Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence

Walker Jameson Blakey
University of North Carolina

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Evidence Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol64/iss1/3
Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence

BY WALKER JAMESON BLAKEY*

I. INTRODUCTION

The struggle over the adoption of uniform rules of evidence for the federal courts has finally ended, and the new Federal Rules of Evidence went into effect on July 1, 1975. Preparation must now begin for a series of interlocking battles over the interpretation and possible revision of these rules, and for disputes over the effects which these Federal Rules of Evidence should or will have on state evidence practices. One area which will surely be the subject of controversy is the federal approach to hearsay.

The ideas which comprise the federal rules on hearsay are not completely new. Instead, they are the products of years of labor by the distinguished committees which created the Model Code of Evidence in 1942, the Uniform Rules of Evidence in 1953, the California Evidence Code in 1966, and the drafts of the Federal Rules of Evidence in 1969, 1971 and 1972. The fact that these rules have now been adopted for use in all federal courts gives the hearsay provisions great

*Assistant Professor of Law, University of North Carolina. I wish to thank my colleagues Henry Brandis, Jr. and Kenneth S. Broun for their discussions of hearsay with me and my research assistant Michael R. Ferrell for his assistance with this article.


3 See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES, REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, 51 F.R.D. 315 (1971) [hereinafter cited as REVISED DRAFT].

4 See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183 (1972) [hereinafter cited as PROPOSED RULES].
importance, and because the new hearsay provisions are sufficiently different from the hearsay rules which have heretofore been applied in most state and federal courts, they can aptly be described as the "federal hearsay" system.

The most important features of this federal hearsay system are as follows: (1) It defines hearsay so as to exclude from hearsay any out-of-court statement or act which indicates a belief by the person saying or doing it but which was not intended by that person as a direct assertion of that belief.5 (2) It permits substantive use of certain prior inconsistent statements of a witness.6 (3) It expands opportunities for introduction of such prior inconsistent statements by authorizing parties to impeach their own witnesses.7 (4) It expands the scope of the exception for admissions by a party to include all statements by an agent or servant made during the existence of the relationship "concerning a matter within the scope of his agency or employment" without regard to whether the employee was authorized to speak concerning the matter.8 (5) In addition to these inroads into the once formidable hearsay rule, the federal hearsay system enumerates 27 other specifically described exceptions.9 Though none of these is totally original,


6 See Fed. R. Evid. 801(d)(1)(A). Under this rule, a witness’ prior inconsistent statement may be used substantively if he is available to be cross-examined on the prior statement and the statement was "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."


8 Fed. R. Evid. 801(d)(2)(D). The common law rule admitted into evidence vicarious admissions by employees only if the employee was authorized by the party to speak. See McNicholas v. New England Tel. & Tel. Co., 81 N.E. 889 (Mass. 1907). The admissibility of these statements is codified in Rule 801(d)(2)(C).

9 See Fed. R. Evid. 803 and 804. Each of these rules also has a catch-all exception. See id. 803(24), 804(5). These are specifically discussed at notes 11-13 and accompany-
many of these exceptions are not recognized in all states, and even where an exception is recognized, the federal version of the exception frequently expands its scope.\textsuperscript{10} (6) The federal rules also provide a catch-all hearsay exception for evidence which, although not qualifying under any of the specific exceptions, is, among other requirements, “more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort.”\textsuperscript{11} To avail himself of this exception, the proponent of the hearsay evidence must provide the adverse party with advance notice,\textsuperscript{12} and the court must find “circumstantial guarantees of trustworthiness” equivalent to those presumed to exist in the specific hearsay exceptions.\textsuperscript{13} (7) Finally, the restrictions imposed upon the use of hearsay are greatly relaxed in the area of expert witnesses. Experts may now give their opinions “without prior disclosure of the underlying facts or data unless the court requires otherwise.”\textsuperscript{14} Furthermore, the data relied on by the expert need not itself be admissible in evidence if “of a type reasonably relied upon by experts in the particular field in

\textsuperscript{10} For example, the common law rule prohibits the admission of unexcited statements of present sense perception. See Morgan, Res Gestae, 12 Wash. L. Rev. 91, 98 (1937). See generally McCormick § 298. Federal Rule 803(1), however, makes admissible statements “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” This exception is clearly distinct from the excited utterances exception. See Fed. R. Evid. 803(2). Modification of the common law of many states is also reflected in Rule 804(b)(2) (dying declarations may now be used in civil cases) and Rule 803(16) (ancient documents need be only 20 years old instead of 30). The 20-year requirement for ancient documents is also incorporated in Rule 901(b)(8), authorizing authentication of ancient documents. The 10-year reduction may possibly be explained on a “lowest common denominator” theory. The Advisory Committee’s Note on Rule 901(b)(8) declares that “any time period selected is bound to be arbitrary,” but it points out that an Oregon statute has already adopted the 20-year standard. See Proposed Rules, supra note 4, at 335.

\textsuperscript{11} Fed. R. Evid. 803(24), 804(b)(5)(B).

\textsuperscript{12} Id.

\textsuperscript{13} Id. Interestingly, one specific hearsay exception requires proof of circumstances of trustworthiness. See Fed. R. Evid. 804(b)(3). Three other exceptions may be abrogated if the circumstances indicate a lack of trustworthiness. See Fed. R. Evid. 803(6), (7), (8).

\textsuperscript{14} Fed. R. Evid. 705. This rule grants the court the discretion to discard the impractical common law rule requiring disclosure of all the underlying facts. See Treadwell v. Nickel, 228 P. 25, 35 (Cal. 1924) where the court refers to an 83-page hypothetical question contained in the trial record.
Although the federal hearsay system will undoubtedly make many significant contributions to the law of evidence, the one development which this article will discuss is the use of prior inconsistent statements as substantive evidence. This was potentially the most important change which the new federal rules would have made in the law of evidence because the original version, drafted by the Advisory Committee on Rules of Evidence and approved by the Supreme Court of the United States, would have permitted all prior inconsistent statements to be used substantively. Congress, however, refused to enact the Supreme Court’s version, and instead narrowed the scope of the substantive use of prior inconsistent statements to situations where the statement “was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.” Even this restrictive rule will still be of considerable significance in federal criminal prosecutions, and it will have a substantial effect in civil cases. Whether the Supreme Court’s version of this rule should be reconsidered and adopted is probably the most important issue which this article will address. Also discussed, however, will be the language and operation of the enacted rule, its restriction on the operation of the federal evidence rules dealing with impeachment by prior consistent statements, and the manner in which either the congressional rule or the Supreme Court rule might affect forum

---

15 Fed. R. Evid. 703. The common law is split on this issue. The more prevalent position is reflected in the federal court case of Harris v. Smith, 372 F.2d 806 (8th Cir. 1967), which held that “all plain substantial” facts underlying the hypothetical must be supported by sufficient competent, though not uncontested, evidence. Id. at 812. The new federal rule follows Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962). “[T]he better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession.” Id. at 641.

16 See Proposed Rules, supra note 4, at 293. Proposed Rule 801(d)(1)(A) simply states that the statement is not hearsay if the declarant is present and subject to cross-examination, and the statement is “inconsistent with his testimony.”


18 Prior inconsistent statements uttered before a grand jury will qualify for use as substantive evidence even under the congressional version of Rule 801(d)(1)(A). See 28 U.S.C.S. § 801.2 (Editorial Comment). Moreover, depositions will become more valuable in civil cases because prior inconsistent statements contained in them will now be usable as substantive evidence in situations in which the depositions themselves would not be admissible.
shopping between state and federal courts.

In writing this analysis on the approach of the Federal Rules of Evidence to substantive use of prior inconsistent statements, the author has tried to keep in mind four different points of view from which the federal hearsay system might be examined. The first of these is from the perspective of an attorney preparing a case for trial in a federal court under the new rules. The second viewpoint is that of an attorney who is considering whether to file a particular action in a state or federal court, or whether to remove a case to federal court, and who wonders how the federal rules of evidence will affect his selection of forums. The third vantage point is that of the many state draftsmen who will be considering whether their states should adopt similar rules of evidence. These draftsmen will be under considerable pressure to prepare state evidence rules which are extremely similar to the federal evidence rules so as to minimize the opportunities available to the forum-shopping attorney just mentioned. Finally there is the viewpoint of federal draftsmen considering whether the new federal evidence rules themselves should be revised.

This article will suggest several potential problems in the operation of the federal rule permitting substantive use of certain prior inconsistent statements, including some created by the congressional restrictions. The major recommendation which this article will make to the draftsmen of any revisions of the Rules is that they should not readopt the congressionally-rejected Supreme Court version of the prior inconsistent statement rule allowing all prior inconsistent statements to be used substantively.

II. THE CONGRESSIONAL VERSION OF FEDERAL EVIDENCE RULE 801(d)(1)(A)

The Federal Rules of Evidence, as adopted, authorize substantive use of certain prior inconsistent statements by declaring such statements to be "not hearsay." Rule 801(d)(1)(A)

---


provides that a prior inconsistent statement made by a witness who testifies at trial, and who is subject to present cross-examination concerning the prior statement, is “not hearsay” if the prior statement “was given under oath subject to the penalty of perjury at a trial, hearing, or other proceedings, or in a deposition.” This rule might be mistaken for a strangely limited statement of the conventional doctrine that a prior inconsistent statement may be admitted for the nonhearsay use of impeaching the witness who made it even though it cannot be admitted for the hearsay use of proving the truth of its contents. This rule is just the opposite, however. Because these prior statements are defined as “not hearsay,” the ban on hearsay in Federal Evidence Rule 802 does not apply to them and they may be admitted for any relevant purpose including proving the truth of their contents.

The earlier version of Rule 801(d)(1)(A), proposed by the Advisory Committee and approved by the Supreme Court, would have declared all prior inconsistent statements by a witness who testifies at the trial, and who is subject to cross-

22 See note 25 infra.

23 The Federal Rules of Evidence do not contain any reference to the traditional rule permitting prior inconsistent statements to be introduced for the limited purpose of impeachment but the rule can be detected in the broad general rules of relevancy set forth in Rules 401, 402, and 403, the ban on “hearsay” in Rule 802, which applies to prior inconsistent statements that do not qualify under 801(d)(1)(A), and the provision for limited admissibility in Rule 105. For a general discussion of the traditional view and the cracks appearing therein, see McCormick § 251. The leading cases propounding substantive use are People v. Green, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), on remand from the United States Supreme Court, see California v. Green, 399 U.S. 149 (1970) (statements made to police officer and at preliminary hearing), and Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969) (statement made in initial complaint to sheriff).

24 Rule 802 provides: “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.”

25 There is a theory that can be used to justify the draftsmen’s language. This theory is that the purpose of the hearsay rule is satisfied if there is an adequate opportunity for cross-examination. Therefore, according to this theory, if prior statements present no hearsay problem because of an adequate opportunity for cross-examination then they are “not hearsay.” See McCormick §§ 244-45. It appears to this writer that this way of referring to substantive use of prior statements merely increases the confusion in an area in which there is already confusion enough. Furthermore, Section VII of this article will demonstrate that this theory overstates the value of an opportunity to cross-examine the alleged declarant of a prior statement and that substantive use of such prior statements does involve hearsay dangers.
examination concerning the prior statements, to be nonhear-say. When this proposed rule was considered by the House of Representatives, however, the House added a requirement that the prior inconsistent statement have been made "under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition . . . ." The Senate restored the Supreme Court's version. This disagreement was reconciled when the two houses reached a compromise providing that, to be admissible for substantive purposes, the prior inconsistent statement must have been given "under oath subject to the penalty of perjury at a trial, hearing, or other proceedings, or in a deposition." The difference between the House version, requiring that the statement have been made "subject to cross-examination," and the version finally adopted, providing that the statement must have been made "under oath subject to the penalty of perjury" during some sort of proceeding, is that statements made during testimony before a grand jury, where only the prosecution may present evidence, can now be used to support a verdict at a subsequent trial despite a change of heart and story by the declarant.

Prior inconsistent statements given by a witness in testimony before a state grand jury would also qualify under Rule 801(d)(1)(A) as substantive evidence in a federal trial. Further extension is unclear, though, and it is impossible to predict how far the term "other proceeding" will be stretched to include prior sworn statements "subject to the penalty of perjury." It is at least arguable that both congressional and state legislative hearings will qualify.

The overall effect of the congressional restriction on the

---

27 S. Rep. No. 1277, 93d Cong., 2d Sess., at 15-16: “For all these reasons, we think the House amendment should be rejected and the rule as submitted by the Supreme Court reinstated.”
29 Although the criminal defendant in federal court will be able to avail himself of the new prior inconsistent statement rule, it appears that its major benefit will befall prosecutors; and it seems reasonable to expect that federal prosecutors will greatly increase the number of witnesses whom they present to the grand jury.
Depositions will also become more valuable in both civil and criminal cases because prior inconsistent statements contained in them will now be usable as substantive evidence in situations in which the depositions themselves would not be admissible.
version propounded by the Supreme Court is to enormously reduce the number of prior inconsistent statements available to become substantive evidence. The restrictions do not necessarily require, however, that the prior testimony have had anything to do with the party against whom the prior inconsistent statements are now offered as substantive evidence. It is true, of course, that in some cases the opposing party will have had an opportunity to cross-examine the witness during the trial or proceeding in which the prior inconsistent statement was given, but there is no guarantee that the opposing party, or a party with a similar interest, or any party at all will have had an opportunity to test the trustworthiness of the prior statement.

This is in sharp contrast to the requirements which must be met under the federal rules in order to substantively use the prior testimony of an individual who is now unavailable. Rule 804(b)(1) declares that this latter exception to the hearsay rule requires not only unavailability, but also that “the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, [have] had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” The prerequisite of unavailability in Rule 804(b)(1) dictates that there can be no present opportunity for cross-examination; and the latter requirement means that the prior statement, to be admissible, must have previously been subjected to an opportunity for cross-examination to test its trustworthiness. In contradistinction, Rule 801(d)(1)(A) allows previously untested prior statements so long as the declarant is available for present cross-examination. Advocates of substantive use of prior inconsistent statements argue that the existence of an opportunity for present cross-examination of the witness at trial provides adequate protection for the party or parties against whom the evidence is offered. Section VII of this article will argue, however, that this opportunity for subsequent cross-examination at trial does not provide adequate protection.

The congressional restrictions are intended to limit substantive use of prior inconsistent statements to those situations in which there is likely to be overwhelming proof that the witness did in fact make the prior inconsistent statement. Discussions of whether prior inconsistent statements should be given substantive effect tend to assume not only the existence of such prior statements, but also that they are inconsistent and that
they were made by the witness. These assumptions are apparently premised upon the further belief that any disputes as to whether the statements were made are ordinary questions of fact which can be satisfactorily resolved by the fact finder in the subsequent trial. In truth, however, the evidence that is offered to support a contention that the witness made a prior inconsistent statement may be less than conclusive. It may consist of the witness' own in-court admission, or a writing containing several lines in one handwriting followed by what is purportedly the witness' signature in another, or merely testimony by another witness that he remembers overhearing the declarant make the prior inconsistent statement. Factual disputes as to whether or not a witness actually made an out-of-court statement are among the most difficult questions which may be asked the fact finder. To add to this dilemma, even an admitted oral statement or signed writing prepared by someone else will often present subtle questions as to what was meant by the statement or the signature.

Although Rule 801(d)(1)(A) does not guarantee that the prior statement will be properly understood, it does assure that prior inconsistent statements offered as substantive evidence are extremely likely to have actually been made. This is because all statements encompassed by the rule will have been spoken by a witness under oath and "on the stand," and in almost all cases they will have been preserved for future use by a court reporter's transcript.

---

25 See McCormick § 251; 3 J. Wigmore, Evidence § 1018 (3d ed. 1940) [hereinafter cited as Wigmore].

21 If a signed writing is used to prove a prior inconsistent statement, the witness must first be provided an opportunity to read the document. See Washington v. State, 112 So. 2d 179 (Ala. 1959). McCormick states that the "actual invocation [of this rule] in trials is relatively infrequent in most states . . . ." McCormick § 29.

22 See note 134 and accompanying text infra.

23 The House Committee explained its similar limitation by stating: The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement. H.R. Rep. No. 650, 93d Cong., 2d Sess. 13 [hereinafter cited as HOUSE COMMITTEE REPORT]. See also Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L.J. 125, 147 (1973).
III. THE OPERATION AND EFFECT OF FEDERAL EVIDENCE RULE 801(d)(1)(A)

There are three particular aspects of Rule 801(d)(1)(A) that merit discussion at this point. The language of the rule presents two problems, and there is one possible limitation which its advocates insist will temper the rule's effect. The problems which appear in the language of 801(d)(1)(A) are the requirements that the declarant be subject to cross-examination and that the prior statements be inconsistent with his testimony. The uncertainty, which is not obvious from the language of the rule, is the suggestion that prior inconsistent statements, even when admitted substantively, are inferior evidence which, by themselves, might not support a verdict.

A. Opportunity for Present Cross-Examination on Prior Statement

Rule 801(d)(1)(A) requires that the declarant of the prior inconsistent statement be "subject to cross-examination concerning the statement" at the trial in which the prior inconsistent statement is offered into evidence. This rule seems to assume that if the declarant takes the stand at the trial in which the inconsistent statement is offered into evidence, he will automatically be subject to cross-examination with respect to the prior inconsistent statement by the side against whom the prior statement is offered. However, under the usual rules controlling the use of cross-examination, which Federal Evidence Rules 611(b) and 611(c) appear to reflect, this would not be

Historically, a party has had no right to cross-examine his own witness. See, e.g., Walker v. Warehouse Transp. Co., 235 F.2d 125 (1st Cir. 1956); Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935); State v. Williams, 192 N.W. 901 (Iowa 1923); Johnson v. Hager, 83 P.2d 621 (Kan. 1938) (cross-examination allowed because of exception for hostile witnesses); Sullivan v. Sullivan, 18 A.2d 828 (N.H. 1941) (ability to cross-examine own witness held to be within the discretion of the trial court). See generally McCormick § 32, at 64. Fed. R. Evid. 607 abolishes the prohibition against a party impeaching his own witness, but Fed. R. Evid. 611(c) will permit a party to lead his own witness only under special circumstances.

Fed. R. Evid. 611(b) states: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Rule 611(c) states: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his
true if the party against whom the prior statement is offered had called the witness. If the party opposing the statement had called the witness, then the proponent of the prior inconsistent statement could not introduce it in his cross-examination because any subsequent testing of its trustworthiness would be on redirect examination, not cross-examination.

Of course, a party wishing to offer a prior inconsistent statement could call the witness himself and thereby clearly make cross-examination by the other party proper. The sensible solution, however, is to read the rule as authorizing cross-examination by the opponent of the statement regardless of who called the witness. But until that interpretation is adopted by the courts, the literal language of 801(d)(1)(A) offers an opportunity for an ironic dispute. Because the draftsmen of 801(d)(1)(A) tied the use of prior inconsistent statements as substantive evidence to the touchstone of cross-examination, even in a situation such as this one in which the parties are not likely to consider cross-examination to be a very valuable right, the party offering a prior inconsistent statement must argue that the opposing party should be given a right to cross-examine and the opposing party may argue that he has no such right.

B. Requirement of Inconsistency

The second problem with the language of Rule 801(d)(1)(A) is that by its own terms the rule applies only to a prior statement by a witness that is inconsistent with his present testimony. If the witness manages to avoid making an assertion concerning the subject of the prior statement, the prior statement cannot be "inconsistent." An obvious problem would occur when the witness claims that he cannot recall the underlying facts of the prior statement. One solution to this

---

testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." It is noteworthy that the Supreme Court proposed to adopt the wide-open rule for use in federal courts, but "Congress completely rewrote the Supreme Court statement of Rule 611(b) in order to set forth the narrower, traditional rule which prevails in the federal courts and 39 state jurisdictions . . . ." 28 U.S.C.S. § 611.2 (Editorial Comment). See House Committee Report, supra note 33, at 12.
problem, which has been adopted by several federal\textsuperscript{35} and California\textsuperscript{37} courts, is to find that the witness' claimed lapse of memory is false and that therefore the evidence which the witness sought to conceal should be admitted into evidence.\textsuperscript{38} Although the solution seems as obvious as the problem, the courts have had difficulty couching the result in applied rules. In \textit{United States v. Insana},\textsuperscript{39} for example, the Second Circuit stated:

Where, as here, a recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to so testify is not a lack of memory but a desire "not to hurt anyone," then the court has discretionary latitude in the search for truth, to admit a prior sworn statement which the witness does not in fact deny he made . . . . However, this does not mean that the trial judge's hands should be tied where a witness does not deny making the statements nor the truth thereof but merely falsifies a lack of memory. Here Schurman had testified in detail before the grand jury, had already pleaded guilty, and on the stand identified Insana and testified to two relevant events. Based upon these facts, the only rational conclusion is that Schurman was fully aware of the content of his grand jury testimony but wished to escape testifying against Insana and thus make a mockery of the trial. By conceding that his lack of memory was due to his desire not to hurt anyone, he impliedly admitted the truth of the extra-judicial statements harmful to the defendant. Thus we believe that these statements are admissible not only to impeach his claim of lack of memory but also as an implied affirmation of the truth.\textsuperscript{40}


\textsuperscript{38} For example, in \textit{People v. Green}, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), the court held admissible as substantive evidence a prior statement of drug involvement in the face of the witness' claimed memory loss.

\textsuperscript{39} 423 F.2d 1165 (2d Cir.), \textit{cert. denied}, 400 U.S. 841 (1970).

\textsuperscript{40} Id. at 1170.
The Supreme Court of California managed to make the same result sound somewhat more plausible in its final decision in *People v. Green.* In its first decision in that case, it had held that the California statute permitting substantive use of prior inconsistent statements violated the Constitution of the United States. The State of California appealed that decision to the United States Supreme Court, which held in *California v. Green* that at least some substantive use of prior inconsistent statements is constitutional. Interestingly, although both appellate courts had decided the constitutional question, neither had determined whether the declarations involved in *Green* were actually admissible as prior inconsistent statements under California Evidence Code § 1235.

The facts in *Green* were that statements incriminating the defendant had been made by Melvin Porter, a sixteen-year-old minor who had been arrested for selling marijuana. At Green’s trial on the charge of supplying Porter with marijuana, Porter was “markedly evasive and uncooperative.” His testimony is difficult to summarize because he was led, impeached, and then refreshed into making many contradictory statements, but its overall thrust was that because he had taken a hallucinogenic drug (LSD), he did not know whether or not the defendant had supplied him with the marijuana.

Neither the trial court nor the California Supreme Court believed Porter’s claim that he did not know whether or not the defendant had furnished the marijuana. After summarizing facts which supported the conclusion that Porter was lying, the Supreme Court of California used the following words to justify turning Porter’s denial of memory into a basis for the

---

41 479 P.2d 998, 92 Cal. Rptr. 494 (1971).
43 CALIF. EVID. CODE § 1235 (West 1966).
44 451 P.2d at 423, 75 Cal. Rptr. at 783. The constitutional provision held violated was the right to confrontation.
46 See id. at 153; 451 P.2d at 424 n.1, 75 Cal. Rptr. at 784 n.1.
47 451 P.2d at 423, 75 Cal. Rptr. at 783.
48 See 479 P.2d at 1000-04, 92 Cal. Rptr. at 496-500.
49 Id.
50 See 479 P.2d at 1002 n.5, 92 Cal. Rptr. at 498 n.5.
51 479 P.2d at 1000-02, 92 Cal. Rptr. at 496-98.
introduction of his prior statements as both impeachment and substantive evidence:

In normal circumstances, the testimony of a witness that he does not remember an event is not "inconsistent" with a prior statement by him describing that event. But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement and the same principle governs the case of the forgetful witness. In contrast to Sam, in which the witness had no recollection whatever of the prior incident, here Porter admittedly remembered the events both leading up to and following the crucial moment when the marijuana came into his possession, and as to that moment his testimony was equivocal. For the reasons stated above, we conclude that Porter's deliberate evasion of the latter point in his trial testimony must be deemed to constitute an implied denial that defendant did in fact furnish him with the marijuana as charged. His testimony was thus materially inconsistent with his preliminary hearing testimony and his extra-judicial declaration to Officer Wade, in both of which he specifically named defendant as his supplier. Accordingly, the two prior statements of this witness were properly admitted pursuant to Evidence Code section 1235.52

If this approach is followed under Rule 801(d)(1)(A), as it seems apparent that it will be,53 the trial judge will be forced to make a determination as to the honesty of every claim of lack of memory by a witness who has made prior affirmative statements. Because of the potential effect of such a determination, it would appear that parties opposing introduction of the prior statements would be entitled to ask for at least a voir dire hearing at which they might offer evidence as to the truth of the claim of loss of memory. In both Insana and Green, however, the trial judges and the appellate courts made the determination that the witness was lying on the basis of what

52 479 P.2d at 1002, 92 Cal. Rptr. at 498 (citations omitted). The Sam case is cited and explained in note 37 supra.

53 See J. Weinstein and M. Berger, 4 Weinstein's Evidence 801-81 to 801-87 (1975) [hereinafter cited as Weinstein's Evidence]. Some of the facts of Green fall within the limited scope of Rule 801(d)(1)(A), as some of the prior inconsistent statements were made at a preliminary hearing.
happened during the examination of the witness. Furthermore, recent cases indicate that unless the judge is able to find that the witness is lying about his lack of memory, the prior statements will not be admissible.

The draftsmen of Rule 801(d)(1)(A) required "inconsistency" because they were attempting to give substantive effect only to those prior statements which would be admissible anyway for impeachment. Under the orthodox theory of impeachment, a prior statement cannot be used to discredit a witness unless it is inconsistent with his in-court testimony. This has been a difficult rule to apply, and it becomes even more troublesome when the purpose of the introduction of the prior statement is to prove an element of the case. It seems that the entire

---

54 For the determination in Insana, see 423 F.2d at 1165-68, 1170. Insana was an extremely unusual case, however, in which the demeanor evidence visible to the trial judge found its way into the "cold record." Footnote 1 states:

In the absence of the jury the court in describing the conduct of the witness used these words:

"I have excused the jury because I want to talk very frankly here. It must be clear to everybody who looks at this witness that he is faking and he is attempting to avoid giving answers.

"His mumbling, the movements of his face and hands show a determined purpose on his part not to give anything unless it is extracted from him. This is to the enjoyment and gratification of the defendant, which the defendant has reflected by smiles of approval.

"It is quite evident, in other words, that this witness has in mind avoiding testifying because he believes it is very likely to involve the defendant.

"We are here to get the truth and I do not think it lies in the lips or the mind of any witness to thwart the truth purposely. This is a piece of hypocrisy [sic] which is as plain as the nose on your face, and I don't think we ought to allow a mockery of justice to be displayed so openly and so indifferently."

Id. at 1167 n.1. The determination in Green can be found at 479 P.2d at 1000-02, 92 Cal. Rptr. at 496-98.


Such was also the reasoning of the draftsmen of Calif. Evid. Code § 1235, upon which Rule 801(d)(1)(A) was based. For a discussion of the use of prior inconsistent statements for impeachment purposes, see generally McCormick §§ 33-38.

57 The question becomes, what degree of inconsistency is required? The earlier cases tended to resolve any doubt in favor of the opponent of the prior statement. See, e.g., Sanger v. Bacon, 101 N.E. 1001 (Ind. 1913); State v. Bowen, 153 S.W. 1033 (Mo. 1913). Later cases reflect the now "more widely accepted view [that] any material variance between the testimony and the previous statement will suffice." McCormick § 34. See, e.g., Morgan v. Washington Trust Co., 249 A.2d 48 (R.I. 1969). Of course, "materiality" is at best a subjective determination.
situation could be clarified by merely changing the language of the rule. Both inconsistency and lack of memory appear to constitute equally adequate grounds for allowing substantive use of prior statements, for both situations reflect a change in position by the declarant. The distinction between a denial of memory and an antithetical statement is in fact negligible and should not justify separate treatment. Certainly this is true if the prior statement was sworn testimony of which a transcript was probably made.

The Supreme Court of the United States, however, in California v. Green, suggested that lack of memory by the alleged declarant might be a vital factor that would make substantive use of prior inconsistent statements unconstitutional absent an opportunity for cross-examination at the time the

---

58 The Kentucky Court of Appeals noted in Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969) that both the Model Code of Evidence and the Uniform Rules of Evidence eliminated the necessity for distinguishing between positive, contradictory statements and mere negative statements. The Court added that “when a witness has testified about some of the facts of a case the jury should know what else he has said about it, so long as it is relevant to the merits of the case . . . .” Id. at 792.

59 Rule 63 (1) of the Utah Rules of Evidence declares the following to be a hearsay exception:

Prior Statements of Witnesses. A prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains, provided that (a) it is inconsistent with his present testimony, or (b) it contains otherwise admissible facts which the witness denies having stated or has forgotten since making the statement . . . .

9 UTAH CODE ANN., RULES OF EVIDENCE 63 (1) (Supp. 1975).

60 Prior statements under oath, of course, would qualify under congressionally enacted Rule 801(d)(1)(A). A case where the admissible prior inconsistent statement was not given under oath was Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969). There, the complaining witness denied having told the sheriff that the defendant was “mistreating her sister on the bed.” Id. at 789. The Court mentioned the argument that the statement was not given under oath, but dismissed it with a quote from Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 192 (1948):

The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or the test of cross-examination. To which the answer might well be: “The declarant as a witness is now under oath and now purports to remember and narrate exactly. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part.”

statements were made. The Court remarked:

The subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, off-hand remark to a stranger, and the carefully recorded testimony at a prior hearing. Here, however, Porter claimed at trial that he could not remember the events that occurred after respondent telephoned him and hence failed to give any current version of the more important events described in his earlier statement.

Whether Porter’s apparent lapse of memory so affected Green’s right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture. The state court did not focus on this precise question, which was irrelevant given its broader and erroneous premise that an out-of-court statement of a witness is inadmissible as substantive evidence, whatever the nature of the opportunity to cross-examine at the trial.62

On remand of the Green case, the California Supreme Court held that the “prescribed purposes of the confrontation clause” had been fulfilled even with respect to the out-of-court prior statement which Porter had made.63 The extraordinary factual situation, in which Porter had claimed that he did not know if the statements were true but admitted making them,64 enabled the court to reach that conclusion. In the absence of these unusual facts, however, lack of memory is likely to be held to make “a critical difference in the application of the Confrontation Clause.”65 Thus, Weinstein and Berger are probably accurately predicting the direction the decisions will take when they warn: “Although the Supreme Court left the matter open in Green, it would seem that the prior statement should not be included under 801(d)(1)(A) if the judge finds that the witness genuinely cannot remember, and the period of

---

62 Id. at 168-69.
63 479 P.2d at 1003-04, 92 Cal. Rptr. at 499-500.
64 Id. at 1003, 92 Cal. Rptr. at 499.
amnesia or forgetfulness is crucial as regards the facts in issue."

It appears to this writer, however, that the suggestion by the United States Supreme Court in Green that lack of memory could make a "critical difference" in the opportunity for cross-examination merely highlights the basic error which the Court made in Green. The Supreme Court felt that there were really no hard choices which needed to be made with respect to the use of prior inconsistent statements as substantive evidence because the right to cross-examine the alleged declarant concerning his prior statement was an adequate substitute for confrontation at the time the statement was made. For reasons which are set forth fully in Section VII of this article, it is questionable whether the right to cross-examine the alleged declarant about a prior inconsistent statement is of much value at all to the opponent of the statement. If this is true, it does not necessarily mean that the use of prior statements as substantive evidence should be excluded; but it does mean that a real price—loss of the opportunity for meaningful confrontation—will have to be paid. The Supreme Court suggested that there can be no meaningful cross-examination at the point where a witness sincerely cannot remember, and that the right of confrontation must prevail under such circumstances. It is this author's opinion, however, that the right to effective confrontation is sacrificed long before that point, even under the congressional version of Rule 801(d)(1)(A).

C. Prior Inconsistent Statements as Inferior Evidence

The third aspect which must be considered with respect to the meaning and effect of Rule 801(d)(1)(A) does not appear in its language, which simply declares that all statements to which the rule applies may be used as substantive evidence. In response to complaints that Rule 801(d)(1)(A) might permit convictions and judgments to be obtained solely on the basis of evidence of prior inconsistent statements, advocates of the federal rules have asserted that the critics were confusing sufficiency and admissibility. Judge Weinstein gave that re-

---

4 Weinstein's Evidence, supra note 53, at 801-86.
joinder during a discussion of the proposed rules at a Judicial Conference of the Second Circuit in 1969:

There are two parts to the question. One involves admissibility and the answer is yes. The second is, will that evidence alone sustain a conviction? In my view it will not. Those are two questions. In considering the Rules of Evidence keep them distinct.

One question, and that is the only one we are facing, is what comes in. The general rules with respect to the responsibility of the bench and of the jury is to insure that people are not convicted in criminal cases on evidence which leaves a reasonable doubt. In my opinion a conviction on the evidence you presented in your hypothetical could not stand.67

The Reporter for the Advisory Committee that drafted the rules, Professor Edward W. Cleary, made a similar response to objections that under the Supreme Court version even unsworn prior inconsistent statements might support a conviction. In a letter to the counsel of the House subcommittee redrafting the rule, Professor Cleary wrote:

Apparently the premise that underlies the suggested re-draft is that a statement not made under penalty of perjury is an insufficient basis to support a conviction. The premise confuses two distinct concepts: sufficiency and admissibility. If every item of evidence admitted were required to be sufficient to support a verdict, almost all circumstantial evidence, for example, would be excluded. No one would argue that this is so. Admittedly, if a judge were confronted with a situation, under the rule as transmitted to the Congress, in which the entire case for the prosecution was a prior inconsistent unsworn statement it would be difficult indeed to see how he could avoid directing a verdict.68

The idea also appears as part of the legislative history of the rules in the form of a footnote to the Senate Committee report which states:

It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate.  

Weinstein and Berger cite the above footnote to support their conclusion that: "It is doubtful . . . that in any but the most unusual case, a prior inconsistent statement alone will suffice to support a conviction since it is unlikely that a reasonable juror could be convinced beyond a reasonable doubt by such evidence alone."  

Thus, there is substantial authority to support the argument that a conviction supported only by prior inconsistent statements should not be allowed to stand. The rule itself, however, does not announce this limitation, and not everyone agrees that the limitation exists. For example, at the same 1969 conference at which Judge Weinstein drew the distinction between sufficiency and admissibility, Professor Fleming James, Jr., responded to the question of whether a conviction could be based upon a repudiated prior statement: "That is as I understand the rules."  

The sufficiency limitation may exist without regard to any implication from the Federal Rules of Evidence, however, if it is constitutionally compelled. Footnote 15 to the Supreme Court's opinion in California v. Green suggests a constitutional basis for such a limitation. That footnote states in part:  

While we may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking, we do not read Bridges as declaring that the Constitution is necessarily violated by the admission of a witness' prior inconsistent statement for the truth of the matter asserted. 

---

70 4 Weinstein's Evidence, supra note 53, at 801-73.  
71 48 F.R.D. at 65.  
72 399 U.S. at 163-64 n.15. See also 399 U.S. at 186 n.20, 189 (Harlan, J., concurring).
The major problem with this supposed limitation on Rule 801(d)(1)(A) is not whether the limitation exists, but rather it is the absence of any standards for determining when the limitation should be applied, if indeed it does exist. None of the advocates of the rule state that the limitation will automatically prevent a conviction (or judgment) from ever being based solely upon a prior inconsistent statement, and the absence of such a standard allows the courts to apply the limitation at their discretion. The record of the courts in that regard is not encouraging. In Green the United States Supreme Court noted that there was a "not insubstantial" issue as to whether the evidence was sufficient to sustain conviction. It stated that the conviction rested "almost entirely on the evidence in Porter's two prior statements which were themselves inconsistent in some respects." Therefore, it would seem that this was an appropriate case in which to apply the sufficiency limitation. On remand, however, the Supreme Court of California disposed of the high Court's concern by declaring:

The evidence is not insufficient as a matter of law to support the finding of guilt: despite certain inconsistencies between Porter's preliminary hearing testimony and his declaration to Officer Wade, both statements unequivocally identify defendant as his supplier of marijuana. Far from being themselves inherently incredible, the statements depict, as characterized by the Attorney General, "a dismally common story" of the exploitation of youth for the purpose of peddling contraband drugs. Even discounting Porter's low level of credibility, the trial court could properly conclude from all the evidence that "I am satisfied myself that Porter dealt with (defendant), used it (i.e., marijuana), and sold it . . . ." Therefore, it would seem that this was an appropriate case in which to apply the sufficiency limitation.

If the California decision in Green is typical of future cases, the limitation means that a judge should not allow a jury to convict only if he does not believe the prior inconsistent statements to be true, and this provides no real protection.

73 399 U.S. at 170 n.19.
74 Id.
75 479 P.2d at 1004, 92 Cal. Rptr. at 500.
76 This is apparently the effect which Mr. Justice Harlan gave to it in footnote 20 of his concurring opinion in California v. Green, which states, in part:

By the same token I would not permit a conviction to stand where the
against convictions based solely upon prior inconsistent statements. It is hoped that the courts will adopt and apply the limitation so that only in the most unusual circumstances would they fail to direct a verdict when essential elements of the case are proven only by prior inconsistent statements.

IV. IMPEACHMENT UNDER THE FEDERAL RULES OF EVIDENCE

Federal Evidence Rule 607 provides: "The credibility of a witness may be attacked by any party, including the party calling him." Therefore it is clearly proper under the new federal rules for either party to attack the credibility of a witness, and there is no longer any need for parties to resort to such devices as claims of surprise, or purported attempts to "refresh the memory" of a witness who now remembers a different story, if the purpose of the impeachment really is to discredit the witness. Purported impeachment, however, has long been used as a device to inform the fact finder of otherwise inadmissible facts. Under the federal hearsay system, of course, this

---

critical issues at trial were supported only by ex parte testimony not subjected to cross-examination, and not found to be reliable by the trial judge. It will, of course, be the unusual situation where the prosecution's entire case is built upon hearsay testimony of an unavailable witness. In such circumstance the defendant would be entitled to a hearing on the reliability of the testimony.

399 U.S. at 186 n.20 (Harlan, J., concurring). See also id. at 189 (Harlan, J., concurring).

7 Weinstein and Berger state:

[F]ederal practice will not be revolutionized since a large number of modifications had been developed under previous practice to side-step the impact of the traditional rule. Now that the rule has finally been abrogated, it seems pointless to devote much more space to perpetuate these exceptions which had been the subject of countless pages of now obsolete discussion. As a matter of historical interest, it suffices to note that in the federal system the consequence of a non-impeachment rule had been cushioned by allowing impeachment of the witness in the following situations: where his testimony surprised the party calling him and was harmful to his case, by having the judge call the witness, by allowing the impeachment of compulsory witnesses, adverse parties in civil cases, government agents called by defendants in criminal cases in the Second Circuit, witnesses in civil cases by their depositions, by permitting a party limited scope to bring out damaging matter about a witness on direct examination, by allowing the accuracy of the testimony to be contradicted by extrinsic evidence, and by getting the impeaching evidence before the jury in the guise of refreshing the witness' recollection.

3 WEINSTEIN'S EVIDENCE, supra note 53, 607-13 to 607-14 (footnotes omitted).
use of prior statements becomes even more important because those which fall within the limits of Rule 801(d)(1)(A) can be used as substantive evidence to prove a case.

The federal rules of evidence drafted by the Advisory Committee and approved by the Supreme Court would have resolved all questions concerning the use of purported impeachment by making prior inconsistent statements proper for any purpose.\(^7\) This draft clearly assumed that such statements would be freely admissible under Rule 801(d)(1)(A) in order to "provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."\(^7\) The federal system would therefore have worked just as the California Law Revision Commission expected the similar California Evidence Code provisions to perform:

Because Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony and whether or not the party was surprised by the testimony, for such evidence is no longer irrelevant (and, hence, inadmissible).\(^8\)

But Rule 801(d)(1)(A) was not adopted by Congress in the form proposed by the draftsmen. Since the version of Rule 801(d)(1)(A) adopted by Congress declares only some prior inconsistent statements to be "not hearsay," it should be possible in the other situations to prevent a witness from being called to the stand merely to permit the jury to hear, as impeachment, his prior statements. Even though it is no longer possible to object that the party is impeaching his own witness,\(^9\) it is still proper to object that the value of the impeachment to the impeaching party is outweighed by the prejudicial effect on the opponent of the prior inconsistent statements which would oth-

---

\(^7\) See Proposed Rules, supra note 4, at 293.

\(^8\) Id. at 296, quoting California Law Revision Commission, Recommendation Proposing an Evidence Code 234 (1965) [hereinafter cited as California Law Revision Commission].

\(^9\) California Law Revision Commission, supra note 79, at 233.

\(^9\) See Fed. R. Evid. 607.
erwise be excluded as hearsay. Such an objection is validated by Federal Evidence Rule 403, which specifically authorizes the exclusion of relevant evidence if its probative value is substantially outweighed by its danger. Of course, if Rule 403 is used to prevent impeachment with prior inconsistent statements which are not admissible under Rule 801(d)(1)(A), it can be expected that attorneys will continue to use the traditional devices to reveal the existence of such prior inconsistent statements.82

V. SUBSTANTIVE USE OF PRIOR CONSISTENT STATEMENTS

Rule 801(d)(1)(B) provides that a prior consistent statement by a witness who testifies at a trial and is subject to cross-examination is "not hearsay" if the statement "is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." By making such statements nonhearsay, the rule allows the introduction of these statements as substantive evidence of the truth of what is therein expressed. The traditional rule has been that prior consistent statements could be admitted in evidence only if the fact that they were said served some nonhearsay purpose, such as proving an act inconsistent with a claim of fabrication or improper influence.83 The federal rule does not change the traditional requirement that a prior consistent statement must serve a nonhearsay purpose in order to be admissible; it simply permits the additional use of these statements substantively, as proof of the truth of their contents.

One wonders if this rule really serves any meaningful purpose. Because the substance of the prior statement has already been given through the witness’ in-court testimony, the prior statement does not really add to the substantive evidence available to the fact finder. In reality, it will be used only for the traditional purpose of aiding the fact finder in deciding whether or not to believe the substance of the two statements. The rule would permit a fact finder to base a decision on a vital fact which appeared to be proved only by a prior statement covered by the rule only if counsel had inadvertently failed to

82 See note 77 and accompanying text supra.
83 See generally McCormick § 251.
bring out that fact during in-court examination or if the fact finder failed to remember that the vital fact had been brought out during in-court examination. Such opportunities to actually apply the rule are likely to be extremely rare.

Rule 801(d)(1)(B) is based upon § 1236 of the California Evidence Code, and that section does not appear to have had any practical effect in any of the cases in which it has been cited. Even when that statute was held to be unconstitutional by the Supreme Court of California, the error caused by following the statute was found to be harmless. It is therefore not surprising that the congressional amendments restricting 801(d)(1)(A) were not added to 801(d)(1)(B).

The only explanation for the draftsmen's decision to follow the California Rules of Evidence concerning prior consistent statements appears to be a desire to put an end to the problem of attempting to explain to a jury the "subtle distinction" between prior statements and substantive evidence in this instance. If Rules 801(d)(1)(A) and 801(d)(1)(B) had been adopted in the form proposed by the Advisory Committee and approved by the Supreme Court, they might well have eliminated that problem. It would have been possible to instruct a jury with respect to all prior statements without distinguishing between those that could be used to support a verdict and those that could not.

But Rule 801(d)(1)(A) was amended to make only prior

---

86 Id. at 488, 80 Cal. Rptr. at 576.
87 The Advisory Committee's note on 801(d)(1)(B) does not suggest that any benefit will be gained by adoption of that section. See PROPOSED RULES, supra note 4, at 296 (Advisory Committee's note). But the Advisory Committee was following the system used by the California Law Revision Commission which had justified giving substantive effect to a prior consistent statement with this argument:

Section 1236, however, permits a prior consistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the rules relating to the rehabilitation of impeached witness. . . .

There is no reason to perpetuate the subtle distinction made in the cases. It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true.

CALIFORNIA LAW REVISION COMMISSION, supra note 79, at 234 (citation omitted).
inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" admissible as substantive evidence. Thus, even though all prior consistent statements which are admissible under Rule 801(d)(1)(B) will be substantive evidence, many prior inconsistent statements which will come into evidence in the traditional manner will not be. The problem of differentiating the two uses to the jury, then, has not been eliminated. Seemingly, no harm will result if the jury either actually understands or completely ignores what it is told. But substantial harm may result if the jury tries to apply an instruction that prior consistent statements are substantive evidence by interpreting the instruction to mean that prior consistent statements are to be given extra weight. This possible misunderstanding stems from the fact that there is almost no proper use to which the jury can put the judge's instruction that prior consistent statements are substantive evidence.

If no purpose is served by informing the jury of the substantive use of prior consistent statements, the jury should not be told. A more complete solution, however, would be for other states to follow Maine's decision to reject 801(d)(1)(B) altogether. Maine Rule of Evidence 801(d)(1) provides:

A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is 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. A prior consistent statement by the declarant, whether or not under oath, is admissible only to rebut an express or implied charge against him of recent fabrication or improper influence or motive.88

88 2 Maine Leg. Serv. 573 (1975). The Adviser's Note to this Maine rule states:

The concluding sentence limiting a prior consistent statement, whether or not under oath, to use in rebuttal of a claim of recent fabrication or improper influence or motive states the present Maine law. Although probably unnecessary, it is included here for the sake of clarity. One reason for including it is to emphasize the difference from the Federal Rule, which makes a prior consistent statement substantive evidence.

SUPREME JUDICIAL COURT, MAINE RULES OF EVIDENCE 50 (1975).
VI. THE EFFECT OF SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS ON FORUM SHOPPING

Our system of parallel federal and state courts constantly presents the problem of whether federal courts must conform to the rules which are applied in state courts. The Advisory Committee on the Rules of Evidence took the position that Erie and its progeny posed problems only with respect to their proposed rules on presumptions. That hurdle was cleared by creating a rule under which federal courts are to look to state law for the effect of presumptions when the claim or defense is one "as to which state law supplies the rule of decision." Thus, only in the area of presumptions, and in two other limited situations, will there necessarily be consistency between state and federal rules of evidence, unless and until states adopt the substance of the federal rules as their own.

Major differences between the evidentiary rules of parallel state and federal courts will undoubtedly create serious problems. If attorneys can predict a difference in outcome due to conflicting rules, forum shopping will result. Even if attorneys cannot predict well enough to make forum shopping profitable, there are other repercussions of parallel court systems deciding the same case by different rules. These include the displacement of state regulation, inconsistent results in similar cases, and a heavy burden on attorneys who practice in the two systems.

The draftsmen and advocates of the federal rules were not unaware of these dangers, but considered them part of the price to be paid for a badly needed change. Judge Weinstein analyzed the conflicting factors between the pressure for uniform and improved federal evidence rules and deference for state law. He suggested that the necessary compromise might be

---

10 Proposed Rules, supra note 4, at 211 (Advisory Committee's note).
11 Id. The author will refer to this type of rule generally as a "mini-Erie" rule.
12 There are two other instances of the application of "mini-Erie" rules in the Federal Rules of Evidence. These were added by Congress and will be discussed infra.
15 Weinstein, supra note 93.
achieved by giving greater weight to state evidentiary rules which reflected important state policies or were closely associated with particular substantive rights and less weight to state evidentiary rules that merely represented a disagreement between the opinions of state and federal draftsmen as to how the truth might best be ascertained. The Advisory Committee’s application of a “mini-Erie” rule to certain presumptions was a limited attempt to strike the desired balance. Weinstein conceded, however, that his approach merely lessened rather than ended the conflicts:

Yet, even as to truth-determining rules, it must be conceded that any liberalization of a general rule of evidence may affect the outcome of a case or even of classes of cases.

Such ephemeral factors must be ignored if the federal courts are to operate as an independent system with an integrity of its own. An independent and respected system of federal courts is desirable as a matter of federal policy, among other reasons, to enforce federal rights and to dignify the independent federal nation. Thus, while the “nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action” at least some of the differences must be ignored in our dual system of sovereignty.

Congress, especially the House of Representatives, demonstrated more concern for the twin dangers of forum shopping and interference with state laws than the draftsmen of the Supreme Court version of the federal rules by the addition of two other “mini-Erie” rules. An elaborate set of rules for privileges was replaced by this final version of Rule 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or

---

96 Id. at 370-73.
97 Id. at 363-70.
98 Id. at 362-63.
100 Proposed Rules, supra note 4, at 230-61 (Advisory Committee’s note).
political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Similar problems with federal rules relating to the competency of witnesses were solved with another "mini-Erie" provision, Rule 601: "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law."

The House Committee explained the reasons for this "mini-Erie" rule as follows:

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense, removes the incentive to "shop."

HOUSE COMMITTEE REPORT, supra note 33, at 9.

PROPOSED RULES, supra note 4, at 261-81 (Advisory Committee's note). The proposed rules on competency would have eliminated such state devices as the Dead Man's Acts. Id. at 262.

With respect to this rule the House Committee stated:

Rule 601 as submitted to the Congress provided that "Every person is competent to be a witness except as otherwise provided in these rules." One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule
The two "mini-Erie" rules added by Congress will have the practical effect of greatly reducing the opportunities for forum shopping. In the common situation where a diversity case involves only claims and defenses controlled by state law, the state rules on privileges and competency will apply, regardless of whether the action is brought in state court or in the corresponding federal court. The "mini-Erie" rules do not affect, however, the opportunities for forum shopping in cases where the claims and defenses are controlled by federal law. When those actions are litigated in federal courts, they will be subject to the Federal Rules of Evidence; when they are tried in state courts, state evidence rules will apply.

The "mini-Erie" rules will also create some opportunities for confusion and even for intracourt forum shopping within the confines of a single case in a single district court. Those parties who have a case which can be brought in a federal court on either state or federal law grounds, or both, will also have a choice as to which evidence rules will control privileges and competency.

The significance of forum shopping opportunities depends on the likelihood of different results obtaining from the application of dissimilar rules. Experienced trial attorneys with whom the author has discussed the problem have suggested that individual evidentiary rules may not be that important. They generally suggest that the decision of where to file or whether to remove takes place early in the development of a case, at which time it is difficult to predict what evidentiary issues will be significant at the time of trial. Evidentiary considerations are among a myriad of factors that must be considered in forum choice, and, in the past, have not been an overriding concern. But the Federal Rules of Evidence may be creating a new era in which the differences between the evidentiary rules in particular courts are going to be clearer and more important.


105 House Committee Report, supra note 33, at 9.

106 But see Weinstein, supra note 93, at 375.
From 1938 to 1975 the use of evidence in civil cases in federal courts was controlled by Federal Rule of Civil Procedure 43(a), which provided in part:

All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

This rule provided precious little guidance to judges. It should not be surprising, therefore, that the actual evidence practice in federal trial courts has frequently resembled the procedure in the state trial courts from which judge and counsel come. Judge Weinstein suggested that these practices would continue even under a system of federal evidence rules:

The court, in exercising its discretion, will tend to be influenced by the state rules with which it is familiar. The knowledge and tradition of the individual lawyer, who will continue to follow the same practice and much the same forms wherever possible, reduces the shock of reform. Thus, for example, although substantial departures from code pleadings were incorporated in federal rules, many federal pleadings still look as if they were drawn for the state courts. Years after the elimination of the need to take an exception to a ruling on evidence, the word “exception” is still regularly flung into the teeth of federal judges by lawyers outraged by

107 COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS, 30 F.R.D. 73, 97 (1962) [hereinafter cited as COMMITTEE ON RULES], quoting MORGAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE 258 (4th ed. 1957). The Committee noted: “Cases in the federal courts are also badly confused, no doubt in part because many federal judges, each steeped in a local state practice before appointment, carried along their established habits; nor is the local bar without influence in this respect.” Id.
the court's rulings. Within the courtroom the lawyer's preparation and his almost involuntary reflexive action in objecting and phrasing his questions and in proffering evidence will not be radically and immediately affected, whatever the new rule.\textsuperscript{103}

To the extent, however, that the changes and differences in rules are clearly spelled out and give important rights to one party or another, as do the hearsay provisions, they will be used to change the practices in the federal courts. Congresswoman Elizabeth Holtzman thought that the federal hearsay rules invited forum shopping:

Another thorny problem this codification will produce is forum shopping. Because this code substantially liberalizes the hearsay rules, federal courts may become a more attractive forum for litigation. This is not, however, a time to increase the work load of the already congested federal courts. Nor is there any substantial justification on a hearsay issue for a different outcome in a federal court when state law is involved.\textsuperscript{103}

The House Committee Report itself acknowledged that one new rule invited forum shopping:

The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.\textsuperscript{103}

If the Federal Rules of Evidence do in fact create new and important differences between practices in state courts and

\textsuperscript{103} Weinstein, \textit{supra} note 33, at 359-60. Rule 43(a) now reads:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

\textit{FED. R. CIV. P. 43(a) (1976).}

\textsuperscript{103} \textit{House COMMITTEE REPORT, supra} note 33, at 27 (Separate Views of Hon. Elizabeth Holtzman).

\textsuperscript{103} \textit{Id.} at 15-16.
federal courts, attorneys may be under an ethical obligation to
discover how these differences affect their cases before they file
or remove them. Professor Wright is correct when he states:

When there is a legitimate choice between a state and a
federal forum for a particular action, the lawyer who has the
choice quite properly will weigh what he conceives to be the
tactical advantages and disadvantages of going to one court
or the other . . . .

If a choice of forum exists, there is nothing improper in
taking such tactical considerations as those mentioned into
account in making that choice.\textsuperscript{111}

The major action taken by Congress to reduce forum shop-
ping opportunities, though Congress apparently took the action
for other reasons, was to restrict the substantive use of prior
inconsistent statements. There is, therefore, an important
forum shopping problem involved in the question of whether or
not the Supreme Court version of Rule 801(d)(1)(A) should be
restored. Almost any federal evidence rule which is to be ap-
plied throughout the nation will create some opportunities for
forum shopping because of the differences in practices from
state to state. Neither version of Rule 801(d)(1)(A) lessens the
problem, however, for each creates a major forum shopping
problem. Eleven states, the Virgin Islands and the Canal Zone
permit, by statute, rule, or decision, substantive use of all prior
inconsistent statements of a witness who is available for cross-
examination.\textsuperscript{112} Three of these states, Nevada, New Mexico,
and Wisconsin, have achieved that result by adopting rules of
evidence based upon the Supreme Court or earlier version of
the Federal Rules of Evidence. Under Civil Rule 43(a), which
controlled evidence practice in civil cases prior to the adoption
of the federal rules, state rules providing for more liberal ad-
mission of evidence would have also been applied in federal

\textsuperscript{112} See Beavers v. State, 492 P.2d 88 (Alas. 1971); State v. Skinner, 515 P.2d 880
(Ariz. 1973); Jett v. Commonwealth, 436 S.W.2d 778 (Ky. 1969); State v. Igoe, 206
tit. 5, § 932(1) (1967).
courts sitting in those states. But the new federal rules do not permit such use of state rules. Thus, in these 13 jurisdictions it is likely that parties will remove to the federal courts in order to avoid substantive use of prior inconsistent statements.

Thirty-eight states continue to apply the orthodox doctrine forbidding substantive use of prior inconsistent statements. The remaining state, Maine, has adopted rules of evidence effective February 2, 1976, which are based upon the congressional version of the federal rules, and which specifically include the congressional restriction of Rule 801(d)(1)(A). The 801(d)(1)(A) restrictions were also followed in a new revision of the Uniform Rules of Evidence based upon the Federal Rules of Evidence. If more states adopt rules of evidence modeled after the federal rules or the Uniform Rules of Evidence (1974), which seems extremely likely, they will probably adopt the federal version of 801(d)(1)(A). Therefore, the form of Rule 801(d)(1)(A) in effect in the federal courts during the next few years will probably have a major impact on the form of future state evidentiary rules.

In these circumstances, some advocates of the Federal Rules of Evidence may have felt that conflicts between federal and state provisions which produce forum shopping would actually be desirable if they led to adoption of the superior federal rules by the states. One of the purposes for the creation of the federal rules was a belief that rules of evidence in use throughout the nation were in great need of improvement. Advocates of the new federal rules expect them to serve as a model for the states in much the same manner as have the Federal Rules of Civil Procedure. Professor Edward W. Cleary, the Reporter for the Advisory Committee which prepared the Supreme Court draft of the federal evidence rules, stated in his testimony before the House subcommittee:

There has been a very marked interest in the States in the progress of the rules from the very inception of this project.

---

113 See text accompanying note 108 supra.
114 See note 88 and accompanying text supra.
116 See text accompanying notes 118 and 119 infra.
117 See COMMITTEE ON RULES, supra note 107, at 108. But see Weinberg, supra note 94, at 606-09.
And we anticipate, I think with reason, that the impact of a set of Federal rules, whether they are these rules or another set, would be substantially the same as the Federal civil rules with regard to State practice.

I learned in the last few days that the Commissioners on Uniform State Laws have appointed a special committee to examine into the changes which might be necessary in these rules for State use. And that committee had a meeting, I think, in St. Louis in the early part of January. I am now in correspondence with them.\footnote{Frank J. Jestrab, who served as Chairman of the Special Committee on Rules of Evidence of the National Conference of Commissioners on Uniform State Laws, told the House Subcommittee:}

I think in certain areas of the law, and indeed of human experience, a certain time comes when, finally, there is action. I think we are in that particular time with respect to rules of evidence now. I am told that within the calendar year 1973, three or four States, additional States, in addition to the two or three that I mentioned, are going to adopt or be working on rules of evidence.

I think that within the next 4 or 5 years we might see 25 or 30 States enacting or adopting, depending on how they do it, whether it is by rule or by statute, a code of evidence. And I think that unless there is some model, some uniform rules to go by, you are going to have all of the diversities that we now have wrapped up in individual evidence codes in the States, and they are going to be exceedingly hard to change.\footnote{I think in certain areas of the law, and indeed of human experience, a certain time comes when, finally, there is action. I think we are in that particular time with respect to rules of evidence now. I am told that within the calendar year 1973, three or four States, additional States, in addition to the two or three that I mentioned, are going to adopt or be working on rules of evidence. I think that within the next 4 or 5 years we might see 25 or 30 States enacting or adopting, depending on how they do it, whether it is by rule or by statute, a code of evidence. And I think that unless there is some model, some uniform rules to go by, you are going to have all of the diversities that we now have wrapped up in individual evidence codes in the States, and they are going to be exceedingly hard to change.}

Under these circumstances, advocates of the Federal Rules of Evidence could argue that even a substantial forum shopping problem might be just a temporary stage in a course of events that would lead to a nationwide evidence reformation. Whether it would be proper for the federal courts to adopt an improved evidence code, despite its forum shopping effects, or in order to create pressure on the states to adopt the same reforms, raises all the unresolved problems of the \textit{Swift v.}
Tyson,120 Erie R.R. v. Tompkins121 dispute. Whatever one's judgment of this general argument, however, its application to general substantive use of prior inconsistent statements depends upon whether or not that change is really an improvement in the law of evidence.

VII. CHANGING THE FEDERAL RULES OF EVIDENCE TO PERMIT SUBSTANTIVE USE OF ALL PRIOR INCONSISTENT STATEMENTS

The most important change in the Federal Rules of Evidence which might be proposed in the near future would be the removal of the congressional restriction on the scope of Rule 801(d)(1)(A) and the readoption of the Supreme Court version of that rule so that all prior inconsistent statements would be admissible as substantive evidence. As enacted, Rule 801(d)(1)(A) was a disappointment to many of those who had worked for the adoption of federal rules of evidence. Weinstein's and Berger's judgment is that "[a]s amended, Rule 801 is hardly even innovative; it is, regrettably, less useful in eliciting truth than the Supreme Court's draft of the rule would have been."122 In a critique of the House version of the rules, Moore and Bendix were harsher in describing the similar House restrictions: "This amendment almost destroys the usefulness of the provision."123 The version of the Federal Rules of Evidence passed by the Senate actually restored the Supreme Court version of Rule 801(d)(1)(A),124 but the conference report adopted the present restrictions as a compromise.125

The major question to be considered in deciding if the Supreme Court version should be restored is whether the chances of reaching correct results will be improved by treating as substantive evidence the kinds of prior inconsistent statements which are excluded by the congressional restrictions on Rule 801(d)(1)(A).

There are two primary arguments advanced in support of

120 41 U.S. (16 Pet.) 1 (1842).
121 304 U.S. 64 (1938).
substantive use of all prior inconsistent statements. The first is that because the jury learns of prior inconsistent statements when they are introduced to impeach credibility, it is mere hypocrisy to call them nonsubstantive and instruct the jury not to decide the case on the basis of such statements. The second argument is that if the declarant of the alleged prior inconsistent statement is available in court for examination, the requirements of the rule against the use of hearsay are satisfied. It appears to this writer that both of these arguments fail to recognize that there will be a price exacted for the substantive use of prior inconsistent statements. That price—the inability to effectively respond to and attack this kind of evidence—would be paid by the parties against whom such prior inconsistent statements are used.

A third argument that is made for the substantive use of prior inconsistent statements is somewhat vague and difficult to articulate. While admitting that a price may be paid for substantive use, supporters argue that the increase in evidence thus available for consideration outweighs the possible costs. This is obviously a value judgment, and one with which the author disagrees.

Moore and Bendix state the first argument in their critique of the House restrictions on Rule 801(d)(1)(A): "[The rule] asks the jury essentially to do the impossible by using a statement for impeachment but not for its substantive truth. Mr. Justice Cardozo long ago criticized such rules of law that require 'discrimination so subtle' and 'beyond the compass of ordinary minds.'" While it is certainly true that it would be hard for the jury to understand and apply an instruction that a particular item of evidence is not to be treated as substantive evidence, it should also be pointed out that the jury is extremely unlikely to reach a result that violates the instruction in any meaningful way, regardless of whether they understand the instruction or not.

If counsel and the trial judge have properly performed their duties, a case will not be submitted to the jury unless there is substantive evidence in the record to support every

---

123 Moore & Bendix, supra note 123.
essential element. In the overwhelming majority of cases, a jury which actually considers the evidence on those essential points will decide to believe the evidence which we have called substantive. With respect to its decision to believe or not believe the substantive evidence, the only use which the jury can logically make of the prior inconsistent and consistent statements is the proper one of aiding it in deciding which substantive evidence to credit. The fact that the jury may well believe that the prior statements are also true is beside the point, if the jury does in fact decide to believe enough substantive evidence to find for the party for whom it returns a verdict. The fact that the jury may give great weight to a prior statement is in no way improper, if there is substantive evidence which the jury decides to believe.

With the exercise of some ingenuity a few situations can be invented whereby the jury could violate an instruction not to use nonsubstantive evidence in a manner which would affect the result in a case. But this supposes a jury that believed a prior inconsistent statement but decided not to credit any of the substantive evidence on that same point, or forgot all the substantive evidence on that point, or simply refused to think about it. This last possibility suggests a much more likely problem—the jury may ignore much or even all of the evidence. But that is not a problem which can be controlled by instructions on the difference between substantive and nonsubstantive evidence.

Thus, the question of whether a particular piece of evidence is called "substantive" is not an important one if the trial judge properly understands and applies the rules requiring that there be substantive evidence to support every essential element of the case. It is not necessary, then, to adopt a rule for prior statements which can be best understood by the jury; this frees rulemakers to structure a provision best suited to the search for truth.

The second argument made in support of substantive use of prior inconsistent statements is that the party against whom the statement is offered as evidence is adequately protected if he has an opportunity to question the alleged declarant about the statement during the trial at which the statement is offered. It is customary in discussions of this topic to refer to the
examination of the declarant by the party against whom the statement is offered as "cross-examination." As was pointed out earlier, the party against whom the statement is offered may not be entitled to conduct a cross-examination of that witness under ordinary procedural rules. The courts, of course, can satisfy the literal requirements of Rule 801(d)(1)(A) if they infer that the rule authorizes the cross-examination it requires. If they do not, however, the effect will be that only those parties who call the declarant themselves, and thereby give the opposing party the right to cross-examination, will be able to use the statements substantively.

Perhaps one ought to question why the party who is supposed to be protected by this cross-examination may have no right to conduct such a cross-examination under ordinary trial rules.

Wigmore, McCormick, Morgan, and Maguire all endorsed general substantive use of prior inconsistent statements. Wigmore argued:

[T]he theory of the hearsay rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination . . . . Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve.

The fact that Congress chose to restrict the application of Rule 801(d)(1)(A) despite the impressive scholarly support for general substantive use of prior inconsistent statements can be explained by the fact that the trial bar has generally rejected the scholars' theories on this point. Weinstein and Berger state:

127 See part III A, supra.
128 3A WIGMORE § 1018.
129 McCormick § 251.
132 3A WIGMORE § 1018, at 996.
In deference to these objections of practical trial lawyers to whom, in the words of Professor Maguire, the analysis of prior statements as non-hearsay appears as "a professorial pipe-dream," Rule 801 was amended to limit the number of situations in which prior statements of a witness would be given substantive effect.13

From the trial lawyer's viewpoint, there are two major objections to the theory that an opportunity during the trial to cross-examine the alleged declarant of the prior inconsistent statement is an adequate substitute for the protection provided by the hearsay rule. The first is that the most the theory purports to provide is an opportunity for cross-examination at trial, while the insistence on in-court testimony also protects the right to require direct examination. Secondly, trial lawyers argue that an opportunity to cross-examine at trial is not an adequate substitute for an opportunity to cross-examine at the time the statement was allegedly given.

Normally, when it is said that a party has a right to cross-examine the witnesses against him, this means that he has a right to require that they appear in court and testify in accordance with the usual rules. Those rules include cross-examination but they also include a set of rules concerning leading questions, and the like, which are designed to ensure that the witness' testimony is actually what the witness himself remembers and what the witness himself intends to say. Although the right to require strict compliance with the rules concerning direct examination is one that parties frequently waive, it is also one that can be very valuable if there is any doubt as to whether a witness intends to say what examining counsel would have him say. It would appear to be a particularly valuable right with respect to the class of statements excluded from substantive use by the congressional restrictions. The most important group of statements excluded by the congressional restrictions are the large number of signed written statements taken by public and private investigators. Although the fact that the statements are in writing would appear to solve the problem of whether we have a correct report of the out-of-court statement, the process by which such statements

132 4 WEINSTEIN'S EVIDENCE, supra note 53, at 801-69.
are obtained is the antithesis of the process of direct ex-amination. Written statements ordinarily are composed by the inves-
tigator and the witness' signature parallels the problem pre-
sented by a witness' acquiescence to a leading question in the
courtroom.\textsuperscript{134}

The advocates of general substantive use of prior inconsist-
ent statements may respond that the witness can explain any
mistake made in signing the statement when cross-examined
by the party against whom the statement is offered. But no
amount of repudiation by the witness can undo the earlier
statement. If the witness admits making the statement, or the
jury decides to believe other evidence that he did so, the jury
is free to believe the earlier statement. This is a desirable result
if one believes that most witnesses who contradict out-of-court
statements do so for fear or favor. But it is not a desirable result
if one believes that out-of-court statements may have been
obtained by leading or misleading the witness. Of course, the
jury will do its best to decide whether the out-of-court version
is true, but the general ban on hearsay is based upon a belief
that this is not protection enough.

The second objection, that cross-examination at trial is
not sufficient protection, was answered by Justice White,
speaking for the majority in \textit{California v. Green}.\textsuperscript{135}

\begin{quote}
[T]he inability to cross-examine the witness at the time
he made his prior statement cannot easily be shown to be of
crucial significance as long as the defendant is assured of full
\end{quote}

\textsuperscript{134} Weinstein and Berger state:

One practical aspect of the problem should not be lost sight of. While
proponents of the rule as adopted by the Supreme Court point out that
statements made earlier in time may be more reliable, most prior inconsist-
ent statements used at trials are given under circumstances where there are
subtle and sometimes severe pressures operating to skew the story one way
or the other. The inconsistent statement may be given to an insurance inves-
tigator or an FBI agent at the time of arrest, or before a Grand Jury where
the witness can be led, advertently or otherwise, to give a somewhat colored
version of the events. In a swearing contest between the witness and FBI
agents the witness will usually come off second best. Very few such state-
ments used at trial are given in a completely neutral and unpressured set-
ting. Skepticism about such cases explain why the rule was narrowed from
its original breadth.

\textit{Id.} at 801-73.

\textsuperscript{135} 399 U.S. 149 (1970).
and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant. 136

The difficulty with this analysis is that it ignores the real differences between what can be accomplished with cross-examination at the time the statement is made and what can be accomplished by showing that the declarant has repudiated or denied the statement. Effective cross-examination at the time the statement is made can destroy the statement so completely that the witness will withdraw it and the jury will be instructed to disregard it completely. 137 But the prior inconsistent statement cannot be destroyed. The witness is treated as if he were two witnesses—one outside and one inside the courtroom. Nothing that happens to the witness inside the court-

---

136 Id. at 159. The only question actually decided by the Court in Green was that the confrontation clause of the sixth amendment does not prohibit all substantive use of prior inconsistent statements, Id. at 155. The Court's decision even on that limited question was made only with respect to the prior inconsistent statements made under oath at a preliminary hearing in the same case as the present prosecution. Id. at 170. Since Green was actually represented by counsel at the preliminary hearing, id. at 165, this was one of the strongest cases that could have been presented for substantive use of prior inconsistent statements. The only defect was that the purpose of cross-examination at a preliminary hearing has historically been quite different from the purpose of cross-examination at trial. The Court had recognized that problem in Barber v. Page, 390 U.S. 719 (1968), and Mr. Justice Brennan pointed it out in his dissent, 399 U.S. 149, 195-97 (1970), but the Court rejected the distinction. Id. at 165-68.

Despite the fact that the question before the Court in Green was one of constitutional law rather than one of evidence, the factors which the Court discussed are the same ones which must be considered in deciding the evidence policy question.

137 Both Massachusetts and Pennsylvania have a long series of cases applying the rule that if a witness clearly repudiates his earlier testimony, the earlier testimony ceases to have any effect as substantive evidence. Sullivan v. Boston Elevated Ry., 112 N.E. 1025 (Mass. 1916); Morris v. Lodgen, 179 N.E.2d 821 (Mass. 1962); Black v. Philadelphia Rapid Transit Co., 86 A. 1066 (Pa. 1913); Wolansky v. Lawson, 133 A.2d 843 (Pa. 1957). This rule cannot apply to mere contradiction, however, when the witness is not compelled to choose one version or another. Fitzgerald v. McCullogh, 96 N.E.2d 163 (Mass. 1950); Steward v. Ray, 76 A.2d 628 (Pa. 1950). An excellent student work, Comment, Prior Inconsistent Statements and the Rule against Impeachment of One's Own Witness: The Proposed Federal Rules, 52 Tex. L. Rev. 1383 (1974), asserts: "Most courts hold that conflicts in a witness's testimony should be resolved by the jury; but when the witness subsequently explains the conflict, finally adhering to one version and repudiating the other, his later statement controls." Id. at 1391 n.34.
room can deprive the fact finder of the right to believe the witness outside the courtroom. Indeed, if the witness inside the courtroom were to be attacked with the usual devices of the cross-examiner and shown to be untrustworthy, that would merely make it all the more likely that the fact finder would decide to believe the witness outside the courtroom. This is what happened in *Green*. The trial court decided to credit the out-of-court witness whose statements were essential to support a conviction, despite a reaction to the same witness at trial which the California Supreme Court described in a footnote as follows:

... [T]he court expressed deep concern over the probative value of the testimony of this youth "who comes in here and defies the Court and counsel with his nonresponsive, insolent answers." In explaining the decision to find defendant guilty, the court again emphasized "the small probability attached to the veracity of this young renegade."^{133}

Under these circumstances the right to conduct cross-examination which belongs to or may be given to a party against whom a prior inconsistent statement is offered is not likely to be used for what we ordinarily think of as cross-examination. Instead, the party against whom a prior inconsistent statement is introduced must undertake to build rather than to destroy. He must convince the fact finder either that (1) the in-court witness is trustworthy despite the contradiction, or (2) that there is some explanation, or (3) that the prior statement is a fraud. In short, substantive use of prior inconsistent statements deprives the opposing party of the tools that can normally be used to attack harmful evidence, and forces the opposing party to bear the risk that he will not be able to dispel the effect of the prior inconsistent statements. It is clear, therefore, that proponents of the Supreme Court version have either not been aware of the real differences the two versions produce, or have chosen to ignore them.

Given the very real repercussions of adopting the Supreme Court version, the remaining question is whether the benefits of allowing the substantive use of prior inconsistent statements

---

outweigh the costs. The proponents argue that they do, and this is in line with the modern attitude that doubtful evidence should be admitted and evaluated by the jury. The Advisory Committee made both conventional arguments and also decided that the benefits of allowing prior inconsistent statements as substantive evidence outweighed the costs:

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates . . . situations in which the statement is excepted from the category of hearsay.139

The Committee did not explain why their experience told them that such a rule was needed, but one likely reason was a belief that the need to prevent evidence and cases from being lost because a witness has been bought or frightened off was great enough to justify taking some risks that cases would be won on the basis of out-of-court statements which had been obtained by trickery or which were complete fabrications.

It is, as the Advisory Committee suggested, a question of judgment, and the judgment is not an easy one to make. One factor that enters into this author’s judgment is the fact that a so-called “turncoat witness” may not be a turncoat at all. A “prior statement” which the witness never made will look very much the same as one which the witness did make when both are introduced in the courtroom. And both will be very hard for the opposing party to attack. Of course, the opportunity for fraud exists with respect to all the hearsay that comes in under the various exceptions. And a fraudulent hearsay statement always presents great difficulty for the opposing party:

A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple

139 Proposed Rules, supra note 4, at 296 (Advisory Committee’s note).
assertion that he was told so, and leaves the burden entirely on his dead or absent author. 140

Each of the other exceptions is tied to some theory of reliability, however, which has the effect of limiting the time, place and manner in which it may be claimed such statements were made. Only the exception for admissions of parties opponent is as wide open as a general exception for prior inconsistent statements would be.

This is not to say that the author believes that most inconsistent statements are the product of pure fraud or would be so even with the added incentive of substantive use. It is the fact that opportunities for successful fraud appear to be so favorable for those few who would undertake it that tips this author's judgment against the general substantive use of prior inconsistent statements.

VIII. Conclusion

The Federal Rules of Evidence are a bold attempt to improve the accuracy and fairness of the results reached by trials in American courts. They were intended not only to apply to federal courts but to serve as a model for anticipated state evidence law reforms. The most notable of the proposed federal reforms was to be general substantive use of prior inconsistent statements, but Congress rejected the largest part of that change.

Even the restricted rule will have great impact in some cases, especially in federal criminal cases in which prior grand jury testimony may now be used as substantive evidence. Although the advocates of the new rule frequently declare that it would be improper to permit a conviction to be based upon a prior inconsistent statement alone, there remains the unresolved question of whether or not the new rule will permit such a result.

If the congressional restrictions were removed, however, there would be far reaching effects on federal trials and federal-state court forum shopping. The basic question is whether it is

140 Chancellor (then Chief Justice) Kent used this description as a quotation without attribution in Coleman v. Southwick, 9 Johns. 45, 50 (1812). Wigmore quotes it from Kent. 5 WIGMORE § 1362, at 6.
best to let the evidence come in and "do the best we can" with it or to keep the evidence out because the "best that can be done" is not good enough. This article attempts to demonstrate that Congress was correct in excluding most prior inconsistent statements from substantive use and concludes by advocating the retention of the congressional restrictions.