REV. STAT. § 27-801 (1975), *codifying* NEB. EVID. R. 801]; Nevada [NEV. REV. STAT. § 51-035 (1973) (adopted the Preliminary Draft version of rule 801, which allows substantive use of all prior inconsistent statements of a witness)]; New Mexico [N.M. STAT. ANN. § 20-4-801 (Supp. 1975), *codifying* N.M.R. EVID. 801 (adopted the Proposed Draft as submitted to Congress, which allows substantive use of all prior inconsistent statements)]; and Wisconsin [WIS. STAT. § 908.01 (1975) (adopted the Proposed Draft)].

Eight states have adopted rule 607 without change: Arkansas [ARK. STAT. ANN. § 28-1001 (Noncum. Supp. 1976), *codifying* ARK. UNIF. R. EVID. 607]; Maine [ME. R. EVID. 607]; Minnesota [MINN. R. EVID. 607]; Nebraska [NEB. REV. STAT. § 27-607 (1975), *codifying* NEB. EVID. R. 607]; Nevada [NEV. REV. STAT. § 50.075 (1975)]; New Mexico [N.M. STAT. ANN. § 20-4-607 (Supp. 1975), *codifying* N.M.R. EVID. 607]; and Wisconsin [WIS. STAT. § 906.07 (1975)].

Arkansas [ARK. STAT. ANN. § 28-1001 (Noncum. Supp. 1976), *codifying* ARK. UNIF. R. EVID. 613], Nebraska [NEB. REV. STAT. § 27-613 (1975), *codifying* Neb. EVID. R. 613] and New Mexico [N.M. STAT. ANN. § 20-4-613 (Supp. 1975), *codifying* N.M.R. EVID. 613] adopted rule 613 without change. Wisconsin [WIS. STAT. § 906.13 (1975)] has also adopted rule 613, but it added a proviso that extrinsic evidence may be excluded if there is no prior foundation and the witness is no longer available. Maine adopted only 613(a) in order to conform to its prior practice of not ever requiring counsel to confront a witness with his prior statement. *See* Advisors' Note, ME. R. EVID. 613. Nevada enacted the Preliminary Draft version of rule 613. NEV. REV. STAT. § 50.135 (1975). Minnesota recently adopted rule 613 with the caveat that, before the extrinsic evidence of the prior inconsistent statement can be admissible, the witness must have a *prior* opportunity to explain or deny the statement.

Several other states are considering adopting codes based on the Federal Rules of Evidence. Those states include Colorado, Florida, Illinois, Michigan, Montana, North Dakota, Ohio, and Vermont.

II. Rule 801(d)(1)(A)—The Battle over Substantive Admissibility

A. *The Orthodox Rule*

The wisdom of admitting as substantive evidence a prior inconsistent statement of an in-court witness available for cross-examination has been thoroughly debated in the literature.[10] Although it is unnecessary to rehash this dialogue in detail, a short summary of the rival contentions is useful to place the relevant issues in perspective.

The hearsay rule as developed in the common law excluded use of a witness' prior out-of-court statement to prove the truth of the matter stated. This denial of substantive effect to a witness' prior inconsistent statements, referred to hereinafter as the Orthodox Rule, was based on a threefold rationale of lack of trustworthiness: (1) the statement was not made under oath, (2) the trier of fact did not observe the declarant's demeanor at the time the statement was made, and (3) the declarant was not subject to contemporaneous cross-examination before the trier of fact by the party against whom the statement is being offered.[11] Although it is certainly correct that a prior statement—unless made at an earlier trial, hearing, or deposition—will rarely have been made under oath, critics of the orthodox view have downplayed the value of the oath and of the penalties for perjury as safeguards of trustworthiness; of all the recognized exceptions to the hearsay rule, only the prior testimony exception requires that the statement have been made under oath.[12]

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10. *See generally* McCormick's Handbook of the Law of Evidence § 251 (2d ed. E. Cleary 1972) [hereinafter cited as McCormick]; 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(1)[01] (1976) [hereinafter cited as Weinstein]; 3A J. Wigmore, Evidence §§ 1018 & 998 n.3 (J. Chadbourn ed. 1970); Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. Rev. 43 (1954); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Texas L. Rev. 573 (1947); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177 (1948); Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine*, 26 Hastings L.J. 361 (1974); Silbert, *Federal Rule of Evidence 801(d)(1)(A)*, 49 Temp. L.Q. 880 (1976).

11. *See* 6 J. Wigmore, *supra* note 10, § 1362; McCormick, *supra* note 10, § 245.

12. C. McCormick, Handbook of the Law of Evidence § 39 (1954) [hereinafter cited as Evidence]. *Compare* Fed. R. Evid. 804(b)(1) (former testimony admissible as hearsay exception if given under oath) *with* Fed. R. Evid. 801(d) (defining certain prior statements by witness and certain admissions by party-opponent as "not hearsay") *and* Fed. R. Evid. 803 (certain declarations admissible as hearsay exceptions regardless of whether declarant is available to testify or whether they were given under oath) *and* Fed. R. Evid. 804(b)(2)-804(b)(5) (certain declarations admissible as hearsay exceptions if declarant is unavailable regardless of whether they were given under oath).

Critics of the Orthodox Rule have also rejected the justification behind the traditional requirement that the trier of fact observe the witness' demeanor when he makes the statement. As Judge Learned Hand stated in dismissing the requirement:

> 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.[13]

The core of the dispute over substantive admissibility of a witness' prior inconsistent statements concerns the final challenge to the trustworthiness of such statements—lack of contemporaneous cross-examination. The critical question may be stated as follows: What is the value of cross-examination that is not conducted contemporaneously with the making of the statement whose truth is in question before the same trier of fact that must determine whether the statement is truthful? The argument that noncontemporaneous cross-examination cannot serve the function performed by cross-examination conducted at the time of the witness' statement is illustrated by the following example. *W*, testifying on direct examination for the plaintiff, states at trial that plaintiff had a green light when the cars entered the intersection. On cross-examination, defense counsel forces *W* to admit that he feels sorry for the badly injured plaintiff and that in fact plaintiff's traffic light was red. In this situation, cross-examination by defense counsel has fulfilled its purpose. The jury first saw and heard the witness testify to one fact and then saw and heard him recant, thus entirely destroying the value of his initial testimony. Now assume that *W* had recanted prior to trial. If *W*'s prior statement that the light was green for the plaintiff were to be introduced at trial, the scenario would be as follows: The defendant calls *W*, who testifies that the plaintiff ran a red light. On cross-examination, the plaintiff's counsel confronts *W* with his prior statement to a police officer that the light was green for the plaintiff. *W* admits making the statement and explains upon redirect examination by defense counsel that he made the prior statement only because he felt sorry for the badly injured plaintiff.

In each of the above situations, the jury faces a choice between two statements and has before it the witness' explanation for their inconsistency. The crucial difference according to the proponents of the Orthodox Rule is that in the first case the jury has seen the

13. Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925).

witness break down as a result of adversarial confrontation. In the second situation, although the jury hears *W*'s explanation of his prior statement, the explanation is generally made during examination by the party who is depending on *W*'s present testimony (*i.e.*, on redirect), a party who obviously desires to help *W* give a believable explanation. Accordingly, proponents of the Orthodox Rule argue against the usefulness of subsequent examination designed to rebuild a witness' credibility:

> Cross-examination presupposes 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.[14]

Under this view, the jury in the first case finds that the defendant's adversarial, destructive cross-examination aids it in determining the truth of the testimony, but in the second case the jury sees only defense counsel attempting to rehabilitate an impeached witness—a less persuasive, less dramatic, and far less clear-cut event.[15]

In response, opponents of the Orthodox Rule have contended that this difference is meaningless and that cross-examination need not be contemporaneous with the making of the statement to be effective:

> The line of questioning in each instance is virtually identical, except that in the contemporaneous version the witness recants his prior version at the conclusion of the cross-examination while in the subsequent cross-examination he has already done so. The only difference lies in the eye of the cross-examiner, who is in the latter instance deprived of a first triumphal flourish.[16]

Moreover, it is argued that the Orthodox Rule assumes that the

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14. Ruhala v. Roby, 379 Mich. 102, 124, 150 N.W.2d 146, 156 (1967).

15. The difference becomes more pronounced in cases in which the witness professes a lack of memory about whether he made the prior statement or about its subject matter. The effectiveness of rehabilitative redirect in these cases varies inversely with the extent of the witness' memory loss. Probably at some point the inability of the criminal defense attorney to conduct effective redirect examination of a witness forgetful of the substance of the alleged inconsistent statement would preclude substantive admission of the prior statement as violative of the sixth amendment right to confrontation. *See* California v. Green, 399 U.S. 149, 168-69 (1970); 4 WEINSTEIN, *supra* note 10, ¶¶ 801(d)(1)(A)[04], 801(d)(1)(A)[06], 801(d)(1)(A)[07].

16. A letter to the Chairman of the Senate Judiciary Committee from the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States (May 22, 1974), *quoted in* 4 WEINSTEIN, *supra* note 10, at 801-6.

cross-examiner at trial will be successful in "breaking down" the witness à la Perry Mason, which obviously is a rare event. Subsequent examination (redirect) relating to a prior inconsistent statement, according to this argument, will more often have a significant impact upon the jury. As stated by the Supreme Court in *California v. Green*:[17]

> The defendant's task in cross-examination is, of course, no longer identical to the task that he would have faced if the witness had not changed his story and hence had to be examined as a "hostile" witness giving evidence for the prosecution. This difference, however, far from lessening, may actually enhance the defendant's ability to attack the prior statement. For the witness, favorable to the defendant, should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event. Under such circumstances, the defendant is not likely to be hampered in effectively attacking the prior statement, solely because his attack comes later in time.

Critics of the Orthodox Rule have not rested with a defense of the merits of subsequent cross-examination. They have also attacked the basic rationale of the Orthodox Rule, asserting that the primary reason for disallowing substantive use of a witness' prior inconsistent statement as hearsay—*i.e.*, that the declarant was not then subject to cross-examination—simply ignores the realities of the situation. By hypothesis, the witness *is* present before the trier of fact, *is* under oath, and *is* subject to cross-examination. The witness can deny making the prior statement or explain the circumstances surrounding the utterance, and his demeanor may be observed throughout.

For essentially these reasons, Wigmore concluded that courts should grant substantive value to prior inconsistent statements of in-court witnesses.[18] McCormick, supporting Wigmore's position, argued that prior statements are even more trustworthy than later in-court statements because they are made closer in time to the event they describe.[19] This argument, which draws on the obvious principle that memory fades with time, suggests as well that there is less likelihood that the earlier statement is the result of corruption, false

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17. 399 U.S. 149, 160 (1970). *See also* 4 WEINSTEIN, *supra* note 10, at 801-6: "[N]ot only does the witness . . . recant his earlier story, but he also explains, in not unplausible fashion, the reasons why he did so. This is a cross-examination successful beyond the dreams of avarice." With respect to the likelihood of successfully "breaking down" the witness, *see* Dutton v. Evans, 400 U.S. 74, 89 (1970).

18. 3A J. WIGMORE, *supra* note 10, § 1018. *See also* Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 767-68 (1961).

19. EVIDENCE, *supra* note 12, § 39.

suggestions, intimidation, or appeals to sympathy or prejudice. McCormick also contended that substantive admissibility was needed to protect parties from the "turncoat" witness, who by changing his story deprives the party calling him of essential evidence.[20]

As the final string to their bow, critics of the Orthodox Rule have argued that, where the rule is followed, prior inconsistent statements are still allowed into evidence, accompanied by an instruction to the jury to consider the prior inconsistent statement as bearing solely upon the credibility of the witness' in-court testimony and specifically providing that the statement cannot be treated as evidence of the facts asserted therein.[21] Professor Morgan has called this practice a pious fraud[22] and along with other scholars[23] has argued that a jury faces an impossible task when asked to accept a statement as

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20. McCormick, 25 TEXAS L. REV. 573, *supra* note 10.

21. *See, e.g.*, the form suggested in 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.16 (3d ed. 1977):

> Effect of Prior Inconsistent Statements or Conduct—By a Witness Not a Party
>
> Evidence that at some other time a witness, . . . has said or done something, or has failed to say or do something, which is inconsistent with the witness' testimony at the trial, may be considered by the jury for the sole purpose of judging the credibility of the witness; but may never be considered as evidence or proof of the truth of any such statement.

Federal Rule of Evidence 105 directs the trial judge to give a limiting instruction to the jury *upon request* whenever evidence is admissible for one purpose, such as impeachment, but not another. Read literally, the rule suggests that the failure to give a limiting instruction can never be reversible error unless counsel had requested the instruction at trial. Two recent Fifth Circuit cases have served notice, however, that rule 105 will not be so read. The court in United States v. Garcia, 530 F.2d 650 (5th Cir. 1976), after reviewing earlier cases, reaffirmed the "plain error" standard under which the failure of the court sua sponte to instruct the jury on the proper use of a prior inconsistent statement required reversal of any criminal conviction in which the error was not clearly harmless. As the Fifth Circuit reiterated several months later in United States v. Sisto, 534 F.2d 616 (5th Cir. 1976):

> From several prior opinions, Judge Coleman in *Garcia* distilled the following general rule, *applicable both before and after the effective date of the new Federal Rules of Evidence*: "Plain error appears only when the impeaching testimony is extremely damaging, the need for the instruction is obvious, and the failure to give it is so prejudicial as to affect the substantial rights of the accused."

534 F.2d at 723 (quoting *Garcia*, 530 F.2d at 656) (emphasis added). Other circuits followed similar standards in criminal cases before 1975, and there is no reason to suspect that rule 105 will provoke any change. *See, e.g.*, United States v. Lipscomb, 425 F.2d 226 (6th Cir. 1970); Benson v. United States, 402 F.2d 576 (9th Cir. 1968); Jones v. United States, 385 F.2d 296 (D.C. Cir. 1967); Newman v. United States, 331 F.2d 968 (8th Cir. 1964).

22. Morgan, *supra* note 10, at 193.

23. *See, e.g.*, EVIDENCE, *supra* note 12, § 39; M. LADD & R. CARLSON, CASES AND MATERIALS ON EVIDENCE 820 (1972). *See also* United States v. Cunningham, 446 F.2d 194, 200 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971); Isaac v. United States, 431 F.2d 11, 15-16 (9th Cir. 1970); United States v. Duff, 332 F.2d 702, 707 (6th Cir. 1964) ("jury could hardly help considering the content of the statement as substantive evidence"); Young v. United States, 97 F.2d 200 (5th Cir. 1938). *Cf.* Bruton v. United States, 391 U.S. 123, 126 (1968) ("[b]ecause of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extra-

bearing on a witness' credibility while ignoring its substantive content.

In summary, the opponents of the Orthodox Rule argue that, so long as the witness is in court and subject to cross-examination, the hearsay problems are eliminated and prior inconsistent statements of the witness should be substantively admissible. They contend further that substantive admissibility is desirable because the proximity of prior statements to the event in question makes them more trustworthy than in-court testimony and because substantive admissibility protects parties from turncoat witnesses. Finally, they urge that the Orthodox Rule does not accomplish its primary purpose because juries are unable or unwilling to distinguish between statements admitted substantively and those admitted solely as evidence of the witness' credibility.

Supporters of the Orthodox Rule have also devised arguments to buttress their position. Of course, one enduring argument is that a witness' prior inconsistent statement should be denied substantive effect because it is technically hearsay, in that the witness was not under oath and was not subject to cross-examination before the trier of fact when the statement was made.[24] They also contend that prior inconsistent statements are often biased as a result of subtle influence, coercion, or deceit on the part of the person eliciting the statement, who is often an investigator or police officer.[25] Carrying

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judicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination"); Shepard v. United States, 290 U.S. 96, 104 (1933) (Cardozo, J.) (evidence inadmissible and gravely prejudicial for one purpose but admissible and not objectionable for another should be excluded from consideration by jury since the task of ignoring the evidence for the one aspect while considering it for the other is too subtle for the ordinary mind). *But see* United States v. Lemon, 497 F.2d 854, 858 (10th Cir. 1974) ("presumed that jurors will be true to their oath and that they will conscientiously observe the instructions and admonitions of the Court").

24. *See* McCORMICK, *supra* note 10, § 251. These particular arguments against substantive admissibility of prior inconsistent statements are not of constitutional dimension. The California Supreme Court decided that substantive use violated the sixth amendment right to confront witnesses in People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969), and in People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969). The United States Supreme Court, however, rejected this contention when it reversed *Green*. California v. Green, 399 U.S. 149 (1970). In Nelson v. O'Neil, 402 U.S. 622 (1971), the Court went on to hold that whether the witness admits or denies making the prior statement is constitutionally irrelevant.

25. *See Hearings on H.R. 5464 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 302 (1974) (statement of Herbert Semmel):

> The problems of inaccurate repetition, ambiguity and incompleteness of out-of-court statements may be found in both written and oral statements, although the problem is more acute in oral statements. But written statements are also subject to distortion. We are all familiar with the way a skilled investigator,

this argument one step further, the rule's supporters assert that prior inconsistent statements may be completely fabricated,[20] a danger that can be eliminated only by the requirement that testimony not be accepted substantively unless it is given in court, under oath, and subject to cross-examination. Implicitly rejected by this argument is the view that examination of either the declarant when he testifies in court or the witness presenting extrinsic proof of the prior inconsistent statement will successfully expose a fabrication or bring to light any illegitimate influence that acted to color the declarant's prior statement. Proponents of the Orthodox Rule also argue that no need for a change exists, since present hearsay exceptions permit substantive admission of prior inconsistent statements that are in fact sufficiently trustworthy.[27] Finally, they point out that prior inconsistent statements may be used to impeach—and thus to neutralize—an opponent's witness. If a party's own witness unfavorably changes his story prior to trial, the party may simply refrain from calling the witness. If the party calling the witness is surprised and affirmatively damaged by the witness' testimony, he may impeach the witness with his prior inconsistent statement.[28] Confrontation with the inconsistent statement coupled with fear of perjury prosecution are asserted to be sufficient to encourage the witness to adopt the prior statement if he actually believes it to be true.[29]

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be he a lawyer, police officer, insurance claim agent, or private detective, can listen to a potential witness and then prepare a statement for signature by the witness which reflects the interest of the investigator's client or agency. Adverse details are omitted; subtle changes of emphasis are made. It is regrettable but true that some lawyers will distort the truth to win a case and that some police officers will do the same to "solve" a crime, particularly one which has aroused the public interest or caused public controversy. Or the police officer may be seeking to put away a "dangerous criminal" who the officer "knows" is guilty but against whom evidence is lacking.

See also Goings v. United States, 377 F.2d 753, 762 n.13 (8th Cir. 1967):

Today the art of statement taking is a recognized science. Inbau & Reid, Criminal Interrogation & Confessions (1962); Schwartz, Trial of Automobile Accident Cases, Vol. I, § 4, pp. 5, 6, "Requisites of Witnesses Statements", 3rd ed. (1965); Smithson, Insurance Law Journal, June, 1958, "Liability Claims and Litigation", pp. 375-403; Schweitzer, Cyclopedia of Trial Practice, Vol. I, § 30, p. 58, "Securing Statements from Witnesses" (1954); Donaldson Casualty Claims Practice, "Richard D. Erwin Series in Risk & Insurance" (1964), pp. 481-500; Averbach, Handling Accident Cases, Vol. 2, p. 269, (1958). Whether the problem be one of fault in communication to a good faith interrogator or culpable strategy of the examiner, is immaterial. The fact remains, most ex parte statements reflect the subjective interest and attitude of the examiner as well.

26. *See* ILLINOIS SUPREME COURT COMMITTEE ON EVIDENCE, MAJORITY REPORT ON THE USE OF PRIOR INCONSISTENT STATEMENTS OF WITNESSES AS SUBSTANTIVE PROOF 16 (1971) [hereinafter cited as MAJORITY REPORT].

27. Marshall, *An Analysis*, in MAJORITY REPORT, *supra* note 26, at 15 [hereinafter cited as Marshall].

28. *See* text at note 135 *infra*.

29. MAJORITY REPORT, *supra* note 26, at 8.

B. *Advisory Committee Proposal and Congressional Reaction*

In the face of the controversy over the substantive admissibility of prior inconsistent statements, Congress enacted rule 801(d)(1)(A), which reads as follows:

> (d) Statements which are not hearsay. A statement is not hearsay if—
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> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.[30]

Rule 801(d)(1)(A) emerged from Congress only after a seesaw battle that evidenced deep concern over the reliability and trustworthiness of prior inconsistent statements. As drafted by the Advisory Committee and submitted by the Supreme Court, rule 801(d)(1)(A) provided for substantive use of all prior inconsistent statements:

> (d) Statements which are not hearsay. A statement is not hearsay if:
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> (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony.[31]

The Advisory Committee, following the path of the California Law Revision Commission,[32] concluded that the arguments in favor of treating prior inconsistent statements as hearsay did not withstand analysis. Specifically, the Advisory Committee stated in its Note that the absence of an oath, cross-examination, and observation of demeanor at the time that the prior statement was made could each be adequately supplied by later examination at trial.[33]

The version of rule 801(d)(1)(A) enacted into law, however, shows that the Advisory Committee failed to persuade Congress that

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30. FED. R. EVID. 801(d)(1)(A).

31. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 293 (1972). For earlier drafts of this proposed rule, see Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 413 (1971), and Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 331 (1969).

32. 56 F.R.D. at 296. *See* CAL. EVID. CODE § 1235 (West 1966), and the California Law Revision Commission's Comment on § 1235, *reprinted in* 29B CAL. EVID. CODE 221.

33. Advisory Committee Note to Proposed Rule 801, 56 F.R.D. 183, 295 (1972).

substantive admissibility for *all* prior inconsistent statements was desirable. Rather, as the legislative history of rule 801(d)(1)(A) suggests, Congress ultimately came to accept arguments for the unreliability of prior inconsistent statements, particularly those that pointed to the risk of total fabrication.[34] Congress' consideration of proposed rule 801(d)(1)(A) commenced in the House Committee on the Judiciary. Initially, a subcommittee report recommended adoption of a compromise rule patterned after decisions of the United States Court of Appeals for the Second Circuit. The Second Circuit had approved substantive admissibility of prior inconsistent statements given under oath at a former trial or in grand jury testimony in the same proceeding.[35] The House subcommittee incorporated the Second Circuit's position by adding the following language to the proposed rule:

> (A) Inconsistent with his testimony and was given under oath and subject to the penalty of perjury at a trial or hearing or in deposition or before a grand jury. . . .[36]

The full House Judiciary Committee next added a requirement that, in order to be substantively admissible, the prior statements must have been subject to contemporaneous cross-examination. This committee also struck the reference to grand jury proceedings. The committee's final version of rule 801(d)(1)(A), which eventually was passed by the House, stated:

> (A) Inconsistent with his testimony and was given under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition. . . .[37]

The House Judiciary Committee's report indicated the nature of the concerns that prompted both the committee and the full House

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34. *See* H.R. REP. No. 650, 93d Cong., 1st Sess. 13 (1973). *See also* United States v. Leslie, 542 F.2d 285 (5th Cir. 1976); notes 38, 45 & 46 *infra*.

35. *See* United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964). In United States v. Cunningham, 446 F.2d 194, 197 n.3 (3d Cir.), *cert. denied*, 404 U.S. 90 (1971), the court said: "Professor Chadbourn, referring to this as 'the Second Circuit view,' has noted the carefully marked boundaries which limit it. 3A WIGMORE, EVIDENCE § 1018, at 997-98 (Chadbourn rev. 1970)."

36. *Hearings on H.R. 5463 Before the Subcomm. on Criminal Justice*, 93d Cong., 1st Sess., 170 Supp. (1973). The Second Circuit rule was developed in criminal cases. Since rule 801(d)(1)(A) is applicable to civil cases as well, the inclusion of deposition testimony was a natural and logical extension.

37. *See* H.R. REP. No. 650, 93d Cong., 1st Sess. 13 (1973)[hereinafter cited as HOUSE REPORT]. Although it is not clear in the House committee report, the right of cross-examination in the formal proceeding presumably was intended to require that, in a criminal case, the party against whom the testimony was being offered have the opportunity and motive to develop the testimony by direct, cross, or redirect examination. *Cf.* FED. R. EVID. 804(b)(1) (similar approach to admission of prior testimony); HOUSE REPORT, *supra* at 15 (same).

to place limitations on proposed rule 801(d)(1)(A). Under the House's approach, "[u]nlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and . . . the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurance of the reliability of the prior statement."[38] Although rule 801(d)(1)(A) was to apply in both civil and criminal proceedings, various statements in the legislative record suggest that, in attacking the reliability of a witness' prior inconsistent statements, the House was focusing on the rule's potential impact upon the criminal defendant.[39] The House was concerned that a defendant could be convicted solely on the basis of a witness' alleged out-of-court statement, even though the statement was disputed by the witness' own testimony and no certain evidence existed establishing that the witness had accurately recounted the information in the statement and, more fundamentally, that the statement had ever been made.

After the House adopted its version of rule 801(d)(1)(A),[40]

38. HOUSE REPORT, *supra* note 37, at 13. Thus the House believed that the rule would both ensure reliability and help neutralize the effect of any influence, coercion, or deceit directed at the witness.

39. *See, e.g.*, letter from James F. Schaefer, Chairman of the Committee on Federal Evidence and Procedure, Trial Lawyers of America, to Rep. William L. Hungate (June 22, 1973) and accompanying material, in *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 127-29 Supp. (1973); *Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 50-52 (1974) (statement of Edward W. Cleary). *But see* letter from Edward W. Cleary to Herbert E. Hoffman, Counsel, Subcommittee on Reform of Federal Criminal Laws, House Committee on the Judiciary, May 31, 1973, in *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 98-99 Supp. (1973) (rejecting exclusion of such evidence). *See also* letter from Hon. Albert B. Maris to Herbert E. Hoffman, May 30, 1973, in *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 98 Supp. (1973).

40. Professor Cleary, in testimony before the Senate subcommittee discussing the limitations placed by the House upon the admissibility of substantive evidence, stated: "Their effect is for all practical purposes virtually to destroy the utility of the rule as a solution for the problems it was designed to meet, such as fading memories, bribery, intimidation, and other influences which cause witnesses to change their stories." *Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 51 (1974) (statement of Edward W. Cleary).

Professor Cleary had earlier stated that

> [t]he redraft would virtually destroy the utility of provision (A), which deals with prior inconsistent statements. If the witness has made a prior statement under oath, the threat of a perjury charge makes it highly unlikely that he will subsequently relate a different story again under oath. Hence the instances in which the rule would operate under the suggested redraft would be greatly curtailed. The problem area consists of cases in which the prior statement was not under oath, whether in the course of a judicial proceeding or not, and a rule which does not deal with these cases is of no practical significance.

consideration of the matter moved to the Senate Committee on the Judiciary. The Senate committee recommended reinstatement of the rule proposed by the Advisory Committee and the Supreme Court, concluding in its report that the requirements of oath and opportunity for cross-examination were "unnecessary" since those elements were present when the witness testified at trial.[41] The full Senate eventually accepted the recommendation of its committee, and consequently the conflicting House and Senate proposals were referred to the conference committee.

The version of rule 801(d)(1)(A) that emerged from the conference committee, which was the version finally enacted by Congress, is as interesting for its packaging as for its resolution of the disputed issues. The conference report[42] stated that the Senate version of rule 801(d)(1)(A), which contained the approach originally proposed by the Advisory Committee, was adopted with an amendment requiring that prior inconsistent statements were substantively admissible only if they were made at a trial, hearing, deposition, or other proceeding under oath and subject to penalty of perjury. The report stated that the "other proceeding" provision would allow testimony given before a grand jury.

Despite the suggestion by the conference committee that it had largely adopted the Senate's version of rule 801(d)(1)(A), the rule proposed by the conference committee and accepted by Congress clearly incorporates the substance of the House version of the rule. Enacted rule 801(d)(1)(A) limits substantive admissibility to those

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Letter from Edward W. Cleary to Herbert E. Hoffman, May 31, 1973, in *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 98-99 Supp. (1973).

The foregoing testimony may well have been a slight overstatement made in the heat of a battle to have the Supreme Court-promulgated rule 801(d)(1)(A) approved by Congress. Statements made at the grand jury or preliminary hearing (in criminal cases) or in depositions (in civil proceedings) would have substantive effect. These proceedings give the state and the civil litigant an important opportunity to solidify the testimony of its witnesses. One must admit, however, that although it is not uncommon for witnesses to testify differently at trial than at deposition or grand jury, these inconsistencies are generally slight. In fact, with respect to many such statements, one needs a magnifying glass to find the discrepancy; it often manifests itself only in the attitude of examining counsel.

41. S. REP. No. 1277, 93d Cong., 2d Sess., 15-16 (1974). The Senate committee first noted that of all the traditional hearsay exceptions only the former testimony exception requires that the prior statement be made under oath. The committee then asserted that the jury has sufficient demeanor evidence to judge the credibility of the prior statement if the declarant was presently testifying in court. Finally, the committee felt that its rule was superior because the prior statements, having been made closer in time to the events they describe, would have been subject to less improper influence and would have been made when the witness' memory was relatively fresh.

42. CONF. REP. No. 1597, 93d Cong., 2d Sess. 10 (1974).

prior inconsistent statements for which there is (1) almost absolute certainty that the statement was made[43] and (2) additional assurance of reliability and truthfulness because of the requirement that the prior statement must have been given in a formal proceeding.[44]

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43. EVIDENCE, *supra* note 12, § 39 states this principle as the hazard of reporting mistransmission, including the risks of honest error or of fabrication.

44. Although Congress' substantial concern over the reliability of prior inconsistent statements would seem to argue for a strict reading of rule 801(d)(1)(A), the early experience of the rule in the courts suggests that it may be broadened in two ways: first, under the "other proceedings" language of the rule itself, and, second, under the catchall hearsay exception of rule 803(24).

In United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir.), *cert. denied*, 429 U.S. 983 (1976), a case involving the breadth of rule 801(d)(1)(A)'s reference to "other proceedings," the Ninth Circuit decided that sworn tape-recorded statements made during interrogation by a border agent were substantively admissible. Examining the legislative history of rule 801(d)(1)(A), the court, while noting that the phrase "other proceedings" was explicitly intended to cover grand jury proceedings, found the term not so limited, reasoning that Congress could easily have made such limitation express. 537 F.2d at 1057 n.3. Moreover, the court argued that inclusion of the border interrogation within the "other proceedings" language of rule 801(d)(1)(A) was supported by the similarity of such interrogation to a grand jury proceeding:

> [W]e note that the immigration proceeding before Agent Pearce bears many similarities to a grand-jury proceeding: both are investigatory, ex parte, inquisitive, sworn, basically prosecutorial, held before an officer other than the arresting officer, recorded, and held in circumstances of some legal formality. Indeed, this immigration proceeding provides more legal rights for the witnesses than does a grand jury: the right to remain totally silent, the right to counsel, and the right to have the interrogator inform the witness of these rights.

537 F.2d at 1058.

Although the court noted at the same page that not "every sworn statement given during a police-station interrogation would be admissible," the logic of the opinion does not readily provide a clear stopping point. In *Castro-Ayon* itself, the fact that the statements were tape-recorded and that the witnesses later admitted their making would appear to satisfy the standards of accuracy and reliability set by Congress. Whether similar safeguards will exist in other situations to which rule 801(d)(1)(A) may be extended remains to be seen.

Although *Castro-Ayon* may well have charted the outer boundaries of rule 801(d)(1)(A), there exists another avenue by which a witness' prior inconsistent statement may gain substantive admission—the catchall hearsay exception of Federal Rule of Evidence 803(24). This rule excludes from the hearsay rule

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

In United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), *affd.*, 540 F.2d 574 (2d Cir. 1976), rule 803(24) was asserted to provide an alternative basis for the admission of a witness' prior *consistent* statement. The trial court noted briefly that the statement was also admissible under rule 801(d)(2)(C) (admissions by an agent) and rule 801(d)(1)(B) (prior consistent statement to rebut charge of recent fabrication), but devoted most of its analysis to the statement's admissibility under

rule 803(24). The court found that the witness' prior statement possessed circumstantial guarantees of trustworthiness, in that it was made minutes after the event it related and was made to a business partner and attorney of the witness, thus suggesting minimal risks of faulty memory or insincerity. That the witness was available for cross-examination regarding the statement's making was also deemed to support its reliability. With respect to the other requirements of rule 803(24), the court found that the statement was evidence of a material fact, and, moreover, the most probative evidence available since there was a direct conflict between the testimony of the defendant and of the witness who had allegedly made the prior statement. The importance of the evidence to resolution of that conflict also indicated to the court that admission of the prior statement was consistent both with the general purposes of rule 803(24) and with the interests of justice. Finally, although the defendant did not receive notice of the government's intention to produce the statement until after the trial had begun—and thus arguably outside the period required by rule 803 (24)—the court ruled that it was sufficient that the defendant had received the notice five days before the government's actual use of the statement. The Second Circuit subsequently approved of the court's application of rule 803(24). 540 F.2d 574.

In a recent case, United States v. Leslie, 542 F.2d 285 (5th Cir. 1976), the Fifth Circuit held that the analysis of rule 803(24) developed in *Iaconetti* supported substantive admission of a witness' prior *inconsistent* statement. In *Leslie*, three alleged accomplices of the defendant, called to the stand as court witnesses, testified that the defendant was not aware that a car that he later sold was a stolen vehicle. The witnesses admitted having given prior statements to the FBI that contradicted that testimony, but, claiming that they had been influenced by expectations of favorable treatment and that they had also been under the influence of various drugs, the witnesses asserted that parts of those statements were untrue and that other parts were not within their memory. In response, the government introduced evidence to show that the prior statements had been freely given, without promise of reward and unaffected by drugs. Although the trial judge had briefly instructed the jury not to consider the witnesses' prior statements as substantive evidence, the court on appeal did not reach the question whether that instruction was adequate, as it concluded after reviewing *Iaconetti* that the prior statements were admissible as substantive evidence under rule 803(24). In support of its conclusion, the court cited five circumstantial guarantees of the statements' reliability: first, the declarants were available for cross-examination; second, the statements followed the events they described by only a few hours; third, the declarants admitted voluntarily signing forms waiving their right to remain silent; fourth, the witnesses admitted making the prior statements; and fifth, the three statements, made before the declarants could agree on one story, were substantially identical. The court discounted the witnesses' mere "hope" of favorable treatment and thought the evidence refuted their claim of having been under the influence of drugs. With respect to the other requirements of rule 803(24), the court found the statements to be evidence on the material issue of whether the defendant was the ringleader of the group or was just innocently along for the ride. Additionally, the statements were said to be the most probative evidence available, since only the four persons involved in the theft and transportation actually knew what had been planned. As the evidence of these plans was conflicting, introduction of the prior statements was asserted to best serve the interests of justice, the jury needing "all the help it could get." 542 F.2d at 291. Although the notice required by rule 803(24) was apparently not given, the court, following *Iaconetti*, ruled that strict adherence to that requirement could be dispensed with where, as the court found to be true in *Leslie*, the opposing party was not prejudiced.

Iaconetti and *Leslie* suggest that courts will use rule 803(24) to justify substantive admission of prior consistent and inconsistent statements of in-court witnesses when such statements appear reliable. Technical requirements such as notice will likely be liberally construed. With respect to a witness' prior inconsistent statement, even though the statement may not be admissible under rule 801(d)(1)(A), the witness' availability for cross-examination, strong evidence that the statement was in fact made, and the presence of a serious conflict between the prior statement and the witness' in-court testimony are likely to argue persuasively that the statement be ad-

Thus, even though Congress did delete the House's requirement of an opportunity for contemporaneous cross-examination, it is clear that Congress ultimately accepted the House's basic position that only the most reliable prior inconsistent statements should be admissible in a criminal action.[45] By the same token, it rejected the

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mitted as substantive evidence. *See generally* Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 TEXAS L. REV. 917, 972-75 (1976).

At the same time, it should be recognized that the substantive admission of a prior inconsistent statement, even under rule 801(d)(1)(A), will not divest the court of control over its usage. In United States v. Librach, 536 F.2d 1228, 1232 (8th Cir. 1976), at trial on remand the defense counsel read into evidence certain testimony of government witnesses from the earlier trial which was inconsistent with their present testimony. The trial court properly granted the evidence substantive value, but refused to allow counsel to reread the prior testimony during closing argument. In response to the defendant's claim that the substantive value of the prior testimony was thus undermined, the Eighth Circuit affirmed, unable to conclude that the jury had failed to understand the substantive quality of the prior testimony and noting that one of the reasons for granting substantive value to certain statements was that the jury was likely to do so even when operating under a contrary instruction.

45. One indication that the limitation in scope of rule 801(d)(1)(A) was a result of concern with fairness for the criminal defendant is that the drafters of UNIFORM RULE OF EVIDENCE 801(d)(1)(A) designed it to permit substantive use of all prior inconsistent statements in civil cases, while adopting the federal rule for criminal proceedings. *See also* letter from Edward W. Cleary to Herbert E. Hoffman, May 31, 1973, in *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 98-99 Supp. (1973): "Apparently the premise that underlies the suggested redraft is that a statement not made under penalty of perjury is an insufficient basis to support a conviction. See Bridges v. Wixon, 326 U.S. 135 [1945]; cf. California v. Green, 399 U.S. 149 [1970]."

A Note by the Federal Judicial Center also attributes Congress' opposition to proposed rule 801(d)(1)(A) as indicating concern that criminal defendants might be convicted solely upon evidence of witnesses' prior inconsistent statements. Federal Judiciary Center Note on Rule 801, Federal Rules of Evidence for United States Courts and Magistrates, 98 n.3 (West 1975). In support of unrestricted admission of prior inconsistent statements, the Federal Judicial Center's Note stressed that rule 801(d)(1)(A) was addressed to admissibility, not to the question of sufficiency of the evidence to support a conviction. The Judicial Center Note states that "factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate." S. REP. No. 1277, 93d Cong., 2d Sess. 16 n.21 (1974). *But cf.* People v. Green, 3 Cal. 3d 981, 279 P.2d 998, 92 Cal. Rptr. 494 (1971) (a jury conviction based upon substantive admission of prior inconsistent statement withstood a motion directed to insufficiency of the evidence). For a discussion of burden of proof as it affects substantive admission of prior inconsistent statements, see Comment, *Prior Inconsistent Statements and the Rule Against Impeachment of One's Own Witness: The Proposed Federal Rules*, 52 TEXAS L. REV. 1383 (1974).

A court might be reluctant to grant a defendant's motion for acquittal pursuant to FED. R. CRIM. P. 29 where the only incriminating substantive evidence was a prior inconsistent statement, since disregarding the statement would certainly not be construing all the evidence most favorably to the government. *See* Crawford v. United States, 375 F.2d 332, 334 (D.C. Cir. 1967). However, the Supreme Court observed in California v. Green, 399 U.S. 149, 163 n.15 (1970), that "considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking." United States v. Schwartz, 390 F.2d 1, 7 (3d Cir. 1968), reversed a conviction in which a prior inconsistent state-

contention advanced by supporters of the Advisory Committee and Senate position that protection of the criminal defendant from unwarranted conviction based solely upon a prior inconsistent statement is properly the function of rules designed to evaluate the *sufficiency* of evidence rather than of rules governing its substantive *admissibility*.[46]

C. *A Proposed Amendment to Rule 801(d)(1)(A)*

From the above review of the Orthodox Rule and the positions of the commentators, the Advisory Committee, and Congress, it is apparent that the dispute over the substantive admissibility of prior inconsistent statements revolves around the question of what circumstances will provide sufficient assurance that a prior statement was indeed made and that subtle influence, coercion, or deception has not impaired its reliability. It should be recognized that concern with fabrication, subtle influence, coercion, and deception is an implicit rejection of the Orthodox Rule's contentions with respect to oath and demeanor and accordingly is a recognition of the limited effectiveness of cross-examination in discovering the truth at a modern trial. Moreover, such concern acknowledges the difficulty inherent in the trier of fact's task of determining whether to believe the witness who denies making a prior inconsistent statement or the witness who offers extrinsic evidence of the statement's existence. Rather than entrust that responsibility solely to the trier of fact, Congress chose to limit substantive admissibility of prior inconsistent statements to situations in which the likelihood of total fabrication was practically nonexistent and the risk of subtle influence, coercion, or deception was significantly reduced.[47]

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ment had been given substantive effect, noting, however, that "[e]ven if this testimony were in the record, we conclude that there is sufficient evidence against defendant."

46. *See* 4 WEINSTEIN, *supra* note 10, ¶ 801(d)(1)(A)[01] at 801-76.1 (1975); Stalmack, *Prior Inconsistent Statements: Congress Takes a Compromising Step Backward in Enacting Rule 801(d)(1)(A)*, 8 LOY. CHI. L.J. 251, 267 (1977).

47. The same issue arises with respect to admissions. As experienced trial counsel know, it is not unusual for one party to claim that the opponent said something that the opponent flatly denies having said. Here, the rules of evidence say the jury is to decide the issue of credibility, and yet this situation and that regarding the substantive admissibility of prior inconsistent statements would appear to be identical. Moreover, how is fabrication by the in-court declarant of alleged present sense impressions, excited utterances, or other hearsay exceptions prevented? What, then, distinguishes testimony regarding prior inconsistent statements of an in-court declarant from testimony of a witness relating an alleged admission or hearsay exception? In what sense do prior inconsistent statements lack the indicia of reliability thought to justify admission of recognized hearsay exceptions? On what ground does the adver-

Acknowledging the legitimacy of Congress' concern regarding rule 801(d)(1)(A), it nevertheless appears that the rule's safeguards, which are designed to ensure that a prior inconsistent statement was actually made and accurately recorded, are overly strict. Why should the rule exclude because of doubt about whether it was made a signed or handwritten statement that is acknowledged by the witness or proved to be his by other evidence? Why should it exclude an oral statement not made under oath when the witness during his testimony admits he made it?[48] Why should the rule exclude on any ground substantive admission of prior inconsistent statements in an affidavit prepared by the party's attorney that was executed under oath and submitted to the court in the same or another proceeding?[49]

Alternative proposals have been advanced that would authorize substantive admission of prior inconsistent statements where it is sufficiently established that they were made. These proposals assert that substantive admissibility should extend to all prior inconsistent statements for which there are substantial guarantees of certainty of making and accuracy of reporting and for which an effective opportunity exists for cross-examination to expose and counteract any impropriety that may have occurred in the taking of the statement. Professor McCormick, for example, has suggested the following rule:

> A statement made on a former occasion by a declarant having an opportunity to observe the facts stated, will be received as evidence of such facts, notwithstanding the rule against hearsay if
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> (1) the statement is proved to have been written or signed by the declarant, or to have been given by him as testimony in a judicial or official hearing, or the making of the statement is

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sary process accept the risk that a party will fabricate a statement of his opponent but reject the same risk regarding statements of a witness unless such statements otherwise fall into a recognized hearsay exception?

48. If the witness also admits that his prior inconsistent statement is true, the statement is substantively admissible as adopted testimony. *See, e.g.*, United States v. Tavares, 512 F.2d 872 (9th Cir. 1975); United States v. Ellis, 461 F.2d 962 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972); Tripp v. United States, 295 F.2d 418 (10th Cir. 1961); Stevens v. United States, 256 F.2d 619, 623 n.9 (9th Cir. 1958).

"When a witness thus affirms the truth of a prior statement, the earlier statement is to be considered 'not only as bearing on the credibility of the witness but as affirmative evidence.' . . . [T]he trier of the facts has 'two conflicting statements . . . of equal force as evidence.'" United States v. Borelli, 336 F.2d 376, 391 (2d Cir. 1964), *cert. denied sub nom.* Mogavero v. United States, 379 U.S. 960 (1965) (citation omitted), *in part quoting* Stewart v. Baltimore & O.R.R., 137 F.2d 527, 529 (2d Cir. 1943), and Zimberg v. United States, 142 F.2d 132, 136 (1st Cir.), *cert. denied*, 323 U.S. 712 (1944).

49. *See* United States v. Schwartz, 252 F. Supp. 866 (E.D. Pa. 1966).

> acknowledged by a declarant in his testimony in the present proceeding, and
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> (2) the party against whom the statement is offered is afforded an opportunity to cross-examine the declarant.[50]

Professor McCormick's proposal contained one important qualification: it would require that the declarant have personal knowledge of the facts stated. The English Evidence Act of 1938 contained a similar personal knowledge requirement:

> In any civil proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
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> (i) if the maker of the statement either—
>
> (a) had personal knowledge of the matters dealt with by the statement;
>
> (b) [made the statement as part of a business record]; and
>
> (ii) if the maker of the statement is called as a witness in the proceedings . . . .[51]

Although the effect of the personal knowledge requirement has not been elaborated upon by the authors of the proposals that adopt it,[52] the requirement has at least two very important consequences. First, only a witness with personal knowledge of the subject matter of a prior inconsistent statement can be cross-examined about whether the statement is truthful. Second, the requirement excludes from evidence all prior statements of a witness that merely narrate a third person's declaration unless the witness also has per-

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50. McCormick, 25 TEXAS L. REV. 573, *supra* note 10, at 588. *See also* EVIDENCE, *supra* note 12, § 39, at 82.

51. Evidence Act, 1938, 1 & 2 Geo. 6 c. 28, § 1, *repealed by* Civil Evidence Act, 1968, c. 64, § 20(2). The personal knowledge requirement was also incorporated in a proposal advanced by Professor Falknor. Out-of-court declarations would have been substantively admissible under the Falknor proposal if

> previously made by a person who is present at the hearing and available for cross-examination if the judge finds that (a) the declarant had an adequate opportunity to perceive the event or condition which the statement narrates, describes or explains and (b) the statement was written or signed by the declarant or the making of the statement is acknowledged by the declarant in his testimony in the present proceeding.

Falknor, *supra* note 9, at 54. Note that, as is true of Professor McCormick's proposal and of the 1938 English Evidence Act, the rule designed by Professor Falknor would apply to all out-of-court declarations, regardless of whether inconsistent with in-court testimony.

52. Falknor alone discusses the need for a personal knowledge requirement, and he considers only its impact upon cross-examination, thus failing to analyze the significance of its exclusion of all second-hand hearsay not grounded in personal knowledge of the facts related. Falknor, *supra* note 9, at 53-54. *See* text at notes 53-62.

sonal knowledge of the facts underlying the third person's statement.[53] Thus a witness' prior statement that he heard a criminal defendant make an incriminating admission would be inadmissible as substantive evidence unless the witness had personal knowledge of the incriminating conduct itself. In effect, the personal knowledge requirement excludes from evidence those statements most open to fabrication[54] while concurrently assuring the opportunity for effective cross-examination. Coupled with strong guarantees that the prior inconsistent statement was actually made,[55] cross-examination—here, really redirect examination—of a witness with personal knowledge of the underlying facts can be expected to test effectively the reliability of the prior statement.[56]

The following illustration demonstrates the importance of the requirement of personal knowledge. Assume that in a bank robbery prosecution the defendant calls a friend to the stand. The friend testifies that he saw the defendant at a local bar on the night

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53. The personal knowledge requirement may thus reflect a belief that a witness is less likely to repeat another person's statement if he knows from his own observations that the statement is false.

54. *See* text at notes 34 & 39-46 *supra*.

55. Since the adoption of the Federal Rules of Evidence, the Fifth Circuit has examined the certainty of making factor with respect to the substantive admissibility under rule 803(24) of prior inconsistent statements not meeting the stricter requirements of rule 801(d)(1)(A). Rule 803(24) authorizes substantive admission of hearsay statements not included within any specific exception if notice of their intended use is given and they possess "equivalent circumstantial guarantees of trustworthiness" and meet certain additional requirements regarding probative value. *See* note 44 *supra*. In United States v. Leslie, 542 F.2d 285 (5th Cir. 1976), discussed in note 44 *supra*, the Fifth Circuit upheld the substantive admissibility of prior written statements of three witnesses who at trial denied the truth of parts of their statements and claimed lapse of memory with respect to other parts. The court, after discussing the various indicia of reliability, stated that, "[p]erhaps most significantly, for all practical purposes they admitted making the statements." 542 F.2d at 290. The court distinguished United States v. Sisto, 534 F.2d 616 (5th Cir. 1976), an earlier Fifth Circuit case that denied substantive admission to a witness' prior inconsistent statement, as follows:

> These factors distinguish this case from United States v. Sisto, . . . in which we held that the trial court had committed plain error by failing to instruct the jury that prior statements allegedly made by the defendant's accomplice were admissible for impeachment only. In *Sisto* the only evidence that the statements were made was the testimony of a government agent. The alleged declarant categorically denied having made the statements, and there was no evidence of a writing or transcription. The House Judiciary Committee was no doubt concerned about exactly this problem of a possible "manufactured" prior statement being used against a criminal defendant when it rejected rule 801(d)(1) as proposed by the Supreme Court. Once a witness has admitted making the prior statement and only disputes the truth of its contents, however, there is no problem of a *contrived* extrajudicial statement getting before the jury for use as substantive evidence.

542 F.2d at 291 n.6 (emphasis original).

56. 4 WEINSTEIN, *supra* note 10, ¶¶ 801(d)(1)(A)[03]-801(d)(1)(A)[08]; Falknor, *supra* note 10, at 54.

of the offense, that the defendant did not say anything to him at that time, and that he appeared in normal health and was not carrying anything. Assume further that the prosecution possesses a written statement by the friend that concerns the night in question. While on the stand, the friend admits having written and signed the statement, though he denies its factual accuracy. Under the proposals discussed above involving personal knowledge, a prior inconsistent statement contained in the friend's written declaration to the effect that the defendant had admitted robbing the bank would not be admissible as substantive evidence, since the friend had no personal knowledge of the matter dealt with in the prior inconsistent statement.[57] Conversely, a prior inconsistent statement in the friend's declaration to the effect that when the defendant entered the bar he was very sweaty and out of breath, was wearing a torn shirt, and was carrying a brown paper bag would be substantively admissible, since the friend's prior inconsistent statement sufficiently demonstrates his personal knowledge of the matters stated.[58]

Both the McCormick proposal and the English statute would keep from the jury the first prior inconsistent statement in our example. This type of statement—the "double hearsay" statement, typified by the admission-confession of the criminal defendant—is the kind of evidence that has most concerned the judicial system,[59] for it raises the greatest danger of misapplication by the jury and the greatest risk of total fabrication by the witness.[60] Under either

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57. Double hearsay statements are substantively admissible only if there exists an exception to the hearsay rule at each level. *See* FED. R. EVID. 805.

58. *See* FED. R. EVID. 602.

59. In United States v. Briggs, 457 F.2d 908, 910 n.3 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972), a case involving the impeachment by a prior inconsistent statement of a turncoat informer called by the defendant, Judge Friendly stated: "As we pointed out in *Cunningham*, it is true that the statements would be admissible as affirmative evidence under Rule 801(d)(1) of the Proposed Federal Rules of Evidence. . . . This case affords another illustration how dangerous such a rule would be."

60. The practical difficulties faced by the criminal defendant in opposing the use of an alleged oral inconsistent statement are well stated in 4 WEINSTEIN, *supra* note 10, ¶ 801(d)(1)(A)[05] n.4:

> Most instances in federal criminal cases as the rule was adopted by the Supreme Court would have pitted the witness against an FBI agent who interviewed the witness while accompanied by a colleague and made a report on the essentials of the story. In such a swearing contest the witness will almost always be at a disadvantage so far as the jury is concerned. Even should there be some discrepancies between the FBI report and an agent's testimony, the use of the report—available as [§ 18 U.S.C.] 3500 material—will generally tend to support the agent's credibility because it will indicate that a contemporaneous memorandum was made. The agent on redirect will be able to explain that the report did not contain all the details and that the regular Bureau practice is to destroy original notes when the typed report is prepared. The realities of the situation explain why defense counsel and members of Congress were so opposed

of the foregoing proposals, only "first-hand hearsay" would be admissible;[61] admission-confessions, the least reliable and most damaging evidence to the criminal defendant,[62] would not be admitted as sub-

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to the rule as adopted by the Supreme Court. Nevertheless, it is probably true that the jury is more apt to arrive at a sound factual determination if it is given as much available data as possible, including evidence of what a key witness said on prior occasions.

With respect to state court proceedings, the trustworthiness of the police officers is even more subject to question.

Moreover, the risk of fabrication and distortion is significantly increased when a witness purports merely to repeat another's out-of-court declaration. It is always easier to say that *X* said something than to report personal observations of the event. Even if *X* did in fact tell the witness something, it would not be unusual for the person asserting to have overheard the out-of-court declaration to inject, intentionally or otherwise, additional or different statements into the conversation. Unfortunately, these fabricated or distorted statements will often be highly damaging admissions or confessions not easily discounted by the jury.

The party opposing the truth of the prior out-of-court declaration containing a second-level hearsay declaration is in a particularly difficult position. The witness who is asserted to have repeated the second-level hearsay declaration could deny having made any such statement and deny ever having heard the alleged second-level statement. Such later denial is not particularly forceful, however, especially if the declarant must admit contact with the person to whom the second-level statement is attributed. If, on the other hand, personal knowledge is required, the witness can do much more than offer a simple denial. He can testify about what he actually perceived, or, if he perceived nothing, explain that, for example, he could not have seen anything because he was in California on the day of the event. Note the discouragement to the purported hearer of the witness' out-of-court declaration to fabricate the existence of the statement or to add second-level embellishments. One is much less likely to fabricate what the in-court witness allegedly perceived and stated than to fabricate what the in-court witness allegedly heard and repeated. Often a policeman will testify that "[t]he witness told me that John told him that he robbed the store." If the witness knows John, the jury could mistakenly give credibility to the story, since it is far from implausible and extremely difficult for the witness to refute.

In sum, the increased risk both of fabrication and of faulty recollection, together with the limitations on effective cross-examination, warrant general exclusion of second-level hearsay statements pursuant to rule 801(d)(1)(A). At the same time, situations may exist in which a prior inconsistent statement not meeting the requirements of rule 801(d)(1)(A) should be admitted substantively pursuant to rule 803(24). *See, e.g.*, United States v. Leslie, 542 F.2d 285 (5th Cir. 1976), discussed in note 55 *supra*. For example, assume the defendant's mother voluntarily goes to a police station and gives a tape-recorded statement that her son had just told her that he had found his wife in bed with the milkman and that he was going to kill both of them. She asks the police to stop her son. The mother's statement, even though containing second-level hearsay about which the mother lacks personal knowledge, should be found admissible in a murder prosecution against her son pursuant to rule 803(24), even if she denies making it while testifying in court.

61. Statement of Lord Chancellor on the second reading of the Bill for the Act of Lords, Civil Evidence Act, 1968, c. 64, § 2, whose forerunner was § 1 of Evidence Act of 1938, 288 H. of L. OFF. REP. 1341, 1342. *See* FED. R. EVID. 805, permitting double-level hearsay if an exception exists for each level. The requirement of personal knowledge gives the declarant an opportunity to state either what he now alleges to have seen or that, having not even been at the location indicated in the prior inconsistent statement at the time alleged, he saw nothing. This statement is a far more effective rebuttal than a mere denial by the witness that someone else said something to him.

62. *See* notes 59 & 60 *supra*. Pursuant to rule 801(d)(1)(A) as enacted, a state-

stantive evidence even if the alleged admission is contained in a signed statement of the in-court witness, unless the declarant also had personal knowledge of the underlying event.

The foregoing proposals would also exclude from substantive evidence an unacknowledged oral statement, the prior statement most likely not to have been made and most likely, if made, to have been unfairly obtained or inaccurately reported. With respect to written statements[63] substantively admissible under each of these proposals when made by a witness possessing personal knowledge of the event related, it is undeniable that subtle influence, coercion, or deception may have affected the process of taking and recording the statement.[64] However, the circumstances surrounding the actual making of the statement may be explained by the witness to the trier of fact, and the declarant may provide the trier of fact with a complete explanation of why the statement is misleading, inaccurate, or incorrect.[65] Moreover, and critically important, the witness possessing personal knowledge of the event related is in a position to advise the trier of fact of what he now contends actually occurred. The jury may observe the demeanor of the witness throughout.[66] Effective cross-examination by counsel opposing the truth of the prior inconsistent statement can be expected to do no more; it rarely accomplishes as much.[67]

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ment by anyone concerning the defendant's confession would be admissible, in spite of the declarant's lack of personal knowledge, if it were given to a grand jury or at a prior trial. For a discussion of whether the formality of the making of the statement is an adequate reason to dispense with the personal knowledge requirement, see notes 25, 68 & 74 *infra*.

63. Many out-of-court declarations are admissible under the Federal Rules of Evidence without regard to whether they are oral or in writing. Present sense impressions (FED. R. EVID. 803(1)), excited utterances (FED. R. EVID. 803(2)), and statements for purposes of medical diagnosis or treatment (FED. R. EVID. 803(4)) are examples. Moreover, none of these require that the declarant be available and thus be subject to cross-examination. Admittedly, these exceptions to the hearsay rule are based on certain presumptions about the certainty of making or accuracy of reporting of the statements to which they apply.

64. *See* note 25 *supra*.

65. FED. R. EVID. 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

See section III *infra*.

66. The jury will have two opportunities for such observation: when the witness testifies to the authenticity of the prior inconsistent statement and when he is cross-examined about that testimony.

67. *See* notes 16-17 *supra* and accompanying text.

In short, the difficulty with rule 801(d)(1)(A) is not that it fails to permit substantive admission of all prior inconsistent statements, but rather that it fails to admit many statements that almost certainly were made and that may be explored for truthfulness through subsequent cross-examination. The McCormick and English proposals broaden admissibility beyond rule 801 (d)(1)(A)'s limitation to statements made at formal proceedings. Yet each, assisted by the requirement of personal knowledge, ensures to a sufficient degree of certainty that the statements were made and are trustworthy; at the same time, both exclude the most untrustworthy declaration, the unacknowledged oral statement. Accordingly, it is suggested that rule 801(d)(1)(A) be amended to state:

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior Statement of Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and

(A) The statement is inconsistent with his testimony, and (i) is proved to have been made under oath subject to penalty of perjury at a trial, hearing, or other proceeding or in a deposition, or (ii) is made by a declarant having personal knowledge of the event or condition the statement narrates, describes, or explains and (1) the statement is proved to have been written or signed by the declarant, or (2) the making of the statement is acknowledged to have been made either (a) by the declarant in his testimony in the present proceeding or (b) by the declarant under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition, or (3) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.[68]

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68. The proposal does not extend the personal knowledge requirement to statements now admissible pursuant to rule 801(d)(1)(A) primarily because that requirement has never been incorporated as part of the common-law hearsay exception for former testimony, an exception closely paralleling rule 801(d)(1)(A)'s reference to testimony and depositions. Moreover, while the same arguments put forth in the Article are applicable to such prior inconsistent statements, additional indications of absolute reliability are provided by the formality and, in some cases, public nature of the prior proceeding. With respect to statements concededly made, such formality does significantly reduce the effect of outside influence, coercion, *see* note 74 *infra*, and deception, *see* text at note 76 *infra*. In any event, application of the personal knowledge requirement to such prior statement would certainly not be unacceptable.

As previously noted, note 45 *supra*, Uniform Rule of Evidence 801(d)(1)(A) permits substantive admissibility of *all* prior inconsistent statements in civil proceedings. While the proposal made in this Article does not differentiate between civil and criminal proceedings, the reduced practical effect of blanket substantive admissi-

Certain provisions of the proposed rule deserve specific mention.[69] Current federal rule 801(d)(1)(A) does not permit substantive admissibility when a witness at trial acknowledges the making but denies the truth of the inconsistent statement; in contrast 801(d)(1)(A)(ii)(2)(a) of the proposed rule would give substantive admissibility to this inconsistent statement. In addition, 801(d)(1)(A)(ii)(2)(b) of the proposed rule provides the possibility of substantive admissibility for a prior oral or written statement the making of which the witness had acknowledged while testifying at a prior trial, hearing, other proceeding, or deposition, even if the witness had denied its truth at that proceeding. Thus, subject to the requirement of personal knowledge, if a witness at a current trial had earlier appeared at one of these formal proceedings and there had stated that he had made a particular oral statement, under the proposal the statement would be admissible substantively in the present trial if it is inconsistent with his present trial testimony, even if he now states that he never made the prior statement or that it was untrue.

The proposal also requires that the statement be "proved" to have been made whenever the witness refuses to acknowledge that he made it. It is envisaged that resolution of that issue would be in the province of the court. This determination is not intended merely to come under rule 104(b),[70] under which the court would only need to find that sufficient evidence had been introduced to support a jury finding that the out-of-court statement was made. Rather, the litigant seeking to use as substantive evidence a prior inconsistent statement that the witness had not admitted making must initially convince the court by a preponderance of the evidence that the statement was in fact made.[71] Of course, given the nature of the prior inconsistent statements that fall within the proposed rule, it is probable that the witness will seldom deny making the statement,[72] al-

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bility in civil cases coupled with the simplification such admissibility would accomplish with respect to problems addressed in rules 613 and 607 makes the Uniform Rules' treatment of civil proceedings an acceptable if not preferable alternative.

69. Substantive effect is given to statements accurately recorded mechanically; stenographic transcripts that are not taken as part of a trial, hearing, proceeding, or deposition and that are unexecuted by the declarant are not included. *Cf.* Bridges v. Wixon, 326 U.S. 135 (1945) (construing the regulations of the Immigration and Naturalization Service on admissibility of evidence).

70. FED. R. EVID. 104(b): "Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

71. Ultimately, of course, the jury must determine if the statement was actually made. *See also* Comment, *supra* note 45, at 1388-89.

72. If the actual making of these statements is disputed, proof of making by a

though the possibility of forged signatures on or alterations in prior signed statements creates a potential for dispute over whether such statements were made.[73]

Since an in-court declarant who denies making a prior inconsistent statement will necessarily be testifying under oath, the proposal is justified in imposing a greater requirement of certainty that he made the statement—accomplished by placing on the proponent of the out-of-court declaration the burden of proof by a preponderance of the evidence—than governs the admission of other disputed writings. Such direct testamentary contradiction is often not present with respect to authentication of writings admitted pursuant to the doctrine of conditional relevance. Moreover, the trier of fact, recognizing that witnesses often lack a party's interest in the outcome of the litigation, tends to value highly the testimony of the occurrence witness. Accordingly, although a written admission introduced into evidence pursuant to current federal rule 801(d)(2) would be admitted under the proposed rule upon a judicial determination that sufficient evidence exists to support a subsequent jury finding that the witness actually made the statement, testimony of the ocurrence witness is potentially so persuasive, especially in criminal proceedings, that more probative evidence that a prior inconsistent statement was actually made must be introduced before it may be presented to the jury for substantive consideration.

The proposed amendment to rule 801(d)(1)(A) also requires that, in order for the prior inconsistent statement to be admissible, the proponent must prove by a preponderance of the evidence that the statement alleged to be that of the declarant was the exact statement that he had written or signed. The proponent of the prior statement should not be required to bear this burden of proof regarding admissibility for other facts about the statement, however. The special problems of distortion through subtle wording variations, complete omissions, fabricated additions followed by uncritical signing, or subtle influence or appeal to the declarant's desire to please another person are resolved by the jury after it has heard the problems explained by the in-court declarant and explored by the cross-examination of the person who took the written statement. The jury, consistent with its traditional function, is assigned the tasks of

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preponderance of the evidence will normally be accomplished as part of the process of authentication. *See generally* United States v. Leslie, 542 F.2d 285 (5th Cir. 1976).

73. *See* note 25 *supra*.

judging the credibility of each witness and of deciding what in fact occurred when the prior statement was allegedly made. Thus, once the court is persuaded by a preponderance of the evidence that the prior statement was in fact written or signed by the witness, it need make no determination of any other facts relating to the statement, for evaluation of the circumstances surrounding the making of the statement is left to the jury.

Finally, if the declarant in either a civil or criminal case asserts that a prior statement was made involuntarily,[74] under the proposed rule the proponent of the statement would be required to convince the judge by a preponderance of the evidence that the statement had not been the product of coercion.[75] In this regard, it is noteworthy

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74. The question of the voluntariness of the prior inconsistent statement was faced in LaFrance v. Bohlinger, 499 F.2d 29 (1st Cir. 1974). The case involved the question whether a witness' prior out-of-court statement inculpating the defendant could be used solely for purposes of impeachment without a judicial determination that the statement was voluntarily made. The court concluded that a preliminary hearing on voluntariness was constitutionally mandated, relying in part on Napue v. Illinois, 360 U.S. 264, 269 (1959): "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."

The problem of police coercion of witnesses to obtain statements must be faced squarely. Unfortunately, the proposed substantive admissibility of witnesses' inconsistent signed or written statements may increase police use of this tactic. Even without such substantive admissibility and despite the discouragement of the voucher rule, *see* text at notes 133-46 *infra*, police officers upon occasion have apparently coerced statements from witnesses. *See* Bradford v. Johnson, 354 F. Supp. 1331 (E.D. Mich. 1972), *affd.*, 476 F.2d 66 (6th Cir. 1973); People v. Underwood, 61 Cal. 2d 113, 389 P.2d 937, 37 Cal. Rptr. 313 (1964); *but see* People v. Bates, 25 Ill. App. 3d 748, 324 N.E.2d 88 (1975).

75. The right of confrontation, of course, applies to prior inconsistent statements placed in evidence against the criminal defendant. *See generally* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972); Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971); Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Semerjian, *The Right of Confrontation*, 55 A.B.A.J. 152 (1969); Silbert, *supra* note 10.

For a general discussion of confrontation issues raised when a witness admits, denies, or does not recall either the making or substance of a prior inconsistent statement, see 4 WEINSTEIN, *supra* note 10, ¶¶ 801(d)(1)(A)[01]-801(d)(1)(A)[08]. Given the requirements of the proposed rule, it seems very unlikely that a witness will in fact deny making the statement. If the witness does admit making the statement, he may either affirm or deny the truth of its contents or deny recollection of the underlying events. If its truth is affirmed, the prior statement has become current testimony and will be given substantive effect. *See* 4 WEINSTEIN, *supra* note 10, 801(d)(1)(A)[02]. If the statement's truth is denied, the prior statement may also be given substantive effect pursuant to California v. Green, 399 U.S. 149 (1970). If the witness denies knowledge or memory of the underlying event, the court must decide whether the witness' "apparent lapse of memory so affected [the defendant's] right to cross-examination as to make a critical difference in the application of the Confrontation Clause." 399 U.S. at 168. In reaching this question upon remand in

that the preponderance-of-the-evidence standard has already been applied in criminal cases to determine the voluntariness of a prior inconsistent statement.[76]

III. Rule 613—The Foundation Requirement

Rule 613, as drafted by the Advisory Committee, approved by the Supreme Court, and adopted by Congress, constitutes a major departure from the traditional foundation requirements developed at common law and applied in the federal courts.[77] In order to understand the operation of rule 613 and the significant change it represents, one must first explore the development of the traditional foundation requirements, the most controversial aspects of which are derived from the famous *Queen Caroline's Case* (hereinafter called *Queen's Case*), decided in England in 1820.[78]

A. *The Common-Law Requirements*

1. *Inconsistency*

Before a party may attack the credibility of a witness by means of a prior statement, it must initially be shown that the prior statement is actually inconsistent with the witness' in-court testimony. Thus, if the prior statement is not inconsistent, the law will not permit its use for impeachment, and no question of proper foundation for the introduction of extrinsic proof arises.

The degree of inconsistency required for impeachment has not escaped the controversy that generally surrounds the foundation requirement. Some jurisdictions have followed a strict test of inconsistency by narrowly construing the meaning of the statements and

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Green, the California Supreme Court, after noting the witness' recollection of events both before and after the alleged event in question, concluded that the witness' "deliberate evasion of the latter point in his trial testimony must be deemed to constitute an implied denial that" defendant committed the offense in question. 3 Cal. 3d 981, 989, 479 P.2d 998, 1002, 92 Cal. Rptr. 494, 498 (1971). After analyzing the threefold purpose of confrontation—to insure reliability, to expose the witness to cross-examination, and to allow the trier of fact to observe the witness' demeanor—the court found that purpose fulfilled and the right to confrontation satisfied.

76. *See* La France v. Bohlinger, 499 F.2d 29 (1st Cir. 1974). *See generally* United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976), discussed in notes 44 & 55 *supra*, which upheld the substantive admission of prior inconsistent statements while not explicitly considering the burden of proof and ruling that contentions as to the declarants' expectations of favorable treatment and drugged condition presented questions of credibility only.

77. For the text of rule 613, see text at note 113 *infra*.

78. 129 Eng. Rep. 976 (1820). *See generally* Stern & Grosh, *A Visit with Queen Caroline: Her Trial and Its Rule*, 6 Cap. U.L. Rev. 165 (1976).

by resolving doubts in favor of the witness.[79] McCormick, on the other hand, suggested that the test should be as follows: "[C]ould the jury reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a prior statement of this type?"[80] Wigmore proposed a similarly liberal test: "Do the two expressions appear to have been produced by inconsistent beliefs?"[81]

Federal courts have tended to agree with the statements of McCormick and Wigmore.[82] For example, in *United States v. Barrett*,[83] the court held that a witness' testimony that the defendant had admitted his involvement in the crime was inconsistent with the same witness' alleged statement that it was too bad the defendant had been indicted because he knew the defendant was not involved. The trial court had excluded the prior statement, ruling that it was not inconsistent but was rather a "hearsay opinion . . . that this guy is innocent."[84] The First Circuit, however, found the two statements inconsistent and reversed, stating:

> To be received as a prior inconsistent statement, the contradiction need not be in plain terms. It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it is sought to contradict. . . . Furthermore, the fact that [the witness'] belief that [the defendant] was not involved might be called an "opinion" is immaterial. . . . The important point is the clear incompatibility between [the witness'] direct testimony and the alleged statement.[85]

2. *The Foundation Requirement*

Although the traditional foundation rule as set out in the *Queen's Case* applied to both written and oral prior inconsistent

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79. *See, e.g.*, Sanger v. Bacon, 180 Ind. 322, 328, 101 N.E. 1001, 1003 (1913). *See also* Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239, 253 (1967) (citation omitted):

> A final observation about the limitations on impeaching statements is that the degree of inconsistency must be real. When the statements are placed side by side, it must be possible to say that both cannot be true. Only in this circumstance will the triers have reason to nullify the testimony given in court, which is the only justification for the admissibility of the out-of-court statement.

80. EVIDENCE, *supra* note 12, § 34, at 68.

81. 3A J. WIGMORE, *supra* note 10, § 1040, at 1048.

82. *See* United States v. Morgan, 555 F.2d 238, 242 (9th Cir. 1977) (approving the liberal view of inconsistency under the Federal Rules of Evidence).

83. 539 F.2d 244 (1st Cir. 1976).

84. 539 F.2d at 254.

85. 539 F.2d at 254.

statements, the specific requirements established for each were not the same. The basic rule, which applied to all prior inconsistent statements whether oral or written, required that a party intending to impeach a witness with extrinsic evidence of a prior inconsistent statement must first ask the witness upon cross-examination whether he had made the prior statement and then must permit the witness to admit, deny, or explain it.[86] In later cases, the foundation requirement was refined to require that time, place, and persons present, as well as the content of the prior statement, also be specified.[87] The rationale of the rule was essentially threefold: (1) to save time, since an admission by the witness that the statement was his own might make the introduction of extrinsic evidence unnecessary; (2) to avoid unfair surprise to the adversary, by alerting him to the possible existence of a prior inconsistent statement and thus enabling him to prepare to meet the issue; and (3) to prevent unfairness to the witness, by permitting him to explain or deny an apparent inconsistency at the time it was first suggested.[88]

The *Queen's Case* established the additional requirement that, before a witness could be examined about the contents of a writing that allegedly contained a prior inconsistent statement, the document itself had to be shown to the witness or its contents read to him. This rule was based on a rather dubious application of the best evidence rule: the court in the *Queen's Case* stated that "the contents of every written paper are, according to ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence."[89] Many courts applying the rule of the *Queen's Case* forbade even questions designed to lay a foundation for the written statement unless the witness was first shown the document, and such disclosure thus came to be an integral part of the foundation required for the introduction into evidence of a prior inconsistent written statement. Clearly, however, the rule was also more than a simple foundation requirement, for its prohibitions arose not when extrinsic evidence of the prior written statement was offered,

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86. The Queen's Case, 129 Eng. Rep. at 987-88; The Charles Morgan, 115 U.S. 69 (1885). *See* Hale, *Impeachment of Witnesses by Prior Inconsistent Statements*, 10 S. CAL. L. REV. 135 (1937); Ladd, *supra* note 79.

87. Crowley v. Page, 173 Eng. Rep. 344 (1837); Angus v. Smith, 173 Eng. Rep. 1228 (1829).

88. *See* MCCORMICK, *supra* note 10, § 37, at 72.

89. 129 Eng. Rep. at 977. For a criticism of the court's analysis, see 4 J. WIGMORE, *supra* note 10, § 1260; Hale, *supra* note 86, at 147-49 & n.60.

but rather when any question concerning the statement was put to the witness on cross-examination.

Commentators have strongly criticized the requirement that a witness must be shown his prior written statement before any cross-examination commences concerning its contents. Wigmore termed the requirement "a rule which for unsoundness of principle, impropriety of policy, and practical inconvenience in trials [is] the most notable mistake that can be found among the rulings upon the present subject."[90] Others have echoed that judgment, emphasizing that showing the prior written statement to the witness on cross-examination may warn the dissembling witness or refresh the memory of the witness who is forgetful, thereby screening such infirmities from the jury's inspection. One commentator has phrased the objection as follows:

> Grant the argument of the judges that a letter or other writing is the best evidence of its contents and that therefore a witness should not be questioned to give his version of the letter's contents from memory, if it is desired to prove what the letter says. But there are nevertheless many cases in which the purpose of the questioning is not to prove the contents of the letter, but rather to test the credibility of the witness. If a witness has claimed to remember the details of an event, but relates falsely what he wrote in a letter associated with the event, that fact diminishes the trust which might be attached to his memory. Similarly, if the witness falsely denied writing a particular letter, or lies about what he wrote, that fact obviously is evidence that he is likely to be lying in other parts of his testimony about related matters. But if the rule in the Queen's Case is followed, and it is required that the witness first be shown or read the letter, this valuable chance to test his memory and veracity is lost. A forgetful witness will have his memory of the letter refreshed or corrected, though his memory for the rest of his testimony remains faulty. A lying witness will discover the matters on which he may safely lie and those in which he must equivocate, thus guarding the lie from discovery.[91]

B. *Prior Federal Practice: Foundation and Extrinsic Evidence*

Although the federal courts accepted in principle the foundation

90. 4 J. WIGMORE, *supra* note 10, § 1259. McCormick also criticized dogmatic application of the rule, but he would have allowed the trial judge discretion to apply it in order to prevent counsel from abusing cross-examination to induce the forgetful witness to widen the gap between his testimony and his prior written statement. EVIDENCE, *supra* note 12, § 28.

91. Stern & Grosh, *supra* note 78, at 198. Of course, the process of discovery has significantly reduced the likelihood that the witness will in fact be surprised and thus be dramatically confronted with an alleged prior inconsistent writing. The issue of fairness to the witness would thus seem to have little practical significance.

rule established in the *Queen's Case*, in practice they never considered themselves bound by its technical requirements. In *The Charles Morgan*,[92] an 1885 case, the Supreme Court did note with approval the foundation requirements applicable to prior inconsistent oral and written statements. However, the Court suggested that, although the requirement that a witness be shown a prior inconsistent written statement before any cross-examination can begin concerning its contents was "ordinarily" applicable, the rule might be ignored in certain situations. The Court stated that "[c]ircumstances may arise, however, which will excuse [the document's] production. All the law requires is that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can and desires to do so."[93] Later courts generally accepted that statement as a presentation of the ordinary rule rather than as an exception thereto, and therefore they did not require that the prior written statement actually be shown to the witness so long as the witness had an opportunity to explain the inconsistency. For example, in *United States v. Dilliard*,[94] the defendant complained that the prosecution had used a letter he had written to impeach him without first allowing him to see it. Affirming the defendant's conviction, Judge Learned Hand, speaking for the Second Circuit, admitted that the rule of the *Queen's Case* had been broken, but held that, although the Supreme Court in *The Charles Morgan* had countenanced the rule, it had

> scarcely accepted [the rule] as preemptory. . . . It was reversed by legislation in England, and is everywhere more honored in the breach than in the observance. Fairness usually does require that the witness shall be told when and where he made the putatively contradictory statement; but that is really all that the Supreme Court has ever exacted, and we think more is not necessary.[95]

The federal rule that ultimately developed did retain the requirement that, before the introduction of extrinsic evidence of a prior oral or written inconsistent statement, the witness must be con-

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92. 115 U.S. 69 (1885).

93. 115 U.S. at 77-78.

94. 101 F.2d 829 (2d Cir. 1938).

95. 101 F.2d at 837. *See also* United States v. Hibler, 463 F.2d 455, 462 (9th Cir. 1972) (trial judge's exclusion of cross-examination of a witness concerning prior trial testimony without showing the witness copies of prior testimony transcript held error); United States v. Bernstein, 417 F.2d 641, 644 (2d Cir. 1969) ("all that fairness requires is that the witness be told when and where he made the putatively contradictory statement"); Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887, 891 (5th Cir. 1969) (error to permit witness to hold copy of deposition in his hand during cross-examination).

fronted with its contents so that he could admit, deny, or explain.[96] Most courts did not strictly enforce the "time, place, and persons present" aspect of the traditional rule, generally requiring only that the witness' attention be sufficiently directed to the circumstances surrounding the making of the prior inconsistent statement so that he could admit, deny, or explain.[97] Although the federal courts had stated that at the very least the witness had to be given this opportunity to explain the inconsistency,[98] they never required that the impeaching cross-examiner himself actually provide it. So long as the court permitted counsel on redirect to elicit an explanation, the

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96. *See* The Charles Morgan, 115 U.S. 69, 77 (1885):

> The rule is, that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it.

The witness' explanation of the inconsistency might take several forms—for example, that the prior statement was coerced, *e.g.*, United States v. Scandifia, 390 F.2d 244, 250-51 (2d Cir. 1968), *vacated on other grounds,* 394 U.S. 310 (1969), that the report of his prior statement is inaccurate, or that the inconsistency is not significant. One means advocated by Wigmore, *see* 3A J. WIGMORE, *supra* note 10, § 1045, and specifically recognized in FED. R. EVID. 106 is to introduce such other portions of the writing as are necessary to explain the inconsistency.

97. *See* Brooks v. United States, 309 F.2d 580, 582 (10th Cir. 1962), *cert. denied,* 383 U.S. 916 (1966) ("it is necessary that the prior statements be called to his attention, and that he be given an opportunity to admit, deny, or explain them"). United States v. Dilliard, 101 F.2d 829, 837 (2d Cir. 1939) ("[f]airness usually does require that the witness shall be told when and where he made the putatively contradictory statement"). *But see* Robertson v. M/S Sanyo Maru, 374 F.2d 463, 465 (5th Cir. 1967), *cert. denied,* 400 U.S. 854 (1970) ("the cross-examiner should ask the witness whether he made the statement, giving its substance, naming the time, the place, and the person to whom made"); Sylvester v. Meditz, 278 F. Supp. 810, 813 (E.D. Wis. 1968) ("The proper procedure for laying a foundation for impeachment by prior inconsistent statements made orally is to call the attention of the witness to the particular time and occasion when the witness purportedly made the statement. The witness should be informed what the statements were and the conditions and circumstances under which they were made."); Osborn v. McEwan, 194 F. Supp. 117, 118 (D.D.C. 1961) ("[t]he interrogation on cross-examination must identify the specific statement and indicate its contents, the occasion, and the person to whom it was alleged to have been made"). *See also* 3A J. WIGMORE, *supra* note 10, § 1029:

> If the preliminary question is to be useful as a warning to enable the witness to prepare to disprove the utterance or to explain it away if admitted, it must usually specify some details as to the occasion of the remark. The witness may perhaps without this understand the occasion alluded to; but usually he will not, and in such a case this specification of the details is a mere dictate of justice. The tendency of American courts, however, is to lose sight of the fact that this specification is a mere means to an end (namely, the end of adequately warning the witness), and to treat it as an inherent requisite, whether the witness really understood the allusion or not. The result of this is that unless the counsel repeats a particular arbitrary formula of question, he loses the use of his evidence, without regard to the substantial adequacy of the warning. Such a practice is impolitic and unjustified by principle.

98. *See, e.g.*, United States v. Wright, 489 F.2d 1181, 1187 (D.C. Cir. 1973); cases cited in notes 99-100 *infra.*

rule was deemed satisfied.[99] However, the federal courts did strictly enforce a requirement that the opportunity for such explanation must occur *before* the introduction of extrinsic evidence.[100]

An additional component of the foundation rule that developed in the federal courts, the good-faith-basis requirement, prevented counsel from making unwarranted insinuations that a witness had made a prior inconsistent statement. This requirement vested the court with discretion to demand the assurance of counsel that he could support the foundation question of whether the witness had made a prior statement with evidence of the alleged statement.[101] In *United States v. Bohle*,[102] the court stated the rule as follows:

> Where a trial judge is aware of the possibility that counsel intends to ask an impeaching question having prejudicial implications, it is proper and advisable, in the interests of avoiding abuse and of insuring a fair trial to both the prosecution and the defendant, that the judge inquire of counsel whether the question on which he is about to embark is for the purpose of impeachment and whether and how counsel intends to follow up the question with impeaching proof. If there is no intention to introduce such impeaching proof, the question may, in the court's discretion, be properly excluded.[103]

If a witness responding to the foundation question denied making a prior statement, federal courts then required the cross-

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99. *See generally* United States v. Franzese, 392 F.2d 954, 959 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969) (witness explained that he feared death or bodily harm); United States v. Scandifia, 390 F.2d 244, 250-51 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969) (witness testified that his family had received threatening phone calls); Pattison v. Standard Oil Co. of Ohio, 375 F.2d 643 (6th Cir. 1967) (prejudicial error to deny witness the opportunity to explain); West v. Greyhound Corp., 254 F.2d 541 (5th Cir. 1958) (witness may admit and explain prior statement); Affronti v. United States, 145 F.2d 3 (8th Cir. 1944) (other portions of prior statement admissible to meet force of impeachment).

100. *See* United States v. Wright, 489 F.2d 1181, 1187 (D.C. Cir. 1973) ("[b]efore introducing extrinsic proof of a witness' prior inconsistent statement, the witness must be asked whether he or she made the statement and must be given an opportunity to explain it"); United States v. Hayutin, 398 F.2d 944, 953 (2d Cir.), *cert. denied*, 393 U.S. 961 (1963).

101. *See* St. Clair v. Eastern Air Lines, Inc., 279 F.2d 119 (2d Cir. 1960).

102. 445 F.2d 54 (7th Cir. 1971).

103. 445 F.2d at 74. The court in *Bohle*, however, condemned the practice of requiring that counsel reveal to the witness and opposing counsel the specific impeaching information, since it gives the witness time to consider his answer to the foundation question and thereby eliminates any reaction of surprise. Referring to the trial court's decision to allow confrontation of the witness with his prior statement out of the presence of the jury, the Seventh Circuit said:

> Such a practice would appear to have a strong tendency to undermine the function of confronting the witness with the question in the first place. The loss to the jury of the witness' initial and immediate response is accompanied by the loss of one potentially significant aspect of the credibility determination. In the usual case, we can see no point in thus weakening the right to an effective cross-

examiner to produce extrinsic evidence of the statement.[104] A witness' equivocal answer to the foundation question also required the introduction of extrinsic evidence. For example, in *Ditrich v. United States*,[105] a witness admitted signing an inconsistent prior written statement, but refused to say whether she had in fact made the statements contained in the writing. Given those circumstances, the court required that the writing itself be introduced.[106] If, on the other hand, the witness admitted making a prior inconsistent statement, the courts did not require that extrinsic evidence of the statement be introduced,[107] and some went so far as to exclude such evidence.[108] There was, however, no consensus among the courts or the commentators about the admissibility of extrinsic evidence under these circumstances. In *Gordon v. United States*,[109] the Supreme Court stated that "an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence."[110] Wigmore agreed that no valid reason existed to exclude evidence following the witness' admission, and he asserted that counsel should be allowed to emphasize the inconsistency.[111] McCormick disagreed, however, advocating what he felt to be the prevailing view of excluding extrinsic evidence of an admitted prior

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examination by use of the voir dire procedure.
445 F.2d at 75.

104. United States v. Stanfield, 521 F.2d 1122, 1127 (9th Cir. 1975); United States v. Hibler, 463 F.2d 455, 461 (9th Cir. 1972); United States v. Bohle, 445 F.2d 54, 74 (7th Cir. 1971) ("[i]n civil litigation and in the case of the prosecution in a criminal case, the duty to follow up foundation with evidence is breached at the risk of reversal of any tainted victory"); United States v. Amabile, 395 F.2d 47, 50 (7th Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969), *affd. on remand*, 432 F.2d 1115 (1970), *cert. denied*, 401 U.S. 924 (1971); Sidders v. United States, 381 F.2d 513, 516 (9th Cir. 1967); Robertson v. M/X Sanyo Maru, 374 F.2d 463, 465 (5th Cir. 1967), *cert. denied*, 400 U.S. 854 (1970) ("[i]f the witness denies the making of the statement or fails to admit it, the cross-examiner must prove the making of the alleged statement at his next stage of giving evidence").

105. 243 F.2d 729 (10th Cir. 1957).

106. *See also* Bush v. United States, 267 F.2d 483, 489 (9th Cir. 1959) (witness answered that he "might have said it"); Patterson v. United States, 361 F.2d 632, 635 (8th Cir. 1966).

107. United States v. Stanfield, 521 F.2d 1122, 1127 (9th Cir. 1975); United States v. Hibler, 463 F.2d 455, 462 (9th Cir. 1972); Brooks v. United States, 309 F.2d 580, 582 (10th Cir. 1962), *cert. denied*, 383 U.S. 916 (1966).

108. Dilley v. Chesapeake & O. Ry., 327 F.2d 249, 251 (6th Cir.), *cert. denied*, 379 U.S. 824 (1964) ("where a witness admits a statement attributed to him, there is no necessity to prove it and the statement is not admissible in evidence").

109. 344 U.S. 414 (1953).

110. 344 U.S. at 420. *See also* United States v. Browne, 313 F.2d 197 (2d Cir.), *cert. denied*, 374 U.S. 814 (1963).

111. 3A J. WIGMORE, *supra* note 10, § 1037.

statement[112] in order to save time and minimize the calling of witnesses on subsidiary issues.

C. *The Approach Adopted in Rule 613*

In assessing what foundation requirement to apply to prior statements of witnesses, the Advisory Committee for the Federal Rules of Evidence was faced with federal court practice that repudiated that aspect of the foundation rule requiring a written statement to be shown or read to the witness prior to examination thereon but still required a foundation sufficient to allow the witness an effective opportunity to admit, deny, or explain the alleged prior statement *before* permitting introduction of extrinsic proof. An analysis of this practice led the Advisory Committee to draft—and Congress to pass—rule 613, which confirmed much of the existing federal practice while also further liberalizing the traditional foundation requirements. The rule provides as follows:

> Prior Statements of Witnesses
>
> (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).[113]

Although Congress passed rule 613 without substantive change,[114] the rule did undergo two significant alterations between the time of its first publication in 1969[115] and its approval by the Advisory Committee and the Supreme Court.[116] Initially, the Advisory Committee substituted "inconsistent" for "contradictory" to

112. EVIDENCE, *supra* note 12, § 37, at 73.

113. FED. R. EVID. 613.

114. The only modification in rule 613 made by Congress was in the second sentence of 613(a), where Congress substituted "nor" for "or." *See* Federal Judiciary Center's Note on Rule 613, FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 75 (West 1975).

115. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 308-09 (1969).

116. The Advisory Committee also made one clarifying change. The committee

describe the nature of the prior statements included, a change designed to assure a liberal interpretation of what statements will qualify for purposes of impeachment.[117] The second—and more important—change in rule 613 was the addition of the phrase "or the interests of justice otherwise require"[118] to 613(b). This modification permits the trial judge to excuse counsel's inadvertent failure to lay a foundation when the witness is unavailable for recall. Furthermore, the amendment assures that evidence will not be automatically excluded if circumstances develop that deny the witness an opportunity to explain the inconsistency.

Rule 613(a) abolishes once and for all the "useless impediment" to cross-examination represented by that portion of the *Queen's Case* requiring a written statement to be shown or read to a witness prior to examination thereon. Instead, rule 613(a) requires that counsel examining a witness concerning a prior oral or written statement disclose, if requested, the contents of the statement to the opposing counsel. Although no specific time for such disclosure is designated, the requirement of disclosure "upon request" presumably refers to when the witness is being examined about the prior statement.[119] In short, rule 613(a) establishes identical foundation requirements for examination as to either a witness' prior oral or written statement. A good-faith basis is required for this examination, enforced by a duty to disclose the content of the statement to opposing counsel upon request. However, examination upon the prior oral or written statement may proceed without initial disclosure to the witness of its contents.

To illustrate the operation of rule 613(a), let us assume that an occurrence witness upon direct examination by plaintiff states that he saw the entire accident and that at the time of the accident the

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added the phrase "at that time" to rule 613(a) following "the statements need not be shown or its contents disclosed to him," in order to make it clear that the statement may have to be shown to the witness at some time in order to allow him to explain or deny it. The amendment also sought to emphasize that Federal Rule of Civil Procedure 26(b)(3), allowing a person to obtain a copy of his own statement, was not repealed, though its operation may be temporarily suspended. Advisory Committee Note to Proposed Rule 613, 56 F.R.D. 183, 278 (1972).

117. *See* 3 WEINSTEIN, *supra* note 10, ¶ 613[01].

118. Professor Alex Brooks, chief draftsman of the New Jersey Rules of Evidence, was primarily responsible for the amendment. The phrase was proposed in the Report of American College of Trial Lawyers, Committee To Study Proposed Rules of Evidence 49 (1970), *cited in* 3 WEINSTEIN, *supra* note 7, ¶ 613[02] at 613-7.

119. Requiring disclosure at the time of the examination may represent a change

traffic light facing the defendant's truck was red. Defense counsel has in his arsenal two prior inconsistent statements. The first is an oral statement by the witness made to police officer Smith. The second is a signed statement given to John Brown, an insurance investigator. Assume further that in both statements the witness is alleged to have asserted that he did not see the color of the traffic light at the time of the accident, having arrived at the scene about twenty seconds after hearing but not observing the impact. In cross-examination of the witness, defense counsel may employ (either alone or in combination) questions falling within any one of the following categories:

(1) Cross-examination confronting the witness with other versions of the facts. For example, "Isn't it true you did not actually see the car and truck collide?," or "Didn't you in fact arrive at the accident twenty seconds after impact?"

(2) Cross-examination inquiring about the assurance, frankness, and recollection of the witness. For example, "Have you always maintained that position?," or "Did you ever tell a contrary story to anyone else?"

(3) Cross-examination going beyond mere inquiry about assurance of position and clearly implying the existence of a contrary statement. For example, "Didn't you talk to John Brown about the accident?"

(4) Cross-examination confronting the witness with the substance or exact content of a prior statement, after laying a partial but not full prior foundation regarding time, place, and persons present. For example, "Didn't you tell Officer Smith a completely contrary story?," or "Haven't you said on another occasion that you arrived at the scene of the accident twenty seconds after hearing the collision?"[120]

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in practice with respect to statements not already in possession of the opposing party. If impeachment is by a document or deposition transcript already in the opponent's possession, it is customary, if not required, to specify the document or give the date, page, and line of the deposition transcript being used to impeach. With respect to written documents not previously discovered, past practice might have required disclosure only at the conclusion of cross-examination. *Cf.* People v. Mulliken, 41 Ill. App. 2d 282, 190 N.E.2d 502 (1963) (no right of opposing counsel to inspect transcript of oral statements used to lay foundation for impeachment).

On the introduction of the remainder of writings that in fairness ought to be considered together, see FED. R. EVID. 106; Westinghouse Elec. Corp. v. Wray Equip. Corp., 286 F.2d 491 (1st Cir.), *cert. denied*, 366 U.S. 929 (1961).

120. Prior to the adoption of rule 613, objections to questions in categories (2), (3), and (4) were often made and sustained on the ground of lack of adequate foundation, referring to the fact that all elements of the traditional common-law foundation were not included. When such objections were overruled, the ruling us-

(5) Cross-examination posing a question containing the traditional full foundation. For example, "Didn't you say to Police Officer Smith on July 1, 1977, when he spoke with you at the scene of the accident, 'I got here about twenty seconds after I heard the collision. I didn't see it happen. Do you know what happened?' "

Pursuant to rule 613(a), questions falling within any of the five categories would be permitted without prior disclosure to the witness of the contents of the written statement. However, questions falling within categories (4) or (5), and probably within category (3), would require disclosure of the prior statement to opposing counsel, if requested, since the cross-examination of the witness concerns the prior statement. Such questions are distinguishable from questions to the witness about the underlying facts, which fall within category (1), or questions about the possible existence of a contrary statement, which come under category (2). Questions falling within categories (1) and (2) do not concern a prior statement made by the witness, and thus they give rise to neither a rule 613(a) requirement of a good-faith basis nor the obligation to disclose the prior statement, if there is one, to opposing counsel.[121]

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ually was in response to the examining counsel's assertion that the question asked was preliminary to the laying of the traditional foundation. Even prior to rule 613, however, such questions should have been allowed as relevant to the recollection, frankness, and honesty of the witness. *See* People v. Jones, 160 Cal. 358, 364-65, 117 P. 176, 179 (1911). Of course, category (3) and (4) questions should be excluded as "unwarranted insinuations" if the cross-examiner does not intend to proceed with impeachment. However, category (1) and (2) questions are proper even if they are not used preliminary to the laying of a foundation for impeachment. In practice, counsel most often refrain from asking a question in categories (1) or (2), since the witness will almost always simply repeat his direct testimony or deny ever making an inconsistent statement. However, if counsel desires to ask such a question without intending to pursue the line of questioning unless he receives a "yes" answer, the question on balance seems unobjectionable, since neither the question nor the answer seems to create an unwarranted risk of insinuation of a prior inconsistent statement.

Dean Hale summarizes the correct position—which was accepted by rule 613—on the allowability of such questions:

> [I]n cross-examining a witness concerning an alleged prior oral contradictory statement, it is not necessary to call his attention to the time, place and parties present. It is only with reference to, and as a basis for the later calling of an impeaching witness, that the requirement as to time, place, *et cetera* figures. Pursuant to one of the basic purposes of cross-examination, it seems entirely appropriate in testing the assurance, and indeed the frankness and honesty, of the witness with reference to his testimony to challenge him with the other possible prior versions of the facts in conflict therewith without requiring the cross-examiner at that point to reveal all the bases of contradiction that he may have in reserve. There may well be something very revealing in the contrasts that appear in answering a first inquiry and a more pointed subsequent inquiry. This contrast becomes particularly vivid if the witness at first denies any prior conflicting statement and then is confronted with a letter over his own signature in which the conflicting statement appears. Weaknesses of memory, if not dishonesty, stand out in bold relief.

Hale, *supra* note 86, at 149. *See* 4 J. WIGMORE, *supra* note 10, § 1260.

121. Rule 613(a) provides that "on request the same [prior inconsistent state-

Turning to 613(b), extrinsic evidence of a prior inconsistent oral or written statement is not permitted unless the witness is afforded an opportunity to explain or deny and the opposite party is afforded an opportunity to interrogate him thereon. As pointed out in the Advisory Committee Note, rule 613(b) permits extrinsic proof to be introduced before the witness is allowed to admit, deny, or explain the prior statement.[122] Moreover, what is important under rule 613(b) is the opportunity to deny or explain, not whether any denial or explanation actually occurs. Thus the foundation requirement is satisfied if the witness remains available for recall by the calling party later in the course of the trial, even if that party chooses not to recall the witness.

Rule 613(b) does not, however, address the question of when cross-examination concerning the prior inconsistent statement has proceeded to focus the witness' attention upon the circumstances surrounding the alleged making of the prior inconsistent statement to such an extent that the witness may be said to have been afforded an opportunity to deny or explain the statement on redirect examination. Returning to the illustration, if a full foundation is provided—*i.e.*, if the questioning covers the time, place, persons present, and content of the prior statement and thus comes under the rubric of category (5) above—an opportunity is obviously provided to opposing counsel to explore the prior inconsistent statement on redirect and to bring out any explanation the witness may have. Furthermore, it is clear that, if the witness on cross-examination is ex-

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ment] shall be shown or disclosed to opposing counsel." This provision apparently contemplates that the exact words of the prior inconsistent statement rather than merely the substance be disclosed even if the prior statement was oral. This disclosure may be done by giving opposing counsel a copy of the statement or by referring to the appropriate segment if he already has a copy. For oral statements, a copy, if reduced to writing, may be given or may be transmitted orally at the side bar. *See also* note 119 *supra*.

122. Advisory Committee Note to Proposed Rule 613, 56 F.R.D. 183, 279 (1972). ("[t]he traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence"). In spite of the clear language of the Advisory Committee Note and the position adopted in 3 WEINSTEIN, *supra* note 10, ¶ 613[04] (1975), in United States v. International Bus. Machs. Corp., 432 F. Supp. 183 (S.D.N.Y. 1977), the court, in requiring prior disclosure, stated that two circuits have taken the position that prior disclosure is required by rule 613(b). The two cases cited at 432 F. Supp. at 140 n.10—United States v. Truslow, 530 F.2d 257 (4th Cir. 1975), and United States v. Wright, 489 F.2d 1181 (D.C. Cir. 1973)—although involving trials occurring prior to the effective date of the federal rules, do in fact support the proposition for which they are cited. For further discussion of cases involving a foundation requirement under rule 613(b), see note 132 *infra*.

amined only about the underlying facts (category (1) questions), no such opportunity to opposing counsel is provided. Similarly, questions falling within categories (2) or (3) above seem inadequate to satisfy the requirement that the witness' attention be sufficiently focused upon the prior inconsistent statement. Whether cross-examination employing a partial but not full foundation—category (4) questioning—provides the witness the requisite opportunity to explain or deny so that extrinsic proof is permitted without reference to his continued availability would likely depend upon the content of and circumstances surrounding the question asked. For example, cross-examination that first involves the time, place, and circumstances of a prior conversation but that then inquires merely whether a particular subject matter was discussed would probably be insufficient. However, an inquiry such as "Didn't you previously tell a police officer that you didn't see the accident happen?" would seem to apprise the witness adequately. Of course, cross-examining counsel, by introducing at the appropriate juncture extrinsic evidence of the prior statement while insuring the continued availability of the witness, could protect against the possibility that the court would conclude that the questions asked upon cross-examination did not raise the proper opportunity to explain or deny. In any event, it is important to realize that, if opposing counsel does recall the witness for denial or explanation followed by cross-examination relating thereto, the prior statement in one form or another will have been placed before the jury on as many as five separate occasions—cross-examination, extrinsic evidence, cross-examination upon the extrinsic evidence, recall of the witness for explanation, and cross-examination again.

Rule 613(b) not only enables examining counsel to place the prior inconsistent statement before the trier of fact on multiple occasions, but it also permits the party impeaching the witness to delay the witness' denial or explanation. For example, if the content of the prior inconsistent statement is first introduced through extrinsic evidence as part of defendant's case-in-chief, plaintiff will in all likelihood be foreclosed from presenting the witness' explanation or denial until rebuttal.[123] This delay, which may well be substantial, could seriously impair the plaintiff's ability to rehabilitate the witness. Moreover, in addition to the fact that the mere mention of the statement in rebuttal permits it to be scrutinized yet another

123. While rule 611 provides the court with discretion to control the order of witness examination, it is unlikely that an explanation will be permitted prior to rebuttal.

time upon further cross-examination of the witness, it seems clear that even if plaintiff's counsel does choose to offer an explanation,

> [g]iven such time to crystallize, it is questionable whether the jury's estimation of the witness can be restored to its former status by his belated explanation. Conceivably, the jury may be even more prone to discount the belated explanation knowing that the witness has had the opportunity to confer with counsel after the evidence of the inconsistent statement was presented.[124]

Cross-examining counsel wishing to highlight a prior inconsistency in this manner may now do so, for rule 613(b) provides that the witness need no longer be given the chance to deny or explain his prior statement before admission of extrinsic evidence. Moreover, under rule 613(b) a party wishing to emphasize an inconsistent statement he believes the witness will admit making may avoid the danger that a court will exclude extrinsic evidence of the prior statement[125] by simply introducing the extrinsic evidence before the witness is provided an opportunity to admit, deny, or explain.[126]

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124. Note, *Modification of the Foundational Requirement for Impeaching Witnesses: California Evidence Code Section 770*, 18 HASTINGS L.J. 210, 219 (1966). *See also* Advisory Committee Note to Proposed Rule 106, 56 F.R.D. 183, 200 (1972).

125. *See, e.g.*, Dilley v. Chesapeake & O. Ry., 327 F.2d 249, 251 (6th Cir.), *cert. denied*, 379 U.S. 824 (1964). McCormick says that exclusion of extrinsic evidence following the witness' admission was the prevailing and better view, EVIDENCE, *supra* note 12, § 37, at 73; *but see* 3A J. WIGMORE, *supra* note 10, § 1037, at 1044-46. *See also* text at notes 107-12 *supra*.

126. 3 WEINSTEIN, *supra* note 10, ¶ 613[04] at 613-17 to -19, asserts that rule 613 may facilitate counsel in putting certain improperly authenticated evidence before the jury. In Dickinson Supply, Inc. v. Montana-Dakota Util. Co., 423 F.2d 106 (8th Cir. 1970), a pre-Federal Rules decision, counsel sought to impeach a witness with a written statement the witness had signed. The witness admitted that the signature was his, but then denied making the statement. While the jury was absent, it was revealed that the witness' supervisor had prepared the statement based on other persons' accounts of the incident. The court refused to allow the statement to be used for impeachment because the impeaching party could not prove that the witness actually made the remarks contained in the written declaration.

3 WEINSTEIN, *supra* note 10, ¶ 613[04], at 613-18, asserts that under rule 613 the statement in *Dickinson Supply* could have been read to the jury in the process of authenticating the witness' signature long before the fact that the witness had not made the statement was discovered; thus, only a jury instruction to disregard the statement, a device of questionable effectiveness at best, would have been available to undo the harm. At the point when the extrinsic evidence was to be introduced, however, it would seem that opposing counsel could present the same evidence indicating that the witness did not actually make the statements recorded in the report. In fact, traditional foundation procedure, when the full contents of the statement may be brought to the jury's attention as part of cross-examination prior to the introduction of extrinsic evidence, presents a greater danger that unauthenticated statements will come before the jury. Under rule 613(b), if extrinsic evidence is offered before any foundation is laid, questions regarding the authenticity of the statement should be resolved before the jury becomes aware of its contents.

D. *A Proposed Amendment to Rule 613*

Having analyzed the provisions of rule 613, it is appropriate to consider the extent to which they improve upon prior federal practice. Clearly a major purpose of rule 613 was to eliminate the restrictions that the rule of the *Queen's Case* placed upon cross-examination of a witness about a prior inconsistent written statement. Rule 613(a) now provides unequivocally that the contents of a witness' prior inconsistent statement, whether written or not, need not be disclosed to him at the time of cross-examination about the statement. The requirement for disclosure of the statement to opposing counsel guards against abuse of the rule. In line with the essentially unanimous judgment of the commentators, rule 613(a) thus concludes that any beneficial effect that accrues from shielding the jury from a witness' inaccurate testimony concerning his earlier writings is outweighed by the limitations the procedure places on the effective use of prior inconsistent statements to test the witness' credibility that results from the curtailment of the element of surprise.

The adoption of rule 613(a) is clearly both salutary and unsurprising, since the rule is essentially a codification of prior federal practice.[127] The same, however, cannot be said of rule 613(b). Nor is it clear whether any justification exists for the rule's substantial departure from the foundation rule as previously applied in the federal courts. The Advisory Committee Note suggests that rule 613(b) will facilitate the questioning of collusive witnesses by permitting several such witnesses to be examined before disclosure of a joint prior inconsistent statement.[128] That rather infrequent benefit hardly seems a plausible explanation for rule 613(b)'s significant modifications of traditional federal practice. Rather, it would seem that the rationale for rule 613(b) derives from a combination of two factors: (1) that rule 801(d)(1)(A), as proposed by the Advisory Committee, gave substantive effect to all prior inconsistent statements, and (2) perceived lawyer incompetence.

To understand the apparent reasoning of the Advisory Committee, one must keep in mind that, if prior inconsistent statements were admissible only for purposes of impeachment, the foundation requirement would foster the use of such statements to affect credibility while discouraging the trier of fact from giving them substantive consideration. In practice, the foundation requirement served to

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127. *See* text at notes 94-100 *supra*.

128. Advisory Committee Note to Proposed Rule 613, 56 F.R.D. 183, 279 (1972).

place a prior statement in juxtaposition to the testimony at trial of the witness sought to be impeached. In addition, by enabling the witness to admit a prior statement as his own, the foundation requirement reduced the likelihood that extrinsic evidence of the prior inconsistent statement would be introduced, evidence that is much harder for the jury not to accept substantively. Under the scheme of the proposed federal rules, however, all prior inconsistent statements were to be admissible as substantive evidence pursuant to rule 801(d)(1)(A). With the substantive admissibility of all such prior statements, this objective fostered by the foundation requirement was no longer relevant, and a practical consideration became paramount. Trial lawyers, for some unknown reason, often forget or, in some cases, never learned how to lay a proper foundation for extrinsic evidence. The Advisory Committee politely referred to such forgetfulness or incompetence as the "dangers of oversight." With substantive admissibility, these "oversight[s]" could be legitimated by permitting introduction of prior inconsistent statements at any time so long as the witness was eventually given an opportunity to deny or explain. In short, it was easier to switch than fight.

As enacted by Congress, however, rule 801(d)(1)(A) does not permit the substantive admission of all prior inconsistent statements. Thus, the traditional foundation requirements' utility in encouraging the jury to consider the prior inconsistent statements solely as an indication of credibility and not as substantive evidence remains relevant, and accordingly the requirements should be resurrected. Since all prior inconsistent statements are not substantively admissible, counsel should not have the unfettered right to introduce extrinsic evidence of such a statement before the witness has an opportunity to admit, deny, or explain the declaration. This procedure permits a prior statement to be placed before the trier of fact on multiple occasions and under circumstances encouraging the statement's acceptance as substantive evidence, and therefore it should be available only as the interests of justice require.[129]

In summary, the provisions of rule 613(a) largely codify existing federal practice regarding cross-examination about a witness' oral and written prior inconsistent statements. Rule 613(b) takes a step forward in rejecting strict adherence to the traditional foundation re-

129. As set forth in the Advisory Committee Note, the "interests of justice" would require ignoring the foundation requirements if the witness after testifying became unavailable by the time the prior statement was discovered or if counsel wishes to examine several collusive witnesses before disclosing a joint prior inconsistent statement. 56 F.R.D. at 278-79.

quirements and in expressly recognizing the courts' authority to dispense with those requirements where the "interests of justice" so require. It is apparent, however, that rule 613(b)'s other liberalizations of the traditional foundation rule are ill-conceived. The Advisory Committee Note states that rule 613(b) preserves the traditional foundation requirement with "some modifications."[130] It does nothing of the kind. Rule 613(b) removes the very heart of the traditional foundation requirement—that the witness be given an opportunity to deny or explain the prior statement *before* evidence of the prior statement will be admitted—a requirement facilitating the introduction of prior inconsistent statements solely for the purpose of impeachment.[131] Given Congress' amendment to rule 801(d)(1)(A), the opportunity to explain or deny should occur *prior* to the introduction of any extrinsic evidence. Accordingly, rule 613(b) should be amended to state:

> Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, unless the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).[132]

IV. Rule 607—Impeaching One's Own Witness

A. *The Dilemma*

A detailed discussion of the historical development of the voucher rule and its rejection in the provisions of the Federal Rules

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130. *Id.*

131. Professor Cleary, who served as the reporter to the committee, suggested that acceptance of rule 613(b) was less than whole-hearted even prior to the amendment to rule 801(d)(1)(A):

> In my view, the existing practice would continue in general to be followed under the rule. It is convenient and effective to raise the matter on cross-examination, and doing so would avoid problems that might ultimately arise if witnesses become unavailable before the end of the trial. The rule ought, however, to remain as drawn, leaving the practical approach to the good sense of the practitioner.

Hearings Before the Subcomm. on Criminal Justice on Proposed Rules of Evidence, 93d Cong., 1st Sess., ser. 2, at 74-75 Supp. (1973).

The requirement that a proper foundation be laid prior to the introduction of extrinsic evidence unless the interests of justice require otherwise is currently applied with respect to establishing bias. United States v. Di Napoli, 557 F.2d 962 (2d Cir. 1977).

132. *Cf.* Minn. R. Evid. 613(b) (requiring that witness be given opportunity to explain before prior inconsistent statement offered into evidence).

Several cases decided since the adoption of the Federal Rules but involving trials that took place before the Rules became effective have cited rule 613(b) as consis-

tent with their holdings. In Strudl v. American Family Mut. Ins. Co., 536 F.2d 242 (8th Cir. 1976), a diversity case involving a wrongful death action, the court, though apparently applying Nebraska evidence law, quoted rule 613(b) and part of the Advisory Committee Note to demonstrate that no foundation was required before the introduction of evidence of a witness' prior inconsistent statement. Since the impeaching party recalled his opponent's witness and questioned her concerning her prior statement, the court concluded that the witness had "full opportunity to explain or deny her alleged inconsistent statements." 536 F.2d at 244-45.

In United States v. Inslow, 530 F.2d 257, 264 (4th Cir. 1975), another pre-Rules case, the impeachment procedure employed was found to satisfy the traditional rule rejected in *Strudl*, though the court in a footnote stated that "[o]ur holding is consistent with Federal Rules of Evidence, Rule 613(b)." 530 F.2d at 264 n.4. The holding was in fact consistent with the rule only to the extent that a foundation satisfying the traditional rule would automatically satisfy rule 613(b).

Several recent cases have applied rule 613(b) after its effective date. Two cases from the Eighth Circuit found the rule satisfied when the witness was given an opportunity to explain or deny his prior statements before extrinsic evidence was introduced in accord with prior federal practice. United States v. Rogers, 549 F.2d 490 (8th Cir. 1976); Osborne v. United States, 542 F.2d 1015 (8th Cir. 1976). The only post-adoption case to deal with rule 613(b) at any length is United States v. Barrett, 539 F.2d 244 (1st Cir. 1976), in which the defendant was charged with interstate transportation and sale of stolen postage stamps. The government's witness, one Adams, had testified that the defendant had admitted his involvement in the crime shortly after his arrest. Defense counsel then called two witnesses who testified that Adams had told them that it was a shame that the defendant had been arrested because he knew the defendant was innocent. The trial judge excluded this testimony, but the appellate court reversed, rejecting the government's argument that a proper foundation had not been laid. The court noted that rule 613(b) "relaxed the traditional foundation rule," and thus the rule required only that the witness be afforded at some time an opportunity to explain or deny and that the opposing party be given a chance to interrogate the witness further. 539 F.2d at 254-55. After quoting extensively from the commentary of the reporter of the Federal Rules, the court stated:

> The foregoing indicates that while good practice still calls for the laying of a foundation, one is not absolutely required. It would have been desirable for defense counsel to have asked Adams on cross-examination if he had made the purported statement to Delaney. And where this was not done, if Adams had later become unavailable to explain or deny, the court might properly in its discretion have refused to receive the testimony in question. Here, however, the court dismissed the evidence out of hand and made no inquiry into Adams' availability. On the present record, we have no basis for assuming that he was not available, or even that judicial economy and convenience would have justified the court in ruling as it did. We hold, therefore, that it was error to exclude the testimony.

539 F.2d at 255-56. Given the court's suggestion that as a matter of "good practice" the foundation should generally precede the impeaching evidence, it would seem that, under *Barrett*, if a party seeks to introduce impeaching statements the trial judge should assure himself that the witness to be impeached is available for recall. If he is not available or, as *Barrett* suggests, if recall would result in significant delay, the court should, in its discretion, exclude the evidence.

It is, of course, still too early to draw authoritative conclusions concerning the effect of rule 613 on the procedure for impeachment with prior inconsistent statements. It does appear, however, that the courts may encourage counsel to follow the traditional federal foundation rule of giving the witness a chance to deny or explain his prior statement *before* introducing extrinsic evidence by excluding such evidence when the witness under attack is no longer available or the recall procedure would foster undue delay. *See* FED. R. EVID. 611(a) & 403; note 122 *supra*.

The final sentence of rule 613(b) provides specifically that its provisions do not apply to admissions, as defined in rule 801(d)(2). Although the Advisory Committee Note makes no mention of the final sentence, the apparent intention of the com-

of Evidence regarding examination and impeachment of a party's own witness has been presented elsewhere.[133] Accordingly, only a brief summary is provided herein. Federal courts, aware that the traditional rationale underlying the voucher rule did not withstand analysis, nevertheless came to appreciate that the rule prohibiting a party from impeaching his own witness had certain beneficial effects. Although recognizing that prior inconsistent statements used by a party to impeach his own witness were admissible solely for the purpose of impeachment and not as substantive evidence, many courts and commentators realized that limiting instructions were ineffective and that juries would consider such evidence substantively.[134] Prior to the adoption of the Federal Rules of Evidence, federal courts permitted impeachment of a party's own witness only where the witness' testimony both surprised and affirmatively damaged the calling party. Application of the voucher rule in all but these circumstances was thought to prevent a party from placing prior inconsistent statements before the jury under the guise of impeachment, while still permitting impeachment where it was truly needed.[135]

Although the voucher rule came to be accepted as necessary to prevent jury misuse of a witness' prior inconsistent statement, rule 801(d)(1)(A) as initially proposed nullified that rationale: with substantive admissibility of all prior inconsistent statements, juries would be allowed to give such statements substantive effect. Accordingly, rule 607, which was drafted upon the supposition that

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mittee was to eliminate even the slightest possibility that the provisions would be construed as applicable to admissions. In this respect, rule 613(b) conforms to the vast majority of decisions under the common law. 4 J. WIGMORE, *supra* note 10, § 1051.

All things considered, it is unclear what motivated the inclusion of the provision regarding admissions in the rule itself rather than in the Advisory Committee Note. Based upon the resulting language of the rule, one could argue that statements otherwise admissible substantively either as a hearsay exception pursuant to rule 803 or as not hearsay pursuant to the provisions of rule 801 (other than either 801(d)(1)(A) or 801(d)(2)) are subject to the requirements of rule 613(b) if in fact they are inconsistent with in-court testimony of the witness. This contention is without merit. Rule 613(b) is intended to apply only to those prior inconsistent statements substantively admissible solely by reason of rule 801(d)(1)(A) or admissible for impeachment purposes only pursuant to rule 607. Thus, rule 613(b) is inapplicable to statements substantively admissible *without* reference to the fact that the statement also happens to be inconsistent with the in-court testimony of the witness.

133. *See* Graham, *supra* note 44.

134. *See, e.g.*, Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); United States v. De Sisto, 329 F.2d 929, 933 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); MCCORMICK, *supra* note 10, § 59; Morgan, *supra* note 10, at 193 (calling the practice a "pious fraud").

135. Graham, *supra* note 44, at 979-80.

all prior inconsistent statements would be substantively admissible, rejects the voucher rule in the following language:

> Who May Impeach
>
> The credibility of a witness may be attacked by any party, including the party calling him.[136]

As previously stated, Congress eventually amended rule 801(d)(1)(A) to limit substantive admissibility of prior inconsistent statements to those statements originally made in testimonial form. There was, however, no corresponding amendment to rule 607 to bring it back into conformity with this prior federal practice, and thus no express limitation presently exists on the calling party's ability to place in evidence a witness' prior inconsistent statement.[137] Al-

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136. FED. R. EVID. 607.

137. Although rule 607 on its face places no restrictions on a party's ability to impeach his own witness, some possibility exists that courts will interpret the rule as retaining the traditional requirements of surprise and affirmative damage. In United States v. Morlang, 531 F.2d 183 (4th Cir. 1975), the Fourth Circuit reversed a conviction at a pre-Rules trial because the government had been allowed to introduce for purposes of impeachment extrinsic evidence of a prior inconsistent statement by its own witness that inculpated the defendant. The court noted that the government was "fully aware" that the witness' courtroom testimony would tend to exonerate the defendant and, although acknowledging that the voucher rule had been rejected in the Fourth Circuit, concluded that

> it has never been the rule that a party may call a witness where his testimony is known to be adverse for the purpose of impeaching him. To so hold would permit the government, in the name of impeachment, to present testimony to the jury by indirection which would not otherwise be admissible. The courts have consistently refused to sanction such a practice.

531 F.2d at 189. As the trial had taken place before the adoption of the Federal Rules, the court was not required to decide whether rule 607, read in light of the revision in rule 801, required that holding. 531 F.2d at 189 n.14. The court's opinion on the matter, however, is perhaps suggested by its statement that "[t]he overwhelming weight of authority is, however, that impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible." 531 F.2d at 190 (footnote omitted).

Though *Morlang*, as the *Morlang* court itself suggested, would seem to have little precedential value with respect to the interpretation of rule 607, 531 F.2d at 189 n.14, the Eighth Circuit, in United States v. Rogers, 549 F.2d 490 (8th Cir. 1976), a case controlled by the Federal Rules, took pains to distinguish the *Morlang* decision in holding proper the government's impeachment of its witness who at trial denied any memory of a prior inconsistent statement he had allegedly given inculpating both himself and the defendant. Finding the elements of surprise and affirmative damage that had been absent in *Morlang*, the court stated:

> In contrast to the witness in *United States v. Morlang*, . . . Baker had never, before trial, taken the position that he could not identify appellant or that he could not recall if appellant was one of the robbers. This doubt about appellant's participation expressed by one of the actual participants was indeed potentially injurious to the government, and it was of sufficient relevance to justify impeachment by use of the inconsistent statement.

549 F.2d at 497.

However, despite its explicit finding that the government had been surprised and damaged by the witness' testimony, the court refrained from any conclusion about the proper interpretation of rule 607, noting only that it was "not at all sure" that sur-

though juries will be instructed to give no substantive weight to a witness' prior statement unless it was initially made in testimonial form, the effectiveness of such an instruction is, as discussed above,[138] highly doubtful.

A recent federal case illustrates how present rule 607 may nullify the safeguards that Congress intended to place on the use of prior inconsistent statements under rule 801(d)(1)(A). In *United States v. Alvarez*,[139] the defendant was prosecuted for attempting to smuggle 1600 pounds of marijuana across the Rio Grande. At trial, the government called as a witness one Villareal, who had previously confessed his participation in the scheme and had allegedly given a statement to government agents placing defendant Alvarez at the scene of the crime. Prior to the trial, Villareal had denied making

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prise under the new rule remained a prerequisite to a party's impeachment of its own witness.

Another case controlled by the new rules in which the court focused upon the element of surprise, though not expressly holding it to be required under rule 607, is United States v. Garcia, 530 F.2d 650 (6th Cir. 1976). In *Garcia*, a government witness who had allegedly made prior statements inculpating the defendant denied in his courtroom testimony any knowledge of the defendant's guilt. Over defense objections that the government was impeaching its own witness, the government was permitted to introduce extrinsic evidence of the alleged prior inconsistent statements. In upholding that impeachment as proper, the Sixth Circuit, although not purporting to interpret rule 607, emphasized the government's surprise, noting that up until its witness' appearance at trial the government believed his testimony would be consistent with his alleged prior statements.

Three other recent cases applying rule 607 tend to rebut any inference from *Morlang*, *Rogers*, and *Garcia* that courts will interpret the rule as retaining the surprise and affirmative damage requirements of prior federal practice. In United States v. Carter, No. 75-2216 (4th Cir. March 13, 1976), an unreported decision noted at 532 F.2d 752, the government called to the stand the defendant's brother, who denied his own involvement in the robbery attempt with which the defendant was charged. Subsequently the government impeached the witness with evidence of a prior inconsistent statement and by drawing from him an admission that he had pleaded guilty to state charges that he was an accessory after the fact to the robbery attempt. Although it is unclear whether the government was surprised by the testimony of the defendant's brother, the Fourth Circuit, in holding the impeachment proper, suggested that the question was irrelevant. The court stated first that "Federal Rule of Evidence 607 provides that the party who calls a witness may impeach his testimony," and then noted that "United States v. Morlang, — F.2d —, No. 74-2071 (4th Cir. Dec. 30, 1975), held that in the absence of surprise a party may not impeach his own witness, but that case is inapposite here, for it was not decided under the Federal Rules of Evidence."

United States v. Alvarez, 548 F.2d 542 (5th Cir. 1977), provides an even clearer statement that rule 607 will not be read to place limitations on a party's ability to impeach its own witness. *See* text at notes 139-40 *infra*. *Accord*, United States v. Palacios, 556 F.2d 1359, 1363 (5th Cir. 1977) ("[u]nder Rule 607 the government's impeachment of [the witness] by her prior inconsistent statement was proper without a showing of surprise").

138. *See* notes 21-23 & 134 *supra* and accompanying text.

139. 548 F.2d 542 (5th Cir. 1977).

that statement, and he reiterated that position in his subsequent testimony at trial. Although there was no question that the government was not surprised by the testimony it elicited from Villareal, it was permitted to call the narcotics agents in whose presence Villareal had allegedly incriminated Alvarez, and they testified about Villareal's purported statement. The jury, which had been instructed to consider the agent's testimony only as evidence of Villareal's credibility, subsequently found Alvarez guilty. Upon Alvarez' appeal, the Fifth Circuit summarily rejected the contention that the government's impeachment of Villareal was improper, ruling that the issue was "foreclosed by Rule 607."[140]

Given the notorious inability of juries to ignore substantively evidence introduced solely for purposes of impeachment, the Fifth Circuit's application of rule 607 creates the precise danger Congress feared when it limited the substantive admissibility of prior inconsistent statements under rule 801(d)(1)(A)—namely, that a defendant might be convicted on the basis of an unverified out-of-court statement. The Fifth Circuit's ruling vindicates Congress' concern in this area and requires reimposition of the surprise and affirmative damage prerequisites to a party's impeachment of his own witness. As developed by the federal courts prior to the adoption of the new rules of evidence, those twin prerequisites shield the jury from prior inconsistent statements not substantively admissible in situations where the interests of justice so require. As I have stated elsewhere,

> [i]n the absence of both surprise and damage, impeachment of one's own witness is inappropriate. If the witness does not give affirmatively damaging testimony, the [party] simply does not need to attack his credibility. If the witness' testimony does not surprise the [party], it should not be permitted to impeach his testimony by placing before the jury the witness' prior statement because it could have refrained from eliciting the statement it seeks to impeach. The requirement of surprise would prevent the [party] from consciously introducing affirmatively damaging testimony under the only circumstances in which it would do so—when the potential effect on the jury of the prior inconsistent statement outweighs the affirmatively damaging effect of the elicited testimony.[141]

The most recent supplement to *Weinstein's Evidence* suggests a different approach to the problem of preventing abusive practice under rule 607:

> Instead of placing so much emphasis on the motive of the profferor, an approach more consistent with the underlying policy of the

140. 548 F.2d at 543 n.3.

141. Graham, *supra* note 44, at 979-80.

> federal rules of evidence would be to analyze the problems in terms of Rule 403—is the probative value of the impeaching evidence outweighed by its prejudicial impact?[142]

In practice, the balancing test of rule 403 would prove inferior to the simple surprise and damage requirement for several reasons. Initially, it is questionable in light of the clear language of rule 607 whether a judge would even consider balancing pursuant to rule 403. Moreover, ad hoc balancing requires a judge under the pressures of a trial situation to sort out and weigh the probative value of evidence upon witness credibility against the possibility that it will confuse the issues or mislead the jury. Accordingly, balancing is unlikely to produce uniform or predictable results. In addition, two of the key factors suggested by *Weinstein's Evidence*, probative value and prejudicial impact, appear to vary directly: the more probative a prior statement is of credibility, the greater the likelihood that the jury will improperly view it as substantive evidence; the less probative of credibility, the less the risk that the statement will be improperly considered.[143] Finally, balancing pursuant to rule 403 is likely to be time-consuming and of limited effectiveness in screening the jury from potentially prejudicial prior statements. As *Weinstein's Evidence* envisions the process, the judge would make his rule 403 ruling only after the witness had been confronted with his alleged prior statement in the presence of the jury.[144] In order to determine the probative value of the alleged prior statement, the judge would then inquire into the degree of certainty that the statement was made. This inquiry, which would, of course, take place initially outside the jury's presence, would often cause substantial delay, for unless extrinsic evidence could be presented on the existence of the prior statement, the application of rule 403 balancing would be ineffective. Moreover, it is not clear that such procedures would adequately prevent prejudice, since the jury would become aware of the prior inconsistent statement before the court initiated its inquiry and since the court would most likely find, given the availability of a

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142. 3 WEINSTEIN, *supra* note 10, ¶ 607[01] at 20 (1976 Cum. Supp.).

143. *See* Graham, *The Relationship Among Federal Rules of Evidence 607, 801 (d)(1)(A), and 403: A Reply to Weinstein's Evidence*, 55 TEXAS L. REV. 573, 579 (1977).

144. 3 WEINSTEIN, *supra* note 10, ¶ 607[01] (1976 Cum. Supp.). According to Weinstein, "[v]ery seldom are evidence questions ruled upon by a pre-trial judge. Where discretion is involved, it is usual to postpone decision until the trial. . . . Often it is not until the trial that the need for a special type of hearsay becomes apparent." Weinstein, *Alternatives to the Present Hearsay Rule*, 44 F.R.D. 375, 380 (1968).

limiting instruction, that the probative value of the impeaching evidence upon credibility outweighed any potential prejudice.

On the other hand, the surprise and affirmative damage approach utilizes criteria developed over the years on a case-by-case basis. The approach is easier to apply and more predictable than rule 403. The criteria of surprise and damage exclude only those—and all of those—statements that the jury should not legitimately consider and, if properly applied,[145] keep all reference to the existence of the prior statement from the jury.[146] In summary, in all civil cases and in those criminal cases in which the government seeks to impeach its own witness,[147] both current rule 801(d)(1)(A) and proposed amended rule 801(d)(1)(A) mandate reimposition of the traditional requirements of surprise and affirmative damage for a calling party to impeach his own witness.

C. *The Proposal*

Rule 607 should be amended to state:

> The credibility of a witness may be attacked by any party, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. The foregoing exception does not apply to impeachment by means of a prior inconsistent statement admitted pursuant to Rule 801(d)(1)(A), 801(d)(2), or 803.

Clarification is in order about how proposed rule 607 applies to several common situations. The requirement of surprise may be inappropriate in criminal cases where impeachment is by the criminal defendant: it could impede the defendant's right to confront the witness, to present a defense, and to produce witnesses on his own behalf.[148] Moreover, whether the prerequisite of surprise may constitutionally be held applicable to the criminal defendant is still unclear; resolution of this issue awaits development upon a case-by-case basis.[149] It should also be noted that the requirements of sur-

145. *See generally* Graham, *supra* note 44, at 996-1005.

146. There are constitutional ramifications to any limitations on the ability of a criminal defendant to impeach his own witness by use of prior inconsistent statements. A prerequisite of surprise seems unwarranted in light of the criminal defendants' constitutional right to confrontation, to present a defense, and to produce witnesses on his own behalf. *See* Chambers v. Mississippi, 410 U.S. 284 (1973); Graham, *supra* note 44, at 984-86. Since this requirement is constitutional, it could be recognized by courts without specifically incorporating it into rule 607 itself.

147. *See* note 146 *supra.*

148. *See* note 146 *supra* and accompanying text.

149. *See* Graham, *supra* note 44, at 985-86. The Supreme Court granted cer-

prise and affirmative damage apply not only to the calling party but also to all parties similarly situated. Thus, a coplaintiff or codefendant similarly situated with respect to that aspect of the witness' testimony sought to be impeached would be subject to the same restrictions. Rather than include this gloss in the rule itself, it is suggested that rules 611(a)(1) and 403 presently provide ample authority for the court to prohibit such attempted impeachment.

Of course, impeachment of a party's own witness through a showing of bias, interest, prejudice, lack of opportunity to observe, or faulty recollection would still be permissible under proposed rule 607. With respect to impeachment by acts of misconduct (rule 608(b)) and prior convictions (rule 609), surprise and affirmative damage should generally be required.[150] However, considering that rules 403[151] and 611(a) as well as rules 608(b) and 609 provide ample authority for imposition of those prerequisites, it seems unnecessary to include this limitation in the language of rule 607. Moreover, the absence of such restrictive language will permit a calling party to impeach his own witness by use of prior conviction under circumstances where the prerequisites of surprise and damage seem inappropriate, such as where the prosecutor wishes to divulge upon direct examination that his witness, a prior codefendant, had pled guilty to a particular offense arising out of the circumstances for which the defendant is now being tried.[152] Although one could

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tiorari in Maness v. Wainwright, 512 F.2d 88 (5th Cir. 1975), *cert. granted*, 429 U.S. 893 (1976), in which one issue was whether the trial court's refusal to allow the criminal defendant to impeach his own witness with prior inconsistent statements violated the defendant's constitutional right to a fair trial, but the Court then dismissed certiorari as improvidently granted. 430 U.S. 550 (1977). *See also* Chambers v. Mississippi, 410 U.S. 284 (1973), *discussed in* Graham, *supra* note 44, at 941-46, 984-86.

150. *See* Graham, *supra* note 44, at 982-91.

151. In the congressional hearings concerning rule 609, Judge Friendly commented upon the relation of rule 403 to specific provisions of the Federal Rules of Evidence:

> You have the problem: Does [Rule 403] apply when there is a specific rule on the subject? This just says relevant evidence may be excluded if it has this effect. But then somebody is going to argue, this other rule dealt very specifically with the question and rule 403 is out. I don't know what the answer would be. It is just another illustration that this code, far from settling problems, creates a great many of them.

Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess., ser. 2, at 252 (1973).

152. Although it is proper for the state to elicit on direct testimony the fact that its witness has pleaded guilty to a charge arising from the same event for which the defendant is on trial, whether the prosecution should be permitted to itself bring out other convictions of the witness seems best handled on a case-by-case basis. Relevant considerations would be the same as those underlying imposition of the surprise and affirmative damage requirements. *See* United States v. Chomley, 376 F.2d 57 (7th

argue that such disclosure constitutes development of background in-information[153] customarily introduced to aid the trier of fact's understanding, it is not clear that such a contention would be accepted if an explicit restriction were included within rule 607.

Finally, it is not intended that rule 607 be applied to foreclose a party from fully exploring the basis for the testimony of an opponent's expert witness. Pursuant to rule 705,[154] an expert may testify without prior disclosure of the basis of his opinion. In addition, rule 703[155] provides that an expert may rely on nonadmitted and even inadmissible information to form his opinion if experts in the field reasonably rely on such information. If the party opposing the testimony of the expert desires to explore the basis of the expert's opinion, he may of course do so upon cross-examination of the expert himself.[156] But what if the opposing party wishes to call at trial the witness upon whose information the expert had relied? Under such circumstances, the opposing party should be permitted to impeach the witness—by use of prior inconsistent statements and any other impeachment tool—without reference to the prerequisites of surprise and affirmative damage.[157]

V. Conclusion

As submitted to Congress, the Federal Rules of Evidence dealt

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Cir.), *cert. denied*, 389 U.S. 898 (1967); United States v. Dardi, 330 F.2d 316, 332-33 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); United States v. Aronson, 319 F.2d 48, 51 (2d Cir.), *cert. denied*, 375 U.S. 920 (1963). United States v. Freeman, 302 F.2d 347, 350 (2d Cir. 1962), *cert. denied*, 375 U.S. 58 (1963), states:

> Of course it was proper for the government to bring out on direct examination the criminal record of its witness. . . . Not to have done so would surely have subjected the prosecution to criticism. The matter of informing the court and jury about information of such clear relevance as the criminal record of a witness called by the prosecution is not something which is to be reserved for the pleasure and strategy of the defense. Whatever the rule may be with respect to the permissible limits for cross-examination of a witness or a defendant, . . . it is usually proper and desirable that the party calling a witness with a criminal record should elicit such information on direct examination.
>
> There may be circumstances where, on proper request of the defense, the trial judge should limit, or even bar such testimony, or allow it only under cautionary instructions because the prejudice to the defendant of the witness' admission of crime implicating the defendant would outweigh the advantages of a full disclosure of the witness' criminal background. Here we find that there was no likelihood of prejudice.

See also Graham, *supra* note 44, at 982-83.

153. *See* Advisory Committee Note to Proposed Rule 401, 56 F.R.D. 183, 215-16 (1972).

154. Fed. R. Evid. 705.

155. Fed. R. Evid. 703.

156. *Cf.* Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal*, 1977 U. Ill. L.F. 169, 196 (1977) (general discussion of examination of expert witnesses).

157. *See* Cal. Evid. Code § 804 (1966).

consistently with all aspects of the use of prior inconsistent statements. The proposed rules allowed substantive admissibility of all prior inconsistent statements, significantly relaxed the foundation requirement, and permitted impeachment of a party's own witness. Congressional action, however, disturbed this coordinated pattern of treatment. This disruption must now be corrected by appropriate amendments to rules 613 and 607. Moreover, although Congress expressed a valid concern in addressing the question of substantive admissibility of prior inconsistent statements pursuant to rule 801(d)(1)(A), it failed to strike an optimum balance between substantive admissibility and the rights of the criminal defendant. Rule 801(d)(1)(A) should be amended to provide for the substantive admissibility of prior inconsistent statements of an in-court declarant possessing personal knowledge of the underlying events if there is a high degree of certainty that the statements were in fact made.